

*Enhancing the delivery of justice and security
in fragile states*

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EXECUTIVE SUMMARY

Justice and security are key concerns of poor people in fragile states. Strengthening the delivery of justice and security is an important development challenge, for without justice and security other public goods and services cannot be provided or accessed. As the OECD states, “a measure of physical security is necessary to make relief, much less development, possible. Without reform of [security] policies and institutions that address incentives and expectations, [other development] capacity building [endeavours] will be largely futile.”¹

Justice and security are different from other public goods and services. In fragile states, the actors providing security and justice -- state and non-state -- are often actually sources of insecurity and injustice. Healthcare and education providers may not always offer a good service, but they rarely do direct harm. However, the means by which justice and security are delivered or withheld by providers is often a matter of life and death. The dual OECD emphasis on “providing effective services to all members of society while addressing the weak governance and limited accountability that lead to fragility” is, therefore, especially important in the delivery of justice and security.² It is also imperative to focus on the fragmentation of social cohesion and target assistance to help rebuild its fabric in order to deliver sustainable justice and security services.

Supporting the state to deliver security and justice may be the “first best” solution.³ However, an approach to security and justice delivery that focuses solely on strengthening governance and state capacities is unlikely to be an effective strategy in fragile states - countries where the state has exceedingly limited capacity, may not be deemed legitimate by significant proportions of the populace, and historically may have never exercised full sovereign authority over its territory.⁴ Furthermore, the nature of the post-colonial state may also not correspond to Western assumptions of how a state is structured, functions, and the degree to which it interacts with civil society. In many fragile environments, as the state itself may be partially incomplete and unformed, the development of effective, coordinated, state-provided justice and security may be a remote prospect, a prognosis that severe capacity and sustainability limitations only reinforce.

Nevertheless, the state has an irreducible role in the delivery and accountability of justice and security. At the very least, this role includes setting minimum standards, formulating policy and legal frameworks, developing varying types of accountability mechanisms, upholding the principles of human rights, and establishing networks and partnerships among service providers. The precise role the state does, can, and should adopt, however, will vary from context to context. Furthermore, local context should determine what development activities occur when, how, and in what order, as the provision of justice and security is based upon historical legacies, cultural value systems, political calculations and intricate balances of power. What is central in fragile states, however, is being vigilant to the twinned issues of:

- ‘who’ actually provides justice and security, where, when, and how; and

¹ OECD (2005A), p. 4

² OECD Fragile States Workstream Terms of Reference.

³ Ibid, p15.

⁴ See Andersen (2006).

- ‘for whom’ justice and security are being provided.

The reality in fragile states is that justice and security are delivered by a large number of actors, some of whom are state agencies and services, but the vast majority are likely to be non-state organisations and systems.⁵ Research in many fragile states suggests that non-state systems are the main providers of justice and security for up to 80-90% of the population.⁶ Non-state systems may often be more effective, accessible, fairer, quicker, cheaper, and in tune with people’s values. It is also important to recognise that some non-state providers may be purveyors of insecurity and injustice and that there may be other challenges associated with them in terms of corruption, manipulation by local elites, and discrimination against disadvantaged groups. However, it is mistaken to presume that the challenges faced by non-state justice and security systems are any more severe than comparable ones in the state system without a thorough study of local contexts. More likely than not, the challenges of one are mirrored in the other. It is also erroneous to believe that development of the non-state system is more onerous and difficult than that of state justice and security service providers, without examining local political circumstances and capacities.

Admittedly, working with non-state providers may expose donor countries and development agencies to a degree of risk with which they are unaccustomed. It may also be true that working in the non-state sector may be highly charged politically for the donor and the fragile state. Additionally, fragile state governments may resist donor engagement with non-state actors. Assistance to non-state providers may require a paradigm shift, challenging donors and fragile state governments to work in ways and with partners with whom they are unfamiliar. Nevertheless, this conceptual shift is vital to help meet local needs for justice and security. In the short and medium-term, assistance to non-state providers should be a core element of donor strategies to support the delivery of justice and security in fragile states, as there may be few other viable options.

What fragile state justice and security delivery requires, therefore, is a multi-layered approach. It is a methodology that is highly context specific, targeting donor assistance to those providers -- state and non-state actors simultaneously -- at the multiple points at which actual day-to-day service delivery occurs. A multi-layered strategy recognises that unorthodox solutions and partnerships may be necessary to respond to the severe challenges of fragile states. The primary objective is to develop and strengthen the relationship between service providers (state and non-state) and the users of those services in the marketplaces where they work, in the neighbourhoods in which they live, and on the roads they travel. The intention is to reinforce the already existing range of choice that users have in fragile states, while developing providers’ service delivery to make it more effective, fair, accessible, accountable, and rights respecting. At the same time, a multi-layered approach seeks to strengthen governance, organisational structures, and systems at the local, provincial, and national levels. The objective is to develop the capacities of the state at its various levels to engage in productive partnerships with non-state providers and to formulate the necessary policies, frameworks, and minimum standards by which the contours of an enabling environment for service delivery can be established.

⁵ Non-state system refers to all systems of justice and security operating alongside formal state institutions “that exercise some form of ... authority in providing safety, security and access to justice,” see DFID, *Non-State Justice and Security Systems*, May 2004, p. 1. Non-state systems, therefore, would include traditional courts, mediation processes, civic and trade organisations, neighbourhood groups, ethnic/clan police etc. See also Schärff (*Non-State Justice Systems in Southern Africa*) pp. 1-3.

⁶ See Chirayath, Sage and Woolcock (2005).

Box 1. Supporting the multiple -layered approach to justice and security delivery

The multi-layered approach to justice and security proportions international assistance between and among:

- the state, at its various levels, as a minority provider of justice and security service delivery;
- the state, in its role of regulator, to establish the parameters for justice and security service delivery and ensure accountability of providers;
- non-state justice and security service providers, given their position as the primary purveyors of day-to-day service delivery; and
- the users and recipients of justice and security services to increase their voice and hold providers accountable.

The most fundamental lesson in justice and service delivery in fragile states is that context trumps everything. However, the DAC typology of fragile states with particular needs (collapsed states, deteriorating environments, and countries recovering from conflict or crisis) is helpful in drawing out broad recommendations of the types of issues to address and the nature of support that can be effective. Some of these recommendations apply to all categories of fragile states. Complementing OECD's principles for engagement in fragile states, this paper recommends that donors can support service delivery in these environments by:

Deteriorating fragile states

- **Staying engaged and focusing on long-term development building blocks.** Focus on the non-coercive elements of the security system such as state delivered justice. Develop building blocks for long term judicial reform, such as new legislation on codes of criminal and civil procedure, family and juvenile law; developing a judicial training institute; publishing laws and digests of court decisions; modernising court administration; and fostering integrative financial budgeting.
- **Supporting non-state justice and security systems.** In worsening conflict and human rights situations, non-state security and justice providers provide a 'safety net' at the community level and can ensure that basic local needs are addressed, when state actors are unable to do so.
- **Supporting broad-based human rights activities** through assistance to community organisations, NGOs, Bar Associations, and independent lawyers groups that protect human rights, monitor allegations of abuses, and defend victims.
- **Assisting women's groups** because in conflict, they exhibit particular resilience, become increasingly active, and can be one of the primary vehicles for the multiple provision of justice.

Collapsed fragile states

- **Undertaking comprehensive assessments of who is actually delivering justice and security on the ground and to whom.** This should assess state and, especially, non-state providers and what impact international interventions may have on those service providers.
- **Being realistic and modest** about what is feasible and sustainable, remembering that international intervention does not begin with a blank slate and that the vast majority of existing service providers will be non-state actors.

- **Addressing priority security issues whilst developing a longer-term strategic plan.** Recognising that collapsed states are unlikely to possess the capacity to participate fully in the design of these plans, international actors may be compelled to take the lead. Nevertheless, local stakeholders should be involved in the process to help develop ownership and increase capacity.
- **Starting small and scaling up,** by targeting salient issues or specific regions, as determined by the political and security situation, with the intention of creating ‘islands of dependability’ that can provide bundled services to a limited area.

Recovering fragile states

- **Focusing on the financial sustainability** of service delivery programmes with detailed estimates of the costs the recovering state will have to assume correlated to its projected state revenues over a period of five years.
- **Concentrating on managerial sustainability,** recognizing that ‘train and equip’ projects with their emphases on outputs have repeatedly been proved to be ineffective and cost inefficient, unless embedded in enduring management development programmes.
- **Integrating security and justice issues into national development frameworks** to ensure they are established as a priority in national government and donor planning and budgeting.
- **Supporting non-state justice and security providers** who have endured throughout violent conflict and are already often delivering more than 80% of all service and endeavour to link them into networks and partnerships with one another, as well as with state providers of justice and security.

PART I. INTRODUCTION: WHY JUSTICE AND SECURITY MATTERS

1. Justice and security are key concerns of poor people in fragile states. Many local communities in the World Bank's Voices of the Poor research identified insecurity as their major barrier to development.⁷ This view was amplified by the Development Ministers of the Organisation for Economic Cooperation and Development in 2005 who said,

security matters to the poor and other vulnerable groups, especially women and children, because bad policing, weak justice and penal systems and corrupt militaries mean that they suffer disproportionately from crime, insecurity and fear. They are consequently less likely to be able to access government services, invest in improving their own futures and escape from poverty.⁸

2. Justice and security have not traditionally been viewed as development services. For example, the World Development Report 2004 focuses on education, health, water, sanitation and electricity as "those services that have the most direct link with human development."⁹ However, without security and justice the poor will be unable to receive these vital services. As the OECD states, "a measure of physical security is necessary to make relief, much less development, possible. Without reform of [security] policies and institutions that address incentives and expectations, [other development] capacity building [endeavours] will be largely futile."¹⁰ Enhancing the delivery of security and justice, therefore, is a key challenge for development. This may be particularly true in fragile states where insecurity and disorder are often most acute.

3. The costs associated with disorder, insecurity, and injustice pose an enormous drain on development in fragile states. The World Bank estimates that the direct cost of crime in Jamaica is at least 3.7 per cent of the country's GDP.¹¹ If indirect expenditures were to be accounted for, the costs rise exponentially. Estimates suggest that in El Salvador and Colombia, in the late 1990s, the costs of insecurity may have reached as high as 25% of GDP, once the full range of indirect costs associated with insecurity were included.¹²

4. Divided into four sections, this paper examines how donors can best support the delivery of justice and security in fragile states. Part II looks at the objectives of justice and security services and identifies the particular challenges of delivering them in fragile states. Part III discusses the political economy of the justice and security sector, examining who actually delivers services in fragile states, and how they may be effectively, efficiently, and accountably provided. Section IV presents practical experiences of delivering justice and security in different fragile state contexts and draws out lessons for policy-makers and practitioners.

5. This paper defines the scope of services within 'justice and security' as addressing:

- Safety, security and protection of persons and property from violence, crime, and disorder.

⁷ See Narayan, Patel, Schafft, Rademacher and (2000) and Narayan, Chambers, Kaul, Shah, and Petesch (2000).

⁸ OECD (2005B) p11.

⁹ World Bank (2003B), p1.

¹⁰ OECD (2005A?), p. 4

¹¹ World Bank (2003A).

¹² Buvinic, Morrison, and Shifter (1999)

- Equal access of justice and security for all.
- Fair and equitable resolution of disputes according to publicly-known principles of due process.
- Human rights respecting treatment of alleged offenders from detention through arrest, prosecution, and imprisonment or the imposition of other sanctions.

6. This paper seeks to address the full range of actors who play a role in policing, justice, prosecutions and corrections in fragile states. In addition to official state justice and security institutions (e.g., the police, courts, prosecutors), this involves looking at the military and intelligence services where they are involved in the provision of internal security. It also necessitates examining the roles, functions, and activities of the myriad private, community and international actors who deliver justice and security in fragile states.

7. The rights to justice and security are enshrined in the Universal Declaration of Human Rights. Justice and security are “public goods” because every state has the obligation to uphold and preserve them. They are public goods for four other reasons as well. First, no single individual can exercise or protect his/her rights in isolation, without the concurrence and cooperation of others. Second, the consumption of the good by one individual does not necessarily reduce the amount of the good available for consumption by others.¹³ Third, “it is difficult to exclude individuals that the group might wish to disqualify (tax evaders).”¹⁴ Finally, as universal human rights, justice and security must be equitably and fairly distributed, with equal access for all, which implies a further responsibility on the state.¹⁵ The importance that the Weberian model of the state attaches to the state monopoly of violence and coercion only reinforces this perspective.

8. The reality of justice and security service delivery in fragile states, however, is quite different for two reasons:

- The nature of the fragile state; and
- The existence of non-state providers.

9. The fragile state does not necessarily resemble Western notions of what constitutes a state in terms of its control over its sovereign territory, legitimacy, structure, cultural value systems and capacity to exercise its will. At best, the fragile state is weakly institutionalised with its writ rarely extending beyond the main urban centres, if that far. Second, in fragile states the public goods of justice and security are delivered by a number of actors, some of whom are state agencies, while the vast majority are often non-state organisations. Similarly, the public responsibility to ensure the equitable and effective delivery of justice and security does not imply that their provision must necessarily be performed by public state services or that state provision is necessarily more accessible, legitimate, fair, effective or cost efficient. The issue of public goods and who delivers the service and is held accountable for that delivery are distinct and separate categories of equal importance.

¹³ See Samuelson (1954).

¹⁴ Meagher (2005) p. 21.

¹⁵ See World Bank (2003B), pp. 32-35.

PART II OBJECTIVES OF JUSTICE AND SECURITY SERVICE DELIVERY IN FRAGILE STATES

10. The OECD characterises fragile states as “states which lack either the capacity and/or the willingness to deliver on their core functions.”¹⁶ Given its poverty reduction focus, DFID specifies the most important state functions as being

territorial control, safety and security, capacity to manage public resources, delivery of basic services and the ability to protect and support the ways in which the poorest people sustain themselves.¹⁷

11. With its slightly different perspective on fragility, concentrating on issues of governance and democratisation, USAID emphasises the relationship between effectiveness and legitimacy, with the former referring

to the capability of the government to work with society to assure the provision of order and public goods and services. Legitimacy refers to the perception by important segments of society that the government is exercising state powers in ways that are reasonably fair and in the interests of the nation as a whole. Where both effectiveness and legitimacy are weak, conflict or state failure is likely to result.¹⁸

12. Whichever lens is used, service delivery lies at the heart of state fragility, with the provision of the public goods of safety, security, law and order being not only the most elemental exercise of state power, but the foundation upon which all other human rights are grounded.

13. The OECD recognises this and defines best practice in service delivery as “providing effective services to all members of society while addressing the weak governance and limited accountability that lead to fragility.”¹⁹ This is as true for justice and security delivery as it is for the delivery of other public goods and services. The importance of the dual emphasis on operational effectiveness and good governance/accountability was a key conclusion from a survey of security system reform (SSR) programmes in developing countries.²⁰ The need to work on both objectives simultaneously is a central theme of the forthcoming OECD Implementation Framework on Security System Reform (IF-SSR).

14. However, fragile state contexts pose particular challenges to achieving and maintaining this balanced approach to security and justice delivery. Because of legitimacy, capacity and political willingness issues, there are three axes that describe the different dimensions of security and justice in fragile states, each of which describes a balance to be achieved and a tension addressed between equally valid goals:

- Short-term achievements – long-term development;
- State-building and centralisation of governance – responsiveness to local needs;
- Rights accountability – performance accountability

¹⁶ OECD CPDC Sub-Group on Security and Justice Service Delivery in Fragile States Terms of Reference.

¹⁷ DFID (2005) p. 7.

¹⁸ USAID (2005A) p. 3.

¹⁹ OECD Fragile States Workstream Terms of Reference.

²⁰ OECD *ibid*, p. 58.

15. There may be instances when the opposite ends of the spectrum may appear to be irreconcilable, though this may be mainly attributable to political considerations and calculations (donor and partner country) rather than inherent contradictions in service delivery. The urgency of needs and the high degree of disorder in fragile states further complicate the situation. Development aid, however, should attempt to minimise the trade-offs between the objectives, by providing assistance at varying levels and through differing partnerships, while recognising that justice and security service delivery in fragile states is played out upon an inherently political terrain, a factor that cannot be underestimated.

16. The manner in which justice and security is provided in fragile states is based upon historical legacies, cultural value systems, political calculations and intricate balances of power. Development assistance can support, disrupt, change, and recast these pre-existing rationales, creating winners and losers, advocates and resisters, enthusiasts and spoilers. There may be multiple and competing 'local owners' whose legitimate interests may not be capable of reconciliation.²¹ In fragile states, the concept of 'local ownership' is inherently contested and difficult for a number of reasons. First, even with the best of intentions, the government may be unable to effect control over the disparate branches of governance. This is not merely a question of organisational behaviour with its natural differentiation between 'official' and 'unofficial' values, behaviours, and structures. In fragile state this also refers to the often uncertain legitimacy of political authorities and their highly circumscribed capacities. Second, the division of state power between and among levels of government -- national, provincial, and local -- may, in many fragile states, be an inherent source of dispute and conflict, with poorly delineated roles, competencies, functions, and responsibilities, not to mention the differing ability of each level to acquire resources (financial, human, capital, infrastructure, etc.). Third, given that the majority of service providers are often non-state actors, the government may be only a 'minority owner' of the issue, one whose actions may be severely resisted by other 'stakeholders' for numerous reasons, including questions of legitimacy, effectiveness, accessibility, accountability, and the exercise of political power. Fourth, the nature of the state in fragile environments may bear little similarity to Western understandings of what constitutes a state, thereby complicating notions of governance and what 'local ownership' entails.

17. These factors do not undermine the importance of 'local ownership' of programmes to strengthen justice and security delivery. Rather, they imply the existence of multiple, sometimes competing owners, only one of whom is the national government. The recognition of multiple local owners and the severe capacity constraints means that donors need to be realistic and politically sensitive in understanding the varying levels and types of local ownership (state and non-state) that are necessary for programme development and implementation. It is essential to prepare the political terrain and increase the ownership of multiple stakeholders throughout the design and implementation phases.²²

18. Enhancing security and justice delivery in fragile states is, therefore, an inherently political and sensitive issue, with local political and community leadership, at various levels, being a key variable. Local context should determine what development activities occur when, how, and in what order. In the assessment, design, implementation, monitoring and evaluation of justice and security development programmes, priority must be given to the needs and strictures of local context. As the OECD has stated,

²¹ Scheye and Peake (2005A). It should be noted that in judicial reform, 'local ownership' is inherently conflictual, as it is divided between and among the prerogatives of judges, the Ministry of Justice, and prosecutors, all of whom may belong to different institutions and independent branches of government.

²² A recent paper suggests that 'local ownership' in fragile state differs from that in other types of situations because of fragile states' massive lack of capacity. "If governments want to undertake SSR, they need the capacity to design, manage and implement the reforms adequately. Capacity here... refers to people with the requisite knowledge, expertise and skills and to material resources, including funds and equipment. Governments in low income countries, fragile states and war-torn societies generally lack the necessary capacity;" See Laurie Nathan, Operationalising the Principle of Local Ownership in Security Sector Reform, (forthcoming, 2006), p. 11.

“analysis and action must be calibrated to particular country circumstances.... Sound political analysis is needed to adapt international responses to country context, above and beyond quantitative indicators of conflict, governance or institutional strength.”²³

19. What fragile state justice and security delivery requires is a multi-layered approach, which recognises the complexity of the local ownership issue and works with multiple stakeholders. The multi-layered methodology is

- highly context specific, targeting donor assistance to service providers -- state and non-state actors simultaneously -- at the multiple points at which actual day-to-day delivery occurs.

20. A multi-layered approach²⁴ recognises that unorthodox solutions and partnerships may be necessary to respond to the severe challenges of fragile states. Complementing the OECD’s principles for engaging with fragile states, a multi-layered approach is a flexible strategy grounded in realism and modesty that enables the role of the state at various levels of governance to be developed over time as fragility reduces and countries move from disorder to order to safety and security. This approach has two primary objectives:

- to develop and strengthen the relationship between service providers and the users of those services in the marketplaces where they work, in the neighbourhoods in which they live, and on the roads they travel, with the intention to reinforce the already existing range of choice that users have in fragile states, while developing providers’ service delivery to make it more effective, fair, accessible, accountable, and rights respecting.
- to strengthen governance, organisational structures, and systems at the local, provincial, and national levels in order to develop and extend the legitimacy and capacity of the state to formulate the necessary policies, regulatory frameworks, partnerships, licensing, and minimum standards, thereby establishing the contours of an enabling environment for service delivery.

Supporting the multiple -layered approach to justice and security delivery

The multi-layered approach to justice and security proportions international assistance between and among:

- the state, at its various levels, as a minority provider of justice and security service delivery;
- the state, in its role of regulator, to establish the parameters for justice and security service delivery and ensure accountability of providers;
- non-state justice and security service providers, given their position as the primary purveyors of day-to-day service delivery; and
- the users and recipients of justice and security services to increase their voice and hold providers accountable.

²³ OECD (2005A), p1.

²⁴ Multi-stakeholder approaches are now accepted as good development practice in many programme areas. The term ‘multi-layered’ approach is used to extend this to the delivery of justice and security and convey the different levels at which services need to be provided by different actors.

Short-term achievements/Long-Term development

21. In fragile states there is often an urgent need to establish a basic sense of order. Only after order has been achieved can the wider issues of safety and security be addressed. This continuum from disorder to order to safety and security is the essential starting point for justice and security delivery in fragile states. This has been true in such disparate fragile state cases as Timor-Leste, Solomon Islands, Sierra Leone, Kosovo, and Bosnia and Herzegovina in the initial stages of international intervention. As a result, this short-term imperative often drives donor assistance, particularly when in contexts where international actors are mandated or take the responsibility to establish order.

22. There are often good reasons for a strong emphasis on short-term initiatives to strengthen the capacity of security and justice providers rather than on longer-term efforts to enhance their accountability. However, this focus on expediency may be politically generated by donor concerns and needs rather than by imperatives on the ground. Although development agencies may not be able to resist such political demands, experience suggests that short-term solutions are often self-defeating and invariably create enduring problems. The challenge is to find creative solutions to respond to pressing physical security needs while avoiding what one commentator has termed “the slide towards expediency”²⁵ and being besieged by what another calls “the tyranny of the immediate.”²⁶

23. The sustainability of short-term responses is a vital, but an often overlooked consideration. Sustainability has four important aspects:

- Human capital;
- Financial;
- Cultural appropriateness; and
- Institutional structures and systems.

24. Development programmes in the justice and security sector may often be designed without realistically considering the local capacity of each of these four factors. For example, a sustainable justice and security programme in Timor-Leste would have had to take into account the fact that there were only nine lawyers in the territory after the independence referendum.²⁷ In Malawi, at the turn of the century, only nine of the country’s magistrates had professional training.²⁸ Similarly, in 2000 in Haiti, approximately 8% of the judges and 5% of their assistants were licensed attorneys and only one-third had any formal legal training.²⁹ And in the recovering fragile state of Mozambique, as of 2000, only 8 lawyers resided and worked outside either the national capital, Maputo, or the major provincial capital, Beira.³⁰ Given these statistics it is highly dubious whether state-centric judicial development programmes can be feasible or sustainable in the short- to medium-term. It is partially in light of these massive human capital

²⁵ See Sedra (2006).

²⁶ Rathmell et al (2005), p110.

²⁷ Personal Interview with development personnel working in Timor-Leste (2006).

²⁸ Wilfred Schärf, “Non-state Justice Systems in Southern Africa: How Should Government Respond,” paper prepared for the UK Department for International Development, 2003.

²⁹ Inter-American Development Bank, Challenges of Capacity Development, Towards Sustainable Reforms of Caribbean Justice Sectors, Volume II: The Caribbean, A Diagnostic Assessment, May 2000.

³⁰ Wilfred Schärf, “State Failure and Stable Security Structures: A Thematic Study on Police and Justice Reform in Fragile States,” paper prepared for the Danish Institute for International Studies, 2006.

deficits that a recent DFID-sponsored study concluded that ‘holistic, sector-wide approaches to [justice and security programmes in] conflict and post-conflict contexts have not yet proved possible.’³¹

25. Financial sustainability is equally important and often dooms justice and security programmes over the long haul if not addressed at the outset of a programme. Although the military reform currently underway in Afghanistan has proved itself to be operationally successful, it is debatable whether the public revenues of the Afghan government can sustain it.³² The judicial reforms that Guatemala has been undertaking for the past half dozen years with extensive donor involvement have suffered severe budgetary cutbacks that call into question the appropriateness of its original design.³³ In Bosnia and Herzegovina and Kosovo, UN peace operations ramped up the numbers of state-employed police officers, only to be compelled to ‘re-engineer’ the institutions a few years later once the costs of expanded payrolls and associated expenditures became apparent.³⁴ Security imperatives in a post-conflict situation may justify an initially disproportionate allocation of resources to the justice and security sector but, unless carefully designed, subsequent cutbacks can themselves be a source of insecurity.

26. Sustainability also refers to development being culturally appropriate for the country in which it takes place. For justice and security development to be successful and sustainable, programmes need to address not “merely access to the institutions, but also... access to fair laws, procedures, affordable, implementable and appropriate remedies in terms of values” that are held by the recipients of those programmes.³⁵ Accessible justice and security implies that what constitutes a crime, how the community thinks that crime should be handled (in terms of reparations, restorative justice, corporal punishment), and the language of proceedings coincide with the beliefs and customs of the communities to whom that justice is to be applied.³⁶ In Timor-Leste, for example, it is apparent that many of the development programmes initiated by the United Nations’ intervention have been and are being circumvented as the Timorese are “revert[ing] to their ‘traditional’ means of solving conflict ..., which [are] based on local structures” and a

³¹ Stone et al. (2005) p. 20. The OECD draft IF-SSR also critiques the ‘comprehensive’ approach and advocates taking a practical, problem-solving approach that focuses on the most important linkages between parts of the justice system. In this sense, particularly in fragile states with their capacity deficits, SSR is best conceived as the ‘art of the possible;’ See Laurie Nathan, Operationalising the Principle of Local Ownership in Security Sector Reform, (unpublished paper, 2006), p. 12.

³² Sedra (2006).

³³ Hessbruegge and García pp. 29-30.

³⁴ See, for example, International Crisis Group, ‘Bosnia’s Stalled Police Reform: No Progress, No EU. (6 September 2005), that argues that the various police agencies in Bosnia and Herzegovina consume “close to 10 per cent of the government budgets at Federation, RS, cantonal and state level, double the percentage of public expenditures dedicated to policing in the EU.” (p. 2). In Kosovo, it is expected that the Kosovo Police Service (KPS) will have to be reduced by up to 15% because of budget constraints (author interview with former UNDP security programme advisor, 2006). As of 2005, costs for the KPS constituted approximately 9% of the provisional government’s budget, despite police salaries being unacceptably low, see Terry O’Neil, Final Report: Phase II of the UNDP-Sponsored Kosovo Police Service, 2005.

³⁵ Schärf, Banda, Röntsch, Kaunda, and Shapiro (2002), 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 and the Customary Justice Forums, MASSAJ, DFID, Lilongwe, p. 4.

³⁶ See Qhubu, pp. 10-11 where, in Lesotho, “neighbours feel intimidated and confused when even minor offences are taken to the police. This makes them feel as if the offended party is declaring permanent feud with the offender. Therefore they are instruments of alienation. The offenders themselves believe that the sentences that are passed by the court are unreasonable and unjust. Even the Local and Central Courts – which are supposed to be Basotho customary courts, are regarded as oppressive and too impersonal... Many ...feel that their need for justice is hardly addressed by the conventional justice system. Restorative Justice is the preferred approach ... [which] would revive the spirit of humanity which the western model is blamed for destroying.” See also Schärf and Nina (2001).

belief in a different form and type of justice.³⁷ If a discrepancy emerges between generally held societal values and those embedded within a justice and security development initiative, the reform programme may be deemed unsustainable and inappropriate.

27. Finally, sustainability pertains to the appropriateness of the institutional arrangements, systems, procedures, and policies within and with which the individuals who deliver the public goods of justice and security work at the various levels of governance -- national, provincial, and local. It is not sufficient to train and equip judges, prosecutors, prison wardens, and police officers. It is also necessary to house the actual service providers in effective and efficient institutions, whose operations are well planned, managed, and evaluated. Justice, for example, cannot be provided without a reasonably managed court administration. In fragile states this issue of institutional and managerial sustainability may often be overlooked because of the urgency to establish a semblance of order. For example, the UN peace operation in Timor-Leste over the course of five years “provided uniforms for 3,000 officers, gave [the] basic training and equipped [them] to minimum standards. However, [the peace operations] were unable ... to develop an appropriate Ministry of the Interior in addition to [not] establishing the internal systems and procedures that provide for the accountable and transparent management and administration of the police service.”³⁸ The result was a police service without “a publicly articulated internal security policy, an up to date police service development plan, and lack[ing] any sense of institutional identity... Indeed, the general lack of an internal security policy is partially responsible for the proliferation of questionable paramilitary police units” who, rather than providing security, are responsible for creating conditions of heightened insecurity and instability.³⁹

State-building and Centralisation/Local Needs

28. Many donors currently approach security and justice delivery in fragile states through the lens of democratic governance and state-building. This is an important and necessary perspective and the state is, unquestionably, a principal actor and has an irreducible role in the delivery of justice and security services. The precise nature of that role and the appropriate level of state involvement (national, provincial, municipal, local), however, are open questions given the structure and character of the state under conditions of fragility.

29. In fragile environments, it is important to maintain an open perspective as to the precise role of the state in justice and security service delivery. A recent OECD survey of recipients of SSR programming has criticised SSR development programming for a lack of evidence-based research in understanding the local context and an over-reliance on “a normative western template of how security systems should operate” that envisages “‘ideal-type’ situations that no country, including OECD countries, has fully succeeded in implementing.”⁴⁰ Implicitly referring to the disorder to safety and justice continuum, the OECD survey also noted that donor-sponsored SSR programmes are often conducted contrary to the needs and priorities of the ‘local populations’ who desire concrete improvements of security in the ‘physical sense.’⁴¹ Consequently, to meet the acute need to restore order and deliver justice and security as demanded by the local populations, donor assistance might be more effective if it were to support the multiple methods (state and non-state) by which service is delivered and at the point at which service delivery occurs -- where people work, live and travel.

³⁷ Hohe and Rod Nixon (2003), p.2. The issue of cultural sustainability and adherence to local values and beliefs raises the fundamental question of ‘for whom’ are justice and development programmes designed and implemented.

³⁸ Ed Rees, Security Sector Reform (SSR) and Peace Operations: “Improvisation and Confusion” from the Field, March 2006, p. 18.

³⁹ Ibid, p. 19.

⁴⁰ OECD (2005AA), p 62.

⁴¹ OECD *ibid* p.65.

30. It is in this sense that justice and security delivery in fragile states should be informed by an understanding of local context and needs and ‘for whom’ justice and security is to be provided.⁴² The objective should be to identify, on the basis of local realities, what are the desirable but realistic roles for the state and other actors to play, rather than to assume that central government does, can or should be the main provider. There is, therefore, an important, but difficult, balance to strike between centralisation and local needs in justice and security delivery. As one commentator reflects centralisation “offers the benefits of tighter control and better funding, and local control offers greater accountability and specific responses to local needs.”⁴³

Box 2. Public-private partnership to deliver citizen security in Karachi, Pakistan

“Beginning in 1989, the Citizen Police Liaison Committee (CPLC) has become an important component of policing in Karachi, the largest city in Pakistan. Rooted in the business community, and dependent largely on private donations and the volunteer labour of business people, it has taken on core policing intelligence functions. The CPLC works very closely with the police and focuses on improving police performance through supportive engagement with their work. It has established a number of crime databases that are used operationally by the police, and manages them on a day-to-day basis. The organisation conducts crime analysis, plays an important role in the investigation of kidnappings, and provides a range of police-related services to rich and poor alike. With offices in police stations and its headquarters in the office of the Governor of Sindh Province, the CPLC has become deeply integrated into the apparatus of government.

The CPLC is an example of the type of ‘hybrid’ arrangement for the provision of public services that, we are beginning to realize, may be widespread where there is a breakdown of conventional governance arrangements. This we term co-production: the provision of public services through an institutionalized long-term relationship between state agencies and organized groups of citizens, where both make substantial resource contributions.”

This approach offers lessons for donors operating in fragile states:

- The challenges of justice and security delivery in fragile states often require unorthodox solutions.
- Context is the most important factor in designing service delivery arrangements. The right approach has to be decided upon by the environment, the range of available actors, their legitimacy in the local context, and their relationships.
- The private sector (business and NGOs) can provide finance, technology, and technical skills that are often in short supply in police services. Their involvement can also increase public trust.
- The CPLC decided to adopt a cooperative attitude to working with the police, rather than confronting them publicly (eg. on human rights). This approach seems sensible given the institutional and political resistance of police to working with outside actors and has produced results. It shows that a focus just on ‘amplifying client voice’ in service delivery may not work in many fragile states.
- The important role of leadership, in the police, government, and in the business community, in developing this approach and making it work.

This example is drawn from Mohammed Musad (2002), Co-producing Citizen Security: the Citizen-Police Liaison Committee in Karachi, IDS Working Paper 172.

31. Upon close examination, it is also evident that the fragile state does not necessarily resemble the Western state in the ways in which it is institutionalised or structured. Nor does it necessarily correspond to Western concepts of how a state functions, and the degree to which it interacts with civil society.

⁴² Scheye and Peake (2005B).

⁴³ Baker (2004A), p7

Furthermore, the fragile state, particularly in the post-colonial African state, has hardly at any point in time had a monopoly of legitimate force.’⁴⁴

32. Many “of the states, which today are considered failed, have artificial and imposed borders, heterogeneous and divided populations and privatised and personalized structures, where traditional notions of kinship, religion and community matters more than modern ideas of citizenship and nationality.”⁴⁵ Furthermore, in fragile state contexts control over the state may be deeply contested in a winner-take-all political struggle. Effective fragile state authority may not extend past the tarmac of the national capital. A state-centric approach, therefore, that primarily focuses on strengthening governance and state capacities may be an inappropriate strategy for fragile states that have exceedingly limited capacity, may not be deemed legitimate by significant proportions of the populace, and historically have never exercised full sovereign authority over their territory.⁴⁶

33. When seen from this perspective, it is a misnomer to advocate a ‘decentralisation’ programme for a fragile state that has never ‘centralised’ state service delivery of justice and security in the first place. Instead, the focus of assistance to strengthen state-building and governance should be on creating the capacity to facilitate a multi-layered approach. It is important to assist the state in building its capacities to centralise particular functions and activities as they pertain to policy formulation, regulatory frameworks, licensing, and the establishment of minimum standards. It may also be appropriate to support the state’s ability to engage in partnerships and networks with various non-state actors, though the fragile state’s participation need not necessarily be as a service provider. In fact, on pragmatic, practical, and political grounds, it may be inappropriate for donors to support an extensive build-up of fragile state-provided justice and security, given that the development of effective, coordinated state service delivery may be a remote prospect. Nevertheless, even if the national state is not a majority provider of justice and security service, its role in establishing the parameters of service delivery and in ensuring the accountability of that service provision remain central.

34. Enhancing the fragile state’s policy, regulatory, licensing, and partnership capabilities may be one way to balance state-building with servicing local needs. A multi-layered approach acknowledges that the political leadership of the fragile state may insist upon a centralisation strategy in that their primary objective may be political - the extension of state power and authority. Furthermore, for similar political reasons, the state leadership may resist donor efforts to work with and support non-state providers. By engaging with the political leadership on issues of minimum standards, networking, and accountability, donors may be able to address the state’s political imperatives as well as meet acute service delivery issues. This may be especially crucial at the provincial and local levels of governance. As state capacity is gradually developed and fragility reduces, the role of the state as a direct provider may be gradually increased.

35. This potential conflict between the political leadership of a fragile state wanting to centralise and expand state power and the imperatives of local needs further highlights the importance of not conflating ‘local ownership’ with government ownership. As pointed out earlier, multiple and competing ‘local owners’ may exist. Without presuming which ‘owner’ is paramount, a multi-layered approach seeks to bring the various stakeholders together -- from parliamentarians, to the provincial and local levels of governance, to the varying levels of service providers, to civil society organisations, to neighbourhood

⁴⁴ Adedeji Ebo, *The Role of Security Sector Reform in Sustainable Development: Donor Policy Trends and Challenges*, (Geneva: Geneva Centre for the Democratic Control of Armed, 2006), p. 10.

⁴⁵ See Andersen (2006), p. 7. In Africa, for example, it has been argued that, in many countries, there is “no genuine disconnection between a structurally differentiated state and a civil society composed of properly organised and politically distinct interest groups”, See Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument*, (Oxford: James Curry, 1999), p. 18.

⁴⁶ *Ibid.*

groups and individuals -- so that their differing needs can be addressed, even as it is acknowledged that they may not always necessarily be reconcilable.

36. One of the central questions in a fragile state that will be affected by the tensions within 'local ownership' is the choice of legal system(s) and the relative proportions and scope of their applicability within the fragile state. There are four main types of legal systems (1) civil law, (2) common law, (3) religious law, and (4) traditional/customary law.⁴⁷ In many fragile state countries three of the four may operate simultaneously, with common law or civil law being complemented by religious and traditional systems. In a multi-layered approach, the operative issue is how to relate the co-existing legal systems -- for example, addressing their respective jurisdictions and rights of appeal of cases in one system to another -- rather than attempting to amalgamate or integrate them. The reason is that in the short to medium-term, it is unlikely for fragile states to possess the requisite resources or capabilities to rely on only one form of jurisprudence. A common law system, for instance, requires that parties to a legal claim be represented by legal professionals, that the state will provide legal aid to those that cannot afford representation in criminal cases, and that the process is accessible in terms of "cost, distance, language, procedure, values, and outcomes."⁴⁸ In a fragile state these assumptions simply cannot be upheld. Similar issues pertain to a civil law system, with its conception of sufficient numbers of well-trained judges capable of being actively involved in evidence collection, investigation, and examination. As a result, the most pragmatic and practical option is a multi-layered approach that seeks to weave a framework of accessible justice by recognising the validity and operation of differing forms of jurisprudence.

Accountability

37. Strengthening accountability is a fundamental objective for achieving effective service delivery. Accountability in security and justice sector reform is often conceived as primarily focusing on human rights, holding providers accountable for abuses and strengthening rights protection. From this perspective, donor assistance often concentrates on external oversight bodies, such as parliamentary committees, complaints commissions and ombudsman offices. It also leads to institutional reform of internal mechanisms within the police, judiciary, and prisons, such as disciplinary procedures and professional standards systems. Ensuring that security and justice providers not only respect but are the principal defenders of human rights is a key part of strengthening service delivery.

38. Accountability, however, is about much more than human rights, narrowly defined as protection from abuse. It is also about real, accessible justice and the actual provision of safety and security. Unfortunately, "SSR initiatives [have too] often operate[d] and end[ed] up at a rather superficial level, having negligible direct effect on the actual security situation of the ... [majority] of the population."⁴⁹ A vigorous human rights programme, therefore, must recognise that accountable justice and security services have to be responsive to the needs of local communities, in a language and a cultural manner that they understand. An ineffective police service, for instance, is fundamentally unaccountable, if disorder is allowed to persist. Even the best court system is inaccessible to local villagers if they cannot understand the language used in the court system, whether due to linguistic, technical, and cultural reasons.

⁴⁷ Although 'traditional/customary law' is a unique category of jurisprudence, there is no presumption that only one type of traditional/customary law exists. On the contrary, in any one fragile state, it would be expected that there may be numerous different customary law traditions, only some of which are related. Furthermore, the label 'traditional/customary law' does not presume that such systems are unchangeable. Rather, it is believed that they are living, changing, growing legal traditions, continuously adopting to their environments.

⁴⁸ Wilfried Schärff, *State Failure and Stable Security Structures: A Thematic Study on Police and Justice Reform in Fragile States*, Prepared for a Danish Institute for International Studies Conference, Justice and Security Development in Fragile States, 9 June 2006, p. 12.

⁴⁹ Adedeji Ebo, *The Role of Security Sector Reform in Sustainable Development: Donor Policy Trends and Challenges*, (Geneva: Geneva Centre for the Democratic Control of Armed, 2006), p. 18.

Accountability, therefore, is not only about human rights abuses, but also an issue of the positive performance of a service and the daily delivery of the public goods of safety, justice and security.

39. To increase accountability, the World Bank advocates the need to strengthen three relationships in the service delivery chain:⁵⁰

- Between poor people and providers (increasing clients' choice and participation).
- Between poor people and policy-makers (raising citizens' voice through elections and information).
- Between providers and policy-makers (rewarding effective delivery and penalising ineffective).

40. For justice and security delivery in fragile states, investing in the "long route" to accountability by helping citizens hold policymakers to account is impractical and unlikely either to lead to improvements in services in the short or medium term or to address effectively local needs. Accountability relationships between citizens and policy-makers are weak in fragile states and will take time to strengthen. In the medium-term, initiatives to strengthen the accountability relationships between policy-makers and providers are important and may bear fruit, if they are targeted to develop government capacity, at its varying levels, to regulate service providers (state and non-state), to formulate minimal standards of conduct, behaviour, and performance, and to establish licensing boards, auditing commissions, Ombudsman offices and parliamentary oversight committees. Building effective executive ministries capable of exercising managerial control, strategic vision, and oversight is an imperative. Some of these mechanisms will be applicable to the provision of security by private for-profit companies such as vetting and training requirements for company personnel, registration of firearms owned by the firm, and the exchange of information between company employees and police agencies. Furthermore, state capacity needs to be strengthened to enable the state's police services to form partnerships and other collaborative relationships with neighbourhood security groups, trade associations, town crime prevention councils, etc. who provide day-to-day security in defined areas. Additional initiatives could focus on enhancing the relationships between state justice actors and their non-state counterparts, delineating the competencies of the various players, methods of recording disputes and their adjudication, and establishing minimum standards of procedure so that the whole forms an overlapping network of accountability and service provision.

41. The area where initiatives are most likely to lead to short-term improvements in effective service delivery, however, is the "short route" to accountability. This accountability method calls for promoting the participation of the recipients of services in decision-making at local levels and increasing trust between local communities and their justice and security providers, irrespective of whether they are state or non-state actors. Consequently, channels are needed to enable local communities to exercise their rights to articulate demands for and participate in the provision of better service delivery performance.⁵¹

42. The key to this form of accountability is the responsiveness of the policy maker and service provider to local needs, with action to be taken to strengthen one or more of the following three areas:⁵²

- Answerability (provide information and/or a decision).

⁵⁰ See World Bank (2003B), pp1-30.

⁵¹ When relating to state providers of justice and security, this type of accountability may involve varying forms of decentralisation of state delivery of service, but it needs to be remembered that sustainable capacity is markedly less likely at local levels, which is where local authorities would "require more autonomy, including budgetary control, [if they were to meet local needs and be held] accountable for service delivery." See Saferworld, SEESAC, UNDP (2003), p 9.

⁵² See Casely (2003) pp24-25

- Enforcement (strengthen achievement of service norms).
- Organisational change (change the way the service is delivered).

43. Responsiveness to local needs lies at the heart of strengthening the delivery of justice and security. The emphasis on “providing effective services to all members of society” should also be underscored. Often in fragile states, the provision of security and justice, by state and non-state providers, is skewed towards the powerful, wealthy, the urbanised, and men. This undermines the legitimacy of service providers, because they may not be deemed representative of the broad base of society (for example an ethnically biased police force) or because the services they deliver disadvantage certain groups. Ensuring an equitable approach to service delivery based on local needs is therefore a vital objective.

PART III. POLITICAL ECONOMY OF THE JUSTICE AND SECURITY SECTOR

44. Justice and security are, by their nature and the impact of their delivery, different from other public goods for three reasons:

- Without a minimal level of order, justice, and security no other public goods can be adequately delivered;
- One of the primary roles of the state is to ensure a reasonable level of justice and security service delivery and, therefore, justice and security delivery defines the basic function of the state; and
- The state may be a principal agent creating insecurity and injustice through its delivery of these public goods.

45. Consequently, the methods by which justice and security are and can be delivered may fundamentally differ from those of other public goods, such as sewage, health, and water.

Security and justice providers as sources of Insecurity and Injustice

46. A fundamental difference between the delivery of justice and security and those of public goods is that very often, in fragile states, the actors providing security and justice -- state and non-state -- are actually sources of insecurity and injustice. Healthcare and education providers may not always offer a good service, but they rarely do direct harm. However, the means by which justice and security are delivered or withheld by providers is often a matter of life and death.

47. Police, militaries, and militia in fragile states often prey on local populations and may be major violators of human rights. “The relationship between the security sector and the population in ... [fragile] contexts tends to be exploitative and predatory, in which individuals and groups are more victims than beneficiaries of underpaid and ill-governed security services.”⁵³ The same can hold true with non-state actors, the May 2006 outbreak of violence in Somalia being a case in point. In some instances, such as in DRC, the state justice and security sector may have been designed to function primarily as a means of exploitation.⁵⁴ Courts and prosecutorial services may also offer impunity to the rich and powerful or be used as vehicles of oppression. Inequitable access to justice for minorities and vulnerable groups, including women and juveniles, exacerbates exclusion, insecurity and injustice, irrespective of whether the service provider in question is the state or a non-state actor.

48. A challenge for development assistance is to try and identify the reasons for the perpetration of insecurity and injustice. One common cause is the state’s lack of commitment to provide security and justice for all. For example, in many fragile states there is a marked tendency for the sector to perceive itself and be perceived as a means to preserve the ruling regime’s prerogatives. As the Kenya Police now acknowledges, “the Kenya Police Force has in the past practised regime policing that appeared to focus

⁵³ Adedeji Ebo, *The Role of Security Sector Reform in Sustainable Development: Donor Policy Trends and Challenges*, (Geneva: Geneva Centre for the Democratic Control of Armed, 2006), p. 2.

⁵⁴ See also Alice Hills, *Policing Africa: Internal Security and the Limits of Liberalization* (Boulder and London: Lynne Rienner, 2000), in which she argues that “it is not in the interests of [many] African regimes to build strong, efficient or ‘profession’ forces.” (p. 186.)

substantial energy on sustaining the power of the political elite.’⁵⁵ The result is that significant segments of the population distrust the sector’s institutions and view them as illegitimate.

49. In virtually all fragile states, even if the will to provide security and justice exists, state providers face overwhelming and (at least in the short to medium term) insurmountable capacity problems. A lack of personnel, communication networks, and transport may mean that it is impossible for many police services to deploy personnel to local security incidents, let alone have the skills and training to deal effectively with them once at the scene. The inability of the state to pay the sector’s personnel a living wage may facilitate a culture of corruption, which, in turn, produces insecurity and injustice. Desperately overcrowded prisons; weak or non-existent managerial systems; the lack of measurement indicators with which to evaluate performance; untrained court administrators; the absence of trained personnel throughout large swathes of the country, and the inability to enforce judicial decisions may all contribute to an insecure and unjust fragile state environment.

50. In many contexts, capacity deficits and lack of political will may reinforce one another. For instance, political pressure may result in the military drawing budgetary resources away from policing, so that the national police are deprived of the necessary capacities to maintain law and order, as happened in Peru during its recent attempts to reform the police.⁵⁶ A lack of police resources can result, as in Guatemala, Honduras, Belize, in the military being asked to engage in domestic security, in support of state police services. In other situations, parliamentary committees may not possess the requisite oversight authority or staff capacity to exercise their democratic prerogatives. Additionally, state prosecutors, as in Yemen, may not possess the requisite legal power and/or capability to investigate incidents of alleged malfeasance committed by security services.

Social Cohesion, Insecurity, and Injustice

51. In almost every instance, fragile states are countries undergoing multiple transitions at the same time. The type of the transition may vary (political, modernisation, globalisation, urbanisation, AIDS, drought, etc.), but in virtually all circumstances, traditional forms of internal social cohesion are being fragmented and eroded; new arrangements may not yet have taken root.⁵⁷ Insecurity and injustice may be acute in fragile states because of the splintering and dissolution of social cohesion that these transitions engender.⁵⁸ Recent studies in the West suggest that a deterioration of the social fabric is directly associated with insecurity and injustice because of the deterioration of social capital and social efficacy.⁵⁹ When this occurs, as it does in most fragile states, individuals and groups become increasingly less able to engage in productive collective action to protect and promote their public goods and interests and, as a result, their neighbourhoods typically descend into disorder, crime, and violence.⁶⁰

52. In some cases, where the method by which the state delivers its services contributes to rising rates of insecurity and injustice, reforming and strengthening service delivery may ameliorate the difficulties caused by a weakening in social cohesion. However, “comparative experience suggests that while the state is good at breaking down forms of local social control and cohesion it is notoriously bad at

⁵⁵ ‘The Kenya Police Strategic Plan 2004-2008’, advertisement in Sunday Nation newspaper Kenya, 7 March 2005.

⁵⁶ Gino da Costa (forthcoming).

⁵⁷ See Zartman (1995) p. 6, who argues that in fragile states there is an “extended breakdown of social coherence: society, as the generator of institutions of cohesion and maintenance, can no longer” bind segments of the population together.

⁵⁸ See Shaw (2000) pp. 10-11.

⁵⁹ See Sampson, Raudenbush, and Earls (1997), Sampson and Raudenbush (2001), Sampson, Morenoff and Gannon-Rowley (2002), and Sampson (2003).

⁶⁰ Ibid.

reconstructing” societal ties.⁶¹ Developmental assistance, therefore, may also have to look to non-state actors, to redress the root causes of conflict and rebuild a fragile state’s social fabric. By providing assistance to multiple layers of state and non-state justice and security providers, donors may support the reconstruction of the bonds that tie. It is also important to note that complementary support may also often have to be given to providers of other services (for example, education, health, and livelihoods), given that the issue of social cohesion extends far beyond the justice and security sector. This does not entail an expansion of SSR into other areas of development, such as youth employment, but highlights the benefit of ‘bundling’ development assistance across different service areas to address underlying causes of insecurity.

Challenges and Opportunities of Working with Different Actors to Deliver Security and Justice in Fragile States

53. The question of who delivers justice and security services and how is deeply and inherently political, wholly dependent upon local contexts, institutional capacities, popular demands, and leadership. It cannot be answered generically. Instead, it requires in-depth analysis of the fragile state, its capabilities, political terrain, the regulatory and legal environment, and cultural legacies. The most appropriate developmental approach to the delivery of justice and security services under conditions of fragility may be one that recognises the presence of multiple providers whose services are layered to meet differing contingencies. This may not be the optimal solution, but does reflect actual realities. The emphasis given to strengthening the role of the state vis-à-vis non-state providers depends on the political context, the willingness of the government, the capacity of different institutions, and the needs of local people. It is not a question of donor’s supporting the existence of parallel non-state structures and, thereby weakening state authorities, as there may often not be a state structure of effective provision. Rather, a multi-layered approach is an explicit recognition of ‘local ownership’ as expressed through the day-to-day choices made by individuals, neighbourhoods, and communities in their desire to live in safety, security, and justice.

54. Experiences of supporting the delivery of security and justice by different actors in fragile states suggest a number of lessons for development agencies. This section examines the challenges and opportunities of working with state, non-state and international actors. It highlights each actor’s strengths and weaknesses and assesses them against the three dimensions of security and justice in fragile states set out in Part I.

a) State

55. Because justice and security are public goods, the state has an irreducible role in their delivery and accountability. This irreducible role is the core issue in the balance between state-building, centralisation, and local needs and is pivotal in security and justice programming. The precise role the state does, can, and should adopt varies from context to context. It may also differ within the sovereign territory of the state, with distinctions made, for instance, between made urban and rural areas or between indigenous and other regions. What is applicable in one environment may be counterproductive in another for historical, political, economic, cultural, and eminently practical reasons. The realistic and appropriate role of the state may also often vary over time. For example, there may be pragmatic immediate limits to a state’s authority because it does not have control over parts of its terrain, but a strategy could be developed that seeks to increase this over time, as is currently being attempted in the DR Congo. At a very minimum, the irreducible role of the state in justice and security service delivery, is fourfold:

- To monitor and regulate the delivery of justice and security;
- To ensure that public goods are equally accessible to all;

⁶¹ Shaw p. 12.

- To protect and preserve human rights, and;
- “To establish the contours of an enabling environment for” the provision of justice and security, even if it is to be delivered by non-state actors.⁶²

56. To fulfil its obligations, the state may legislate minimum standards and rights respecting codes of conduct. It may also outsource their establishment to professional associations, as is often the situation, for example, with the creation of bar associations. The state may establish broad policy guidelines or strategic justice and security frameworks. It may determine, for instance, that serious crimes such as murder and rape must be referred to state courts, while all other alleged offences can be adjudicated in non-state systems. Or it may decree that crimes that would, upon conviction, warrant long periods of incarceration must be handled by state courts, with others being delegated to non-state purveyors of justice and security.

57. States may provide justice and security services directly or work in varying types of partnerships or cooperative arrangements with non-state actors. There is an important role for the state in regulating, licensing, and monitoring non-state justice and security actors. It may establish networks among various actors, furthering the exchange of information. There is no one right method, nor one that is necessarily inappropriate. Invariably, the delivery of justice and security will mix and match approaches, with a variety of state and non-state service providers delivering the public goods of justice and security. To adapt the World Development Report, “no matter how daunting the problems of delivery may be, the public sector cannot walk away from [justice and security]. The challenge is to see how the government -- in collaboration with the private sector, communities and outside partners -- can meet this fundamental responsibility.”⁶³

58. In fragile states, the challenge is especially acute, given local needs and states’ severe capacity deficiencies. It must be acknowledged that even the most narrowly circumscribed role of the state -- monitoring and regulating non-state service delivery -- may severely test state capacities and in many fragile states the state-provider relationship is “either problematic or inoperative.”⁶⁴ Holding service providers accountable for the protection of human rights and performance delivery must, however, be and remain part of the state’s responsibility. It is a central element of a multi-layered approach. In addition to maintaining budgetary and prosecutorial oversight, the state may most effectively concentrate on policy, legal, and regulatory frameworks, laying the building blocks for later development and state-building endeavours. Because of capacity deficits, establishing networks, partnerships, and collaborative relationships between the state and non-state providers is also crucial. Developing the appropriate accountability and working relationships in terms of recording, exchanging, collecting, and analysing information between and among the multiple justice and security providers -- and between providers and recipients -- is vital in fragile states and, with the state as the central player, may also be one of the primary areas of donor assistance. It may also be the most effective way of building state capacity and legitimacy.

59. The capacity shortfalls in many fragile states are enormous and cannot be underestimated. Given current human resource staffing levels and capacity, fragile states are simply unable to provide adequate justice and security to the vast majority of their populations and it is unrealistic to expect them to be able to do so in the short- to medium-term. As already suggested above, the likelihood of being able to implement a Western model of judicial reform in Timor-Leste, Malawi, Haiti, and Mozambique is severely curtailed because of dire human resource constraints. As the following table illustrates, albeit using data from fragile and non-fragile states, these countries are not alone in their massive capacity deficits.⁶⁵

⁶² OECD, (2005A). p. 4-5

⁶³ World Bank (2003) op cit p. 3.

⁶⁴ Meagher, op. cit. p. 17.

⁶⁵ Kampala Penal Reform International Conference: Access to Justice, October 1999.

Table 1. Numbers of lawyers/population in fragile states

Country	Number of private lawyers	Size of Population in 2002
Namibia	140	1.2 million
Kenya	Over 3000	31.3 m
Zimbabwe	700 or more	13.0m
Tanzania	120	35.2m
Malawi	300	10.7m

60. Estimates of the ratios of police to inhabitants of selected African countries, again using fragile and non-fragile state figures, only reaffirm the massive capacity shortfall:

- Uganda: 1:1,800
- Nigeria: 1:1,166
- Sierra Leone: 1:750⁶⁶

61. The shortfall in personnel is matched by comparable fragile state deficits in infrastructure, financial resources, and human capital. This lack of capacity is important in a related way as well. A fragile state may voice political commitment to development, but it may be an open question whether and to what degree the political leadership is able to exercise real control over the state's disparate components. Recognising that the state is not monolithic, it is often the case that,

governments that do pursue reforms run into problems arising from conflicts among ministries and agencies with different objectives and bases of power, the fear among officials in different units of government of losing personnel or budgetary resources, and from widespread inertia because no organization within government has overall coordinating responsibility for implementation of reforms or because they lack a sufficient number of "champions" within government to sustain the momentum.⁶⁷

Short-term achievements – long-term development

62. In the long-term, supporting the delivery of state justice and security may be the "first best" solution.⁶⁸ However, even with the political commitment of the government, most fragile states have exceedingly limited resources and means to provide safety and justice to the majority of their citizens in the short and medium-term. Economic and institutional sustainability issues only compound the daunting challenge. To attempt rapidly to create new justice and security services or grow existing ones is unlikely to meet local needs immediately, can result in the proliferation of corruption and human rights abuses, and may be counterproductive. A rapid expansion of services, for instance, was attempted with the initial

⁶⁶ The United Nations model ratio is 1:500. The United Kingdom ratio is 1:418. It should be noted, however, that the ratio is only indicative and cannot be an absolute guide to estimate the required number of police personnel. A number of factors need to be taken into account to determine the appropriate staffing levels of a police service, including, among other, demographic data, transportation systems, geographic terrain, economic information, education levels, and crime statistics.

⁶⁷ See Rondinelli (2006), p. 17

⁶⁸ OECD Fragile States Group Workstream Terms of Reference p15.

policing efforts in El Salvador after the end of the civil war and subsequently necessitated a thorough overhaul, setting back police development by a number of years at the moment in which crime and violence were growing exponentially. Similar results have recently occurred in Iraq with respect to the accelerated build-up of the Iraqi police and other security services, as significant percentages of newly commissioned police officers and those assigned to protect vital installations have been found to be illiterate, convicted criminals, and deeply implicated in corruption and violence.⁶⁹

63. To strengthen recruitment and selection procedures takes time. Thorough professional training, particularly of police middle management personnel, is an issue of years, not weeks or months. Three to six week crash training programmes may prove inefficient and ineffective, particularly if illiteracy is an issue and court codes of procedure (criminal and civil), as well as administrative processes, are faulty or non-existent. Legal education is an even longer process. The practical question is not how many police personnel or judges pass through training programmes, but what has been absorbed, by whom, and what behaviours have been changed in the day-to-day delivery of justice and security. Initiatives to develop progressively the basic foundations of state capacity have to be balanced with support to other providers to help meet immediate local needs and facilitate moving along the disorder to safety, security and justice continuum. It is precisely to address the varying needs that a multi-layered approach to justice and security service delivery is required.

64. Although the fragile state's capacity is exceedingly limited, developmental assistance to multiple service providers serves a second purpose. It can foster the long-term legitimacy of the state through building its capacity to formulate policy, set minimum standards, and monitor, regulate, license, and participate in partnerships and networks of non-state providers. Establishing regulations over the numerous justice and security providers is crucial and is a key element of any accountability mechanism. In Honduras in 2002, for example, the police had no functional ability to regulate the activities of private security companies with regard to their personnel, training programmes, or weaponry utilised. In the short-term, therefore, it may be productive to strengthen these strategic capabilities of the state. Of special interest may be managerial systems and capabilities, focusing on those that can measure and evaluate the performance of justice and security providers.

State building and centralisation of governance – responsiveness to local needs

65. Unquestionably developing state functions and service delivery are the most convenient ways of establishing control over service provision in order to address, for instance, inequalities of access to justice and security. Building the capacities of ministries and parliaments may be productive under most circumstances, except when the government exhibits little commitment to reform and/or is engaged in severe human rights violations.

66. Enhanced state-building and centralisation, however, is often achieved at the cost of meeting local needs, whether they pertain to crime reduction strategies, alternative sentencing methods, or restorative justice. An excellent example of the trade-offs incurred is the unwritten history of bail reform in South Africa.⁷⁰ To resolve a burdensome pre-trial detention issue, a new bail regime was established. Although the number of incarcerated declined, local needs went unaddressed and the result was that many of the alleged perpetrators were murdered upon release from jail by the new bail system because local communities, believing the released detainees to be guilty, did not want them living in their neighbourhoods.

⁶⁹ New York Times, May 19-24, 2006, articles on security in Iraq.

⁷⁰ Personal Interview with police advisor who, during the time of the reform, worked in South Africa (2006).

Rights accountability – performance accountability

67. There is no necessary trade-off between these two forms of accountability. In fragile states, however, there may be a question of efficacy in determining which approach produces the desired outcomes, the preservation and protection of human rights, understood broadly. Although perceived as necessary in the short-term, particularly when there is a lack of state commitment to reform, the establishment of independent ombudsman offices and human rights commissions may prove to be financially unsustainable. The development of internal institutional mechanisms and systems such as codes of conduct, professional standards, promotion systems, and managerial accountability within the police, prisons, and the judiciary may prove to be significantly more effective and cost-effective in changing behaviours in the long-term, though the human resources and capital within the institutions of the sector may be in decidedly short supply.

68. Because of structural and capacity deficits, as well as the politicisation typical of the fragile state's justice and security sector, mechanisms and procedures to monitor abuses and enforce sanctions, if existent, are often weak. Performance accountability is also often highly circumscribed, with clients distrustful of state providers. Consequently, the most productive method of enhancing accountability may be encouraging a multi-layered approach by maximising client/customer choice, participation, and knowledge of their legal and human rights. The objective is to increase the frequency and strength of the relationship between the local service provider and the client, not only to make the performance more accountable, but better to preserve and protect human rights.

b) Non-State Justice and Security

69. 'Non-state justice' refers to all systems of justice and security operating alongside formal state institutions "that exercise some form of ... authority in providing safety, security and access to justice."⁷¹ This includes "a range of traditional, customary, religious and informal mechanisms that deal with disputes and/or security matters."⁷² Non-state justice may include systems that employ varying mechanisms to mediate, arbitrate, and resolve conflicts through restorative and/or reparative justice procedures, including, but not limited to traditional courts, village elder councils, market associations, and religious hearings.⁷³ Non-state security encompasses varying agencies and services that provide safety and security to individuals and groups in the places where they live and work that are not entirely incorporated within institutions of the state.⁷⁴ Such organizations and groups may include:⁷⁵

- Informal loosely-organised groups;

⁷¹ For an explication of some of the varying terms used, such as informal justice and legal pluralism, see Scharf (*Non-State Justice Systems in Southern Africa*) pp. 1-3. It is inappropriate to label non-state systems as customary or traditional justice because the systems employed change over time, adapting to historical circumstances. It is also inappropriate to label them as informal in that there may be well-established rules of procedure, even if they may not be codified. Finally, it is important to recognise that the issue is not one of one of public vs. private justice and security. In many fragile states, public state justice and security is anything but free, given rampant corruption. Transparency International (2002) research indicates, for instance, that 95% of citizen interactions with the Kenyan police involved bribery and that the average Kenyan paid police bribes 4.5 times a month, totalling approximately US \$16. This suggests that Kenyan state policing may not be public in any sense other than in a narrowly defined *de jure* sense. Instead, it is privatised security conducted according to a fees-for-service model in the guise of state policing.

⁷² DFID (2004), p. 1.

⁷³ The types of traditional, customary, village, mediation, and conflict resolution non-state justice systems are innumerable. Alternative dispute resolution (ADR), justices of the peace, paralegals, lay judges and all related mechanisms also fall into this category. For examples of the later types of systems in Peru and Colombia, see Faundez (2003).

⁷⁴ See Johnston and Shearing (2003).

⁷⁵ This list is adapted from those proposed by Bruce Baker.

- Civic and trade associations;⁷⁶
- Neighbourhood groups and crime prevention organisations;⁷⁷
- Religious police;⁷⁸
- Ethnic/clan police;⁷⁹
- Political party security; and
- Private for-profit security companies.

70. It should be also pointed out that in many fragile countries is it impossible to make clean and sharp distinctions between state and non-state justice and security systems. In many parts of Somalia, it is legal that if a murder case can be resolved through ‘customary clan methods,’ the case will be removed from the formal court docket and the alleged perpetrator set free, even if he/she had been in custody.⁸⁰ In Yemen many traditional and religious procedures and processes are written into state law. Similar situations exist in Peru, Bolivia, Ecuador, Paraguay, Indonesia, Timor-Leste, Nepal, Sierra Leone, Rwanda, South Africa, Botswana, Malawi, and Mozambique. Even when the state is not directly involved in the provision of justice and security, non-state systems may still be strongly influenced by, associated with elements of the state system, or semi-legitimated by the state through licensing, regulation, partnerships, collaborative relationships, and/or the exchange of information. As a result, instead of a clean demarcation between state and non-state justice and security, a continuum of methods of resolving disputes and delivery safety exists.

71. As highlighted above, resource scarcity may explain the existence of non-state justice and security service providers, but it does not elucidate the tenacity and vibrancy of those systems. There are many reasons for the vitality and strength of non-state service delivery, including:⁸¹

- greater effectiveness;
- the populace’s greater physical access to non-state dispute resolution methods;
- the populace’s ability to understand the language -- linguistically, culturally, intellectually;
- the populace’s greater trust in the transparency, legitimacy, efficacy and timeliness of decisions;
- lower transactional costs;⁸²

⁷⁶ See Bassett (2003) and the hunters associations of Côte d'Ivoire during the 1990s; for taxi associations in Sierra Leone and Uganda see Baker ‘Multi-choice Policing in Uganda’, *Policing and Society*, 15, 1 (2005A), 19-41; ‘Who do People Turn to for Policing in Sierra Leone?’, *Journal of Contemporary African Studies*, 23, 3 (2005B), 371-390; for community group security in Somalia, see unpublished paper, Andre Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives* (USIP, forthcoming.)

⁷⁷ See Chirayath, Sage, and Woolcock (2005) for a discussion of the Tanzanian *Sungusungu*-traditionally organized village defense groups; see also Baker (2005A) for a discussion of the Local Council 1’s, the lowest level of administrative governance, and crime prevention panels.

⁷⁸ Religious police existed in Afghanistan under the Taliban and currently exist in Saudi Arabia.

⁷⁹ Yemen is a case study of a country in which local ‘tribes’ exercise significant policing authority.

⁸⁰ Academy for Peace and Development, ‘The Judicial System in Somaliland’, Workshop Report, Hargeisa, April 2002.

⁸¹ Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems*, 2000.

⁸² World Bank (2004B), p. IV, ‘Time, distance and cost were especially serious obstacles in rural areas where, in one place, it took villagers three days and the equivalent of half the minimum monthly wage to travel to the district capital for police interviews.’

- the populace's belief in restitution and restorative justice rather than punishment and incarceration;
- a higher degree of participation afforded in that the parties to a dispute may be able to choose their arbitrators and mediators;
- greater accountability; and
- a more holistic approach with a greater ability to resolve the complexity of issues surrounding an incident by examining the antecedents and addressing the root cause(s).

72. Consequently, “in many developing countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law.”⁸³ Similarly, the Ministry of Justice in Afghanistan estimates that “90% of Afghans rely on customary law due to a lack of ‘trust and confidence’ in the nation’s formal justice institutions as well as the justice institutions’ ‘physical absence and low capacity.’”⁸⁴ Comparable estimates exist for Mozambique, Malawi, Lesotho, Somalia, Sudan, Yemen, Solomon Islands, Timor-Leste, and Nepal. In Nigeria, for example, approximately “16 [different] types of informal policing structures [have been] established [by local] communities to deal with crime... in order to protect their neighbourhoods from criminal attacks; to provide speedy safety and security services which the formal police were unable to offer, and because they were closer to the people than the formal police.”⁸⁵

73. The prevalence and dominance of non-state justice and security systems does not imply that the fragile state is uninvolved. As indicated earlier, a continuum exists along which state and non-state service providers are arrayed. As one scholar of African policing has written (an assertion which applies equally to justice systems in fragile states),

as people move about their daily business, or as the time of day changes, so they may move from the sphere of one policing agency to which they would naturally look for protection, to another, or be faced at times with a choice of agency to be made in terms of personal experience, preference for mentality (surveillance or punishment), cost or communal status.⁸⁶

74. In fact, for many citizens of fragile states their experience of justice and security service delivery is based “on ‘what is available’, ‘what works best’ and ‘what can I afford’, more than issues” of legal authority, mandate, and accountability.”⁸⁷ From the perspective of the individual or group, it is an issue of ‘local ownership,’ legitimacy, effectiveness, choice and diversity. From the perspective of development, it is an issue of governance and local ownership in the multiple layering of service providers, a continuum of state and non-state, which only at the extremes of the range can be readily delineated one for the other.

75. It is important to recognise, however, that there are potential problems and challenges associated with non-state security and justice systems. These include, non-state systems being:⁸⁸

⁸³ Chirayath, Sage and Woolcock (2005) p. 3.

⁸⁴ Senier (2006), p2.

⁸⁵ Etannibi E.O. Alemika and Innocent C. Chukwuma, A Report on Poor Peoples’ Perceptions and Priorities on Safety, Security and Informal Policing in A2J Focal States in Nigeria (Lagos: Center for Law Enforcement Education, 2004), p. 6.

⁸⁶ Baker (2004A) p. 36

⁸⁷ Baker, ‘Protection from Crime: What is on Offer for Africans?’ *Journal of Contemporary African Studies*, 22, 2 (2004B), p. 170.

⁸⁸ See DFID (2004) p3.

- sources of insecurity and injustice;
- subject to corruption, abuse of power and manipulation by local elites;
- in non-compliance with international human rights standards, such as discrimination (especially against women) or inhuman and degrading punishments;
- unaccountable; and
- unable to maintain adequate record-keeping.

76. It is a fundamental mistake, however, to presume that these challenges are any more severe in the non-state systems than in the state one, without a thorough study of local contexts. More likely than not, the challenges of one are mirrored in the other. It is also erroneous to believe that development of the non-state system is more onerous and difficult than that of state justice and security service providers, without examining local political circumstances and capacities. A multi-layered approach, in fact, makes no generalized presumption that accountability and protection of human rights is best achieved through state systems.

77. In some instances, the activity of non-state systems may be significantly more human rights respecting. For example, vigilantism and lynching appear to be more common in neighbourhoods and communities where, in the absence of effective state justice and security, non-state systems have fallen into disrepair.⁸⁹ A study of rural Colombia suggests that ‘mob justice’ is up to five times more likely in such environments.⁹⁰ This may also be especially true in countries where the criminal code does not correspond to the beliefs of the local population. “For example, the criminalization of customary responses to witchcraft in South Africa, and the fact that state courts refuse to recognize the existence of witchcraft, has arguably lead to a form of vigilante justice based on the belief that the state sides with witches.”⁹¹ It may be the case that non-state systems as they are closest to their clients/customers may be more amenable to the preservation of human rights and the delivery of an accountable service for they more accurately reflect local beliefs and needs and are believed to be more legitimate.

Short-term achievements – long-term development

78. Supporting non-state justice and security systems may be a means of realising short-term gains in security and justice provision as they exist in virtually all fragile states. These systems are often more resilient than state systems, enduring throughout conflicts and deteriorating environments. Despite recent events which highlight some of the inherent difficulties of working with non-state actors, Somalia is a case in point, for even after state collapse,

the ensuing years of warfare eroded [but]... did not destroy, the traditional, clan-based structures that had been used to manage problems and maintain law and order. There appears to have been a turnaround in recent years, with traditional (clan-based) and religious (Sharia) structures providing protection and social insurance, and increasingly being relied on to resolve disputes and create stability. In South-central Somalia, for instance, given the failure of the [transitional government] to perform such normal government functions as provision of security and justice,

⁸⁹ See Buscaglia, E. (1996). “Justice and the Strengthening of Democracy”, Paper presented before the USAID sponsored Conference on Justice and Democracy. Quito, Ecuador, August 7-9; and Buscaglia, E. (1997). “Introduction to Law and Economics of Development” *Law and Economics of Development*, New Jersey, JAI Press: 13-18.

⁹⁰ Ibid.

⁹¹ Chirayath, Sage and Woolcock (2005), p. 6. See also Hund, J. (2000). “Witchcraft and Accusations of Witchcraft in South Africa: Ontological Denial and the Suppression of African Justice.” *Comparative and International Law Journal of Southern Africa* 33: 366-389.

Sharia courts, which transcend clan divisions, have been revived. These courts, funded by businessmen and controlled by clan elders, are providing increased law and order...⁹²

79. In this sense, non-state systems may be the most productive vehicles for the reconstruction of social capital and social efficacy in the hope of rebuilding social cohesion. Furthermore, non-state justice and security provision may be bundled together with other social services to provide more comprehensive development outside the confines of the justice and security sector.

80. While non-state systems may be the most effective means of delivering justice and security in fragile states, it cannot be overlooked that, at the same time, there may be significant discrepancies between the methods and activities of non-state justice and security providers and international human rights covenants. However, rather than shun non-state systems, the multi-layered answer is to engage with the non-state system through the use of local actors to ameliorate conditions, procedures, and results. The same applies to non-state actors who, although initially provide security, may over time devolve into organisations who may perpetuate insecurity. The *Sungusungu*-traditionally organized village groups, for example, effectively provided security against crime and violence in areas of Tanzania, but also engaged in beating of petty criminals and have been implicated in conducting witchcraft trials in which women were singled out and, in some instances, killed.⁹³

81. In line with the findings of the 2005 OECD survey of recipient countries, the issue is not whether to engage with non-state justice and security providers, but how, given there are few other viable methods of delivering service in fragile states. The *Sungusungu* are considered legitimate organisations by local people. They represent the values of the communities in which and for whom they provide effective justice and security service. The Tanzanian state has attempted to ameliorate the situation, but seems to have met with little success in increasing *Sungusungu* rights respecting accountability and behaviour.⁹⁴ It may be, then, that only a multi-layered approach that works to increase the capacity of other local community groups to raise legal and rights awareness might have a chance to increase accountability and improve the situation.

State-building and centralisation of governance – responsiveness to local needs

82. Supporting non-state systems may be perceived to be the antithesis of state-building and centralising governance, but because they operate at the local level they can be readily responsive to local needs. It is likely that non-state systems are also more adaptable and flexible to the changing needs of the local populace and, thus, more capable of modification during periods of transition.

83. Assistance to non-state systems, however, ought to be balanced by the establishment of mechanisms to link them to state systems. The registering and recording of decisions reached in the non-state systems may be an appropriate first step, eventually leading to a strengthening of the connections between and among systems. Developing methods of exchanging information and coordinating operations may be a second step, which, over time, may create enduring networks and partnerships of state and non-state justice and security providers. Policy formulation that lays out the broader competencies of varying levels of justice and security would also be appropriate, although it may be necessary to acknowledge that written policy and actual practice may be two very different phenomena and that codification of non-state justice systems does not allow them to change and meet local needs. Establishing a right of appeal to formal courts may be another important measure in many contexts, accepting that ‘forum shopping’ is an every day occurrence. Finally, the development of strategic frameworks could be initiated, so long as non-

⁹² World Bank, *Conflict in Somalia: Drivers and Dynamics* (2005B), p. 17.

⁹³ Chirayath, Sage and Woolcock (2005), p. 18.

⁹⁴ Ibid.

state systems are allowed to retain their flexibility.⁹⁵ In all these ways, state-building may be progressively achieved and sustained.

84. Similarly, there may be need to insulate the non-state systems from being co-opted by political parties and leaders. Frequently, non-state systems are used in the democratic process as a means of garnering votes or extending the reach of political parties. Conversely, traditional leaders can be used by the fragile states, such as Mozambique, as the reason and excuse not to extend local forms of democratisation.⁹⁶

Rights accountability – performance accountability

85. The accountability of non-state systems varies. Some may be more accountable than others. Some non-state systems may protect the prerogatives of the local power elite to the detriment of vulnerable and excluded groups, including women. Private security firms, for instance, may be more accountable to the clients who pay for the service, but less accountable to those who may fall under the private companies' exercise of power. What may be required is that the state establishes minimum standards of procedure to which non-state systems must adhere. Similarly, efforts may need to be undertaken by which legal and human rights awareness is raised and methods established by which decisions rendered in the non-state system can be appealed.

c) International actors

86. International actors -- government development agencies, international organisations, peace support operation, NGOs and private sector companies -- are playing increasingly significant roles in security and justice delivery in fragile states. The roles they play vary depending on the actor and the context. The lack of capacity in fragile states and the need to regain a semblance of order, as quickly as possible, implies that international actors have an active role to play. In many fragile states emerging from conflict, there is often a regional or UN-mandated peace support operation and international actors may be directly responsible for the delivery of many security and justice services. In contested fragile states, international actors can sometimes have the benefit of being viewed as relatively 'neutral' actors. However, that may not always be the case and international actors are viewed as partisan figures, who have sometimes been a party to the conflict themselves, as in Afghanistan, Iraq, and Somalia.

Box 3. The role of international actors in security system reform in Solomon Islands

In 2003 the Australian government led a multilateral Regional Assistance Mission to Solomon Islands (RAMSI). The assistance mission was in response to a request from the newly elected Solomon Islands Government for support in restoring the rule of law. Under the auspices of the Pacific Islands Forum, the regional multilateral organ, more than 2000 police and soldiers from many member countries landed in Solomon Islands with the mandate to "reinforce and uphold the legitimate institutions and authorities in Solomon Islands, and insure respect for the Constitution and the implementation of laws". RAMSI's first goal was to reinstate law and order.

Prior to RAMSI, the Royal Solomon Islands Police (RSIP) had effectively disintegrated as an effective agency for enforcing the rule of law across the Solomon Islands. The early phases of RAMSI therefore depended on the regional Participating Police Force (PPF), supported by military personnel, playing an active role in restoring law and order throughout the country, providing a boost in law enforcement capabilities, and also re-establishing the trust of the people in the police force. The Solomon Islands Government endorsed the priority given to law and order under RAMSI. Furthermore, SIG agreed that the substantial increase in law enforcement capabilities (delivered through the

⁹⁵ For lessons learned in donor assistance to non-state justice systems, see Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems*, 2000.

⁹⁶ See Kyed and Burr (2006).

PPF) meant that increased donor support to the criminal justice and corrections systems was also required. In addition, corruption and politicisation of the RSIP had been strongly associated with state decline in Solomon Islands; therefore reform of the police force was a key entry point for Australia's increased engagement in Solomon Islands.

Another key aspect in restoring security – and an important entry point - was the introduction of a systematic disarmament program, which included a comprehensive weapons amnesty (this occurred in late August 2003) coupled with the demobilisation of “Special Constables” and their reintegration into society. Over 3,700 firearms have been removed from circulation in Solomon Islands.

With basic law and order largely restored in Solomon Islands, RAMSI has moved into the longer-term state building phase. On the policing side, the emphasis on long-term reform is reflected in a transition from an active law enforcement role (with a strong operational focus) towards capacity development and sustainment. However in recognition that the security situation in the Solomon Islands will remain fragile for some time, the Australian Government stands ready to deploy additional military and police capability to assist if law and order breaks down again; this preparedness to respond quickly was demonstrated during the post election riots in Honiara in April 2006.

Given the integrated nature of the law and justice sector, support to policing is complemented by a comprehensive program of judicial and corrections strengthening. Attention is now focused on dealing with longer-term priorities and the re-establishment of an effective, accessible and sustainable law and justice system which regains and maintains the confidence of the Solomon Islands.

This approach offers lessons for donors operating in fragile states:

- Restoring law and order is often the most pressing priority in fragile states.
- The transition from short-term crisis management to longer-term development is challenging and requires significant local capacity development.
- There are potential linkages between small arms control and police reform in fragile states.
- Having a clear lead donor provides considerable clarity and increases the possibilities for co-ordination and coherence.

The comprehensive make-up of RAMSI's support to the security and justice sector in Solomon Islands addresses police, justice, prisons, economic governance and machinery of Government in parallel.

87. When international actors are responsible for justice and security delivery, it is crucial to distinguish between the establishment of law and order and developmental activity.⁹⁷ There is frequently a tension between the role international actors play in short-term crisis management and the longer-term development needs of building the capacity of local actors to provide sustainable justice and security. A fundamental problem that international actors face is that they are subject to political, reporting and accounting pressures in their home countries that have no relation to the fragile state environment in which they are operating. This, combined with the imperative of arresting insecurity, means that international actors often get frustrated by the pace of local reform initiatives and end up designing and implementing programmes themselves. The benefits of this approach though are invariably fleeting. Experience shows that investing time in involving local actors and building ownership pays dividends in the end. However, in some fragile state circumstances with their massive resource deficits, particularly in collapsed conditions, donors may have to initiate and manage the development process at the outset, building support and local ownership from the ground up.⁹⁸ Ensuring that this happens is vital. As a recent report puts it,

⁹⁷ See Renata Dwan, *Executive Policing: Enforcing the Law in Peace Operations* (Oxford University Press, 2003).

⁹⁸ OECD DAC 2005 *The Challenge of Capacity Development: Working Towards Good Practice* argues that ownership is never likely to be a simple yes/no issue. Ownership is a matter of processes and trends, not the presence or absence of a particular quality. Also, ownership is not monolithic, something that is exercised by a whole nation or its government. Systemic constraints are likely to be important, and the highest level of leadership endorsement should be sought, in all cases. But the potential for real policy ownership may vary across sectors or individual organisations (departments, agencies). The conditions may be right for donors to support locally-owned processes of

“domination and paternalism by external actors generate resentment, resistance and inertia among local actors; local actors have little commitment to externally imposed products... The bottom line is that reforms that are not shaped and driven by local actors are unlikely to be implemented properly and sustained.”⁹⁹

88. Achieving local ownership is a process that often starts with ensuring effective consultation, participation and dialogue. Ownership may follow when stakeholders see evidence that they are being heard, and their views are reflected in consensus and outcomes. “A process-oriented approach that respects and empowers local actors is more likely to yield good results than a product-oriented approach that undermines local actors.”¹⁰⁰ For example, in the Solomon Islands under RAMSI, the active involvement of the Solomon Islands Prison Service in the recruitment of international advisors (who have been tasked with assisting in capacity building of the Solomon Islands Prison System) has helped increase local ownership and empowerment. This has been particularly the case in relation to infrastructure development and procedural reforms. The same can be said for the recruitment process in the justice sector. Key stakeholders, including the Chief Justice, Attorney-General and the Permanent Secretary of the Ministry of Justice and Legal Affairs are involved in recruitment panels for advisors, prosecutors, defenders and magistrates. Solomon Islands Government involvement in recruitment has also helped as a capacity building exercise in itself, which has enabled officials to experience and apply good human resource management practises in the workplace.

89. International interventions in fragile states have significant potential to support peacebuilding and conflict resolution. However, if poorly targeted, they can also exacerbate fragility. A conflict-sensitive approach to the delivery of justice and security is, therefore, vital in all fragile states. This requires a comprehensive assessment of the root causes of conflict and fragility, such as a lack of participation of disadvantaged social groups, human rights abuses and land tenure disputes, and then targeting programming to address these issues.

Short-term achievements – long-term development

90. International actors may often be able to achieve quick and effective results in the aftermath of conflicts. Ensuring, however, that international actors play a mentoring role to local stakeholders and institutions and transfer their skills is fundamental to moving fragile states along the development continuum. Equally important is the effort to support the development of the enabling institutional framework, structures, and systems, in which the skills transfer is to take place.¹⁰¹ In Kosovo, for instance, after five years of international intervention, there was still no functioning Ministry of Interior within the government. Furthermore, it was only after UNDP initiated a police management programme that

the procedures, processes and systems [came into being,] which are the backbone of [a police agency’s] institutional administrative capacity in personnel, logistics, finance/budget, strategic management and procurement functions ... [The UNDP programme] has also had some success in binding the KPS to the Ministry of Finance and the broader Government as well as in designing and implementing a transition strategy for a future Ministry of Interior.¹⁰²

improvement in certain organisational spheres even when the conditions in the wider system and the overarching structural/institutional environment are unhelpful.

⁹⁹ Nathan (2006), p3.

¹⁰⁰ Ibid.

¹⁰¹ See OECD DAC 2005, The Challenge of Capacity Development. Human capital development is a necessary but not sufficient element for development. Also required is the organizational and institutional capacity.

¹⁰² Ed Rees, p. 20; author interviews with UNMIK and UNDP staff (2003 and 2005).

91. 64. Progress in security and justice delivery in fragile states is also often undermined by a lack of coordination between different international actors. A recent report on SSR in DRC highlights that “coordination remains problematic at best between donors who have diverging philosophies on the nature of these [specialised police] forces... The difference of approach was apparent during the management of street protests that followed postponement of the elections in July 2005, when most police performed well but Angolan-trained units adopted a heavy-handed approach to crowd control.”¹⁰³ Developing practical mechanisms for donor coordination is important to support service delivery and an important element in a multi-layered approach.

State-building and centralisation of governance – responsiveness to local needs

92. 65. International actors, particularly governments and international organisations, tend to work primarily with the national/federal governments of fragile states on security and justice delivery¹⁰⁴, even though 80% or more of justice and security delivery is often conducted in the non-state arena. Although strengthening governance is a key component of a multi-layered strategy, such international assistance may have little effect on the delivery of services and meeting the real security and justice needs of local people. Such support may also misconstrue the nature of the fragile state in the false belief that the state once had monopoly control over coercive force and violence. In most fragile state the issue is not a ‘recreation of a state,’ as understood in Western parlance; nor is it a question of supporting parallel non-state structures that undermine state authority and capacity, given that there is little state capacity in the first place. Rather the challenge is to facilitate the ‘birth’ of the ‘enabling contours of a sustainable state,’ where the state may never have exercised sovereign control over the entire country, possessed a monopoly of force, or delivered accessible justice and security to a majority of its citizens. In fact, in addition to giving birth to ‘the enabling contours of the state,’ the main governance challenge may be how to invigorate local and provincial levels of government as a means of strengthening the accountability of service providers to meet local needs. In fragile states, this is not an issue of ‘decentralisation,’ but of establishing governance systems at the local and provincial levels that may have never existed or functioned before, at a moment in time in which the political leadership of the fragile state may be seeking to centralise state power and authority.¹⁰⁵

Rights accountability – performance accountability

93. The performance accountability of international actors is weak. Development actors are in theory accountable to their own governments, funders or electorates but there is little oversight or accountability of their work. In the countries where they operate there are often few means by which local institutions or people can hold them accountable for their performance, thereby creating a fundamental challenge, which lies outside the scope of this report. The rights accountability mechanisms are also not strong, but recent cases of peacekeepers being investigated for allegations of abuses indicate that they do exist.

¹⁰³ ICG (2006), p7.

¹⁰⁴ When international actors do engage with national governments they often primarily engage with government ministries at the expense of service providers. A recent UN study of peacekeeping missions identifies that: “the focus of ROL [rule of law] relationships with the executive (usually the Ministry of Justice) often overshadows the importance of the judiciary as a key and independent partner. For reasons of political import or expediency, the UN can unintentionally reinforce executive control and interference in the judicial realm by relying too heavily on relationships with executive actors.” This illustrates the importance of engaging with multiple service providers.

¹⁰⁵ One of the principal lessons learned in decentralisation programmes is the imperative that local levels of governance have the financial wherewithal to function appropriately, which means the ability to generate their own revenues and/or to have the mechanisms in place by which such revenues can be transferred to them from national/federal coffers. In Africa, a recent study has indicated that in 19 out of 30 countries examined, “local governments control less than 5% of public expenditures,” see Social Development Notes, Community Driven Development & Urban Services to the Poor, Number 86/July 2004, p. 2.

94. A key issue is how donor assistance can help foster greater accountability of justice and security providers (state and non-state) by “better matching of local preferences to service delivery.”¹⁰⁶ As discussed above, in fragile states,

despite the long-term presence of some kind of state apparatus, either in the form of colonial rule or an independent, though authoritarian, regime, local communities have often functioned according to their own, fundamentally stateless, structures, regardless of the paramouncy of the machine controlled by the capital city. Considerably older than the national identity, such social structures have proved profoundly resilient and easily resist quick interventions to build new ‘democratic’ institutions to replace the ones that have previously collapsed.... To avoid this scenario, and bridge the local-national gap, communities have to be integrated in the process of institution-building, where they live as well as at higher levels, in order to foster a sense of identification with the greater whole and a feeling of ownership of the alternative structure.¹⁰⁷

95. To achieve the accountability objective, one of the methods of linking local non-state systems to state-building processes that may be through community-driven social funds, development initiatives that attempt to build local and provincial governance structures in conjunction with existing community, village, and neighbourhood institutions. In Afghanistan this may mean working with local shuras; in Mozambique it could imply a combination of village elders, elected councils, and local administrative structures; in Indonesian it would imply an extension of the Kecamatan Development Programme suitably modified to be applicable to the justice and security sector. In each and every fragile state, the non-state systems will be different and, therefore, so will the methods of establishing the appropriate governance structures at the local and provincial levels. Key elements common to all contexts though are support to vibrant community organisations and locally-driven demand based planning.¹⁰⁸

Strategic Choices

96. There a number of strategic choices in the development of a multiple-layered approach to justice and security delivery in fragile states. A flexible approach is needed but it is important to think and plan programmatically. Donors supporting the delivery of security and justice by multiple actors need to be aware of what the basic strategic choices are, and work with local partners to identify the approach must suited to the context. These choices need not, and often can and should not, be made at the start, but it is important to be aware of their existence. They include:

- Benign neglect or toleration (by the state and donors) of non-state systems until the state can take over service provision.
- Eventual incorporation of multiple service providers into a single system.
- Evolution of a structured system of multiple and overlapping systems and jurisdictions.

97. Given the significant capacity constraints of the state, the first option fails to acknowledge the reality of justice and security provision in most fragile states and is, at best, a very long-term prospect. The second approach recognises the existence of alternative non-state providers, but in practice is often limited to recognising the right of traditional communities to use their own norms and dispute resolution mechanisms to resolve local disputes, without seeking to develop how the formal and informal systems will interface and work with or alongside one another. Implementation, therefore, often remains

¹⁰⁶ Social Development Notes, Community Driven Development & Urban Services to the Poor, Number 86/July 2004, p. 2.

¹⁰⁷ Jarat Chopra and Tanja Hohe, Participatory Intervention, unpublished manuscript, 2006, p. 7.

¹⁰⁸ See Social Development Notes, p. 3.

problematic. The most realistic and desirable goal in the circumstances, therefore, may often be a combination of the second and third options. The goal should be to position the state at the hub of a network of justice and security providers. The result may not be a single, unitary system, for there will be multiple and overlapping systems and jurisdictions. Nevertheless, the state would provide the linkages, partnerships, and regulatory frameworks needed to ensure effective, equitable and accountable service provision. Making a realistic and considered assessment of the desirable and likely end point of assistance can help donors structure support towards that goal. A multiple-layered approach is a more nuanced and realistic objective than simply ‘state-building’ and may often be more effective at meeting local needs.

Selecting aid instruments to support a multiple-layered approach

98. One of the challenges for donors in supporting a multiple-layered approach to justice and security delivery in fragile states is how to channel resources and structure programming. The lack of state capacity and the need to support multiple providers mean that relying on traditional methods of channelling large-scale support primarily to the partner government may not be effective. The level of political support for a progressive approach in fragile state governments is another factor. As a working paper produced for DFID put it, “In countries where there is little political will to invest and account for pro-poor expenditure, programme aid instruments such as budget support will remain inappropriate.”¹⁰⁹ This is particularly true in deteriorating or collapsed fragile states. In fragile states recovering from conflict with new regimes that are committed to enhancing service delivery, however, budget support either directly to the government or through a trust fund can bring benefits. But even in these circumstances, the need to support multiple layers of service provision means that budget support should not be the sole approach.

99. Social funds provide a valuable means of disbursing resources to multiple service providers and client groups. These funds generally involve the provision of block grants to communities to be spent on micro-projects selected by the community, but they can also be scaled up to a provincial, regional, or national level. They, therefore, enable a decentralised approach to service delivery that is often important in fragile states, increase local participation, and respond to local needs. “They can be effective mechanisms for delivering small-scale [service delivery] infrastructure and because they are demand-driven can promote both allocative efficiency and sustainability.”¹¹⁰

100. Social funds, such as the Kecamatan Development Programme in Indonesia, are used widely by the World Bank and have grown in popularity in many countries for the development of local infrastructure, education, health and water services. For example, the Yemen Social Fund for Development (SFD) is a public agency that has had a significant impact in a difficult environment. “The autonomous setup and a flexible, demand-driven approach to service delivery has allowed the SFD to successfully scale up its operations...evidence points to SFD’s success in reaching poor and disadvantaged groups.”¹¹¹ Its financing rose from \$80 million for the first phase starting in 1997 to \$340 for the third phase starting in 2004.

101. The potential of social funds to support a multiple-layered approach to justice and security delivery has not yet been broached, though this may be beginning to change. In Uganda, for instance, the Northern Uganda Social Action Fund has established a pillar on conflict management and has targeted support to a range of community reconciliation and dispute resolution initiatives. SSR programmes in other countries that are currently in the planning phase are looking to extend the use of social funds for justice.

¹⁰⁹ Leader and Colenso (2005), p7.

¹¹⁰ Ibid, p31.

¹¹¹ World Bank (2004a) ‘The Yemen Social Fund for Development’, Shanghai Poverty Conference: Case Study Summary, In *Reducing Poverty Sustaining Growth: Scaling Up Poverty Reduction*, A Global Learning Process and Conference in Shanghai, May 25–27, 2004, p2.

102. The relationship of social funds for justice with government structures is a key design issue and will depend largely on the commitment of the government to pursue a multiple-layered approach to service delivery, recognising the necessity of devolving authority to local communities and non-state actors. Various configurations and levels of government involvement are possible according to the local context. When sensitively designed, social funds for justice do not undermine the state by creating parallel structures, especially when effective state systems and service delivery structures have never existed. Rather they may provide a flexible means of strengthening a wide range of local actors in their provision of effective, legitimate, and accountable service delivery, while simultaneously increasing state capacities by developing its position and role at the hub of this network of provision. As grants are often seen as coming from the government, they may also provide a means of enhancing the legitimacy of the state. There are clearly risks with any choice of aid instruments in fragile states, but social funds for justice can enable “a ‘venture capital’ approach...that acknowledges high risk, but high returns.”¹¹²

¹¹² Leader and Colenso, op cit, p54.

IV. PRACTICAL EXPERIENCES OF JUSTICE AND SECURITY DELIVERY IN FRAGILE STATES

103. This section reviews experiences of donors working to support justice and security delivery in three different types of fragile states identified by the OECD -- countries where security and governance are deteriorating, countries (or parts of countries) where the state has collapsed, and countries recovering from conflict. Recommendations are offered, based upon case studies, on ways in which a multi-layered approach could target donor support to strengthen service delivery in these different contexts. Some of these recommendations apply to all categories of fragile states. Taken together, the recommendations suggest ways in which to develop an enabling environment for service delivery in fragile states by targeting support to a range of service providers (state and non-state) and strengthening their accountability.

Table 2. OECD DAC typology of fragile state contexts

Declining/Deteriorating	Collapsed	Recovering
Capacity and/or willingness to perform functions in decline (indicators falling). May have weak rule of law and Authoritarian regimes. In some cases, donors may be unwilling to work with government because of human rights issues	State no longer able to function in most of its territory, and little or no government for international actors to engage with. Chronic conflict likely.	Includes post conflict and early recovery – willingness may be low or high but capacity extremely weak. Risk of return to conflict in post conflict transition high and focus will be on initial peacebuilding. In early recovery, more evidence of willingness.

A) Deteriorating Fragile States

104. Because of the downward spiral in which deteriorating countries find themselves, these fragile states pose a complex set of challenges for development donors in their support to justice and security provision. Deteriorating states exhibit low capacity and/or political willingness, which is often associated with an erosion of the state’s perceived legitimacy.¹¹³ “Channels of political expression, mechanisms of accountability, administrative capabilities” are all under-developed.¹¹⁴ Managerial control of the justice and security is often weak or non-existent; and social cohesion is fragmenting and possesses little resiliency to the ongoing strife. The impact of a deterioration in security and governance on excluded and vulnerable groups is particularly acute, with their access to justice and security decreasing proportionally more than it does for other groups.¹¹⁵

105. The populace’s reaction to a deteriorating environment in which justice and security service delivery markedly decreases includes a range of responses, such as:

- increased use of non-state systems;
- banding together to apply group pressure;
- seeking assistance from influential third parties; and

¹¹³ Meagher, p. 11.

¹¹⁴ Ibid, p. 11.

¹¹⁵ UNDP (2005B), p. 11.

- abandonment of justice and security systems (state and non-state) for the seeking of redress.

106. These responses are compounded by the fact that in many deteriorating environments, state justice and security providers modify and lower the norms of legal procedures.¹¹⁶ The challenge for development donors is how to support service delivery given this constellation of factors. The appropriate response is determined largely by the political commitment of the state to address the declining situation and seek to provide increased justice and security for local people.

B) Deteriorating states without political commitment

107. A classic case of a deteriorating fragile state where political will was in short supply is Nepal, prior to the most recent democratisation efforts during early spring 2006. The country had been suffering a civil war and the state exercised control over only limited areas of the country, mainly limited to urban centres.¹¹⁷ The police have “insufficient resources and coordination to properly conduct investigations, together with a weak monitoring of the investigation process”, all of which has resulted in “low prosecution rates... creating a favourable environment for the widespread use of torture.”¹¹⁸ The attorney general’s offices “have a substantial backlog of cases and a high rate of failure”... and “face constraints in jurisdiction and weak capacities to monitor/direct police investigation.”¹¹⁹ Allegations of human rights abuses by state security services had been spiralling upward with beatings and deaths recorded, factors that coupled with a state of emergency declared by the King resulted in a withdrawal or diminution of activity by many international development donors.¹²⁰

Recommendation 1: Stay engaged by focusing on long-term development building blocks and support to broad-based human rights activities

108. Donor risks are high in a deteriorating environment in which the fragile state exhibits little commitment to undertake justice and security sector development. Nevertheless, experience suggests that it is important to remain engaged with security and justice institutions, where possible. A multi-layered approach recommends a focus on:

- the non-coercive elements of the security system, such as the state-delivered justice; and
- the activities of community organisations, NGOs, Bar Associations, and independent lawyers groups engaged in the protection of human rights, the monitoring of allegations of abuses, and the defence of victims.¹²¹

¹¹⁶ See UNDP (2005).

¹¹⁷ Case study presented by Nepalese participants at OECD Fragile State Workshop, London, 24 March 2006.

¹¹⁸ UNDP (Executive Summary, 2005A), p. 6.

¹¹⁹ UNDP, *Ibid.*

¹²⁰ See UNDP (2005B), p. 30: “Human Rights Watch situates Nepal as the world leader in ‘disappearances’, with at least 1,200 people allegedly missing after being detained in the past four years. According to the National Human Rights Commission of Nepal (NHRC), government security forces have been responsible for approximately 2000 extrajudicial killings since 2001. The total number of disappearances reported by the NHRC between the years 2000 and 2004 is 808.” See also Case study presented by Nepalese participants at OECD Fragile State Workshop, London, 24 March 2006.

¹²¹ Presentations and comments at the OECD Fragile State Workshop, London, 24 March 2006.

109. In deteriorating environments a significant range of activities can be conducted to promote the provision of state delivered justice. USAID's experience in El Salvador, during the civil war, is emblematic of how to develop the building blocks for enduring judicial reform. During the 1980s, USAID supported efforts to "introduce non-political research and public consultation to the formulation of legal policy and draft legislation on key themes such as criminal procedure and family law."¹²² The results also included a new law establishing the judiciary, creation of a public defenders service, the establishment of a judicial training institute.¹²³ Equally importantly, USAID assisted the El Salvadorian Supreme Court in resuming the "publication of laws and [a] digest of its opinions for the information of judges and the public."¹²⁴

110. Additional judicial building block projects that can be initiated during periods of deterioration include the modernisation of court administration, the manner in which it is structured and organised, its procedures, and training programmes. To accompany new codes of procedures (civil and criminal), bench books and digests can be published and disseminated and integrative financial budgeting introduced. Prison reform can also be initiated during periods of deterioration in much the same way, with an emphasis, for instance, on juvenile law, as accorded in El Salvador. Other initiatives could include modernising the prison law, strengthening the education of prison personnel, and improving in-prison health facilities. All of these afore-mentioned programmes are long-term projects that need not necessarily await a cessation of conflict, but each is a fundamental cornerstone upon which enduring and sustainable state justice can later be provided.

111. To supplement and complement the 'building block' approach, a multi-layered strategy would also recommend extensive engagement with human rights activities. The donor community can support the work of community organisations, NGOs, Bar Associations, and independent lawyers groups, who are engaged in the protection of human rights, monitor allegations of abuses and defend victims.¹²⁵ The level and nature of human rights abuses are good indicators of a worsening security and justice situation. It is important to be able to record abuses because the methods and instruments used to analyse human rights allegations may be converted, in time, to performance assessment tools once the political situation stabilises, thus, initiating the possibility of multiple forms of accountability oversight.

112. Donors can also support the creation of legal libraries, the establishment of legal clinics for lawyers to gain practical experience and the training of paralegals, justices of the peace, and lay judges to work in local communities. Experience shows the benefits of supporting inclusive justice networks, bringing together various non-state actors, as USAID did in Central America, to strengthen legal awareness and advocacy, while setting in motion the process of formulating strategic frameworks and policy orientations that will be needed once the political situation solidifies and development can take place.

Recommendation 2: Support non-state structures

113. In situations where direct support to the state is politically-sensitive, a multi-layered approach advocates that donors, in addition to seeking ways to strengthen the state's provision of justice and security, should also look creatively at the range of non-state justice and security systems that service local needs in direct and immediate ways. Approximately 90% of all Nepalese conflicts and disputes appear to be addressed through non-state actors and mechanisms, even though these procedures are not legally recognised.¹²⁶ The state systems have little presence outside urban centres, are considered illegitimate,

¹²² USAID, *Achievements in Building and Maintaining the Rule of Law* ((2002), p. 66.

¹²³ USAID, *Ibid.*

¹²⁴ USAID, *Ibid.*, p. 67.

¹²⁵ Presentations and comments at the OECD Fragile State Workshop, London, 24 March 2006.

¹²⁶ Case study presented by Nepalese participants at OECD Fragile State Workshop, London, 24 March 2006.

and/or are perceived, in comparison to non-state systems, to be less effective, too expensive, unaccountable, and non-responsive to local needs.¹²⁷ As a UNDP-sponsored study concluded,

judicial remedy of disputes are not easy, quick and inexpensive because it is a slow and lengthy process with lots of bureaucratic hassles and in some of the cases it continued for decades. The scenario for rural people in this regard is further aggravated by the difficult accessibility to most of the district headquarters where the district courts are situated. As such, in most of the cases for the rural population of the country, the possibility of easy judicial remedy becomes more remote.¹²⁸

114. In worsening conflict and human rights situations, non-state security and justice providers are the 'safety net' at the community level and, perhaps, the only service delivery that addresses basic local needs. It is imperative that the donor community, therefore, support their activities.

Recommendation 3: Support women's groups and women's access to justice

115. Non-state justice and security systems often adapt and endure in deteriorating environments. As in the case of Nepal, some "informal providers of justice [have been] displaced by the conflict or [can] no longer function."¹²⁹ Interestingly, a high percentage of these displaced providers will, most likely be males and "in their absence women groups become increasingly active, taking up some of the functions of more traditional providers."¹³⁰ Research shows that "women's groups and NGOs seem to have a particular resilience"¹³¹ and flexibility to cope with changing and deteriorating situations. In Guatemala and Somalia, women have been at the forefront of peace movements. It is also well known in the provision of micro-credits, that women and women's organizations are the most effective way not only of stimulating economic activity and growth, but of promoting social cohesion. The evidence, therefore, seems to support the case for donor assistance to these organisations as one of the primary vehicles in a multi-layered provision of justice.¹³² Paradoxically then, deteriorating environments may provide a unique opportunity for donors to strengthen women's rights by supporting their participation in non-state justice systems.¹³³

116. A broad range of programmes can be supported that raise legal awareness and promote legal rights. Local NGOs and other community groups have been utilised for the provision of paralegals, lay judges, and/or justices who assist women to be the providers as well as recipients of enhanced justice. Donors have also supported local mediation and arbitration projects that have similar objectives. Efforts can be undertaken to encourage the recording and registering of disputes addressed in the non-state justice system as women appear more conscientious than men in keeping records, a crucial first step in an eventual linkage between non-state and state systems.¹³⁴ With women as the core group, programmes can be bundled, addressing health, education, and justice issues simultaneously.

¹²⁷ See also Pun and Bhandari (2002) and UNDP (2005B). It should also be noted that the Maoist insurgents have established a justice system in areas of the country under their control. The fear instilled by the Maoists in the population should also not be minimised, further constraining access to justice.

¹²⁸ Pun and Malla (2003), p. 9.

¹²⁹ UNDP (2005B), p. 38

¹³⁰ UNDP (2005B), p. 73.

¹³¹ Ibid.

¹³² For a case study in which women and a local NGO were the main actors in a resolution of a dispute over water use, see Upreti (2000), *Resource-Use Negotiation as an Alternate Strategy for Sustainable Water-Resource Management: Experience from Nepal*, Journal of Agricultural Education and Extension, vol. 7, 1, pp. 11-20.

¹³³ See UNDP (2005B), pp. 74-77.

¹³⁴ UNDP (2005B), p. 79.

Recommendation 4: Use political pressure and conditionality carefully while preparing for the future

117. In deteriorating contexts when the state is misusing the security sector, “high level [international] diplomacy and pressure... may be required.”¹³⁵ Political engagement is vital to complement the multi-layered approach. It may be the case, however, that some forms of political conditionality are counter-productive because the fragile state government may have little incentive to cooperate and strengthen justice delivery. For example, in Nepal, donor assistance to bolster judicial independence had to be offered unconditionally because any preconditions would have hastened governmental withdrawal from development programmes, which would have only worsened the situation.¹³⁶

118. It is also important that donors adopt a long-term perspective in deteriorating contexts and maintain assistance and engagement because human capital development benefits do accrue over time. Throughout Latin America and Africa, a number of emerging leaders are individuals who have participated in donor-assisted development programmes over the past 10 years. For instance, the Deputy Minister of Interior of Guatemala, in 2004, was a former NGO leader whose organisation donors had supported. With the improving political situation, in her position as Deputy Minister, she has been able to apply the knowledge and experience she had gained.

Deteriorating states with political commitment

119. There are contexts in which the state may be strong, but the justice and security sector is fragile and deteriorating, unable to deliver adequate service. Jamaica, for example is a democratic, middle-income country with established governance structures, but its security situation has worsened significantly in recent years. The murder rate has risen from 232 in 1973 to 1139 in 2001 and up to a record 1,669 murders in 2005.¹³⁷ “Violence occurs predominantly in ‘garrison communities’ where the state often exerts limited control. These communities are dominated by gangs led by ‘Dons’ that demand local support and are often aligned to rival political parties. The Government faces significant challenges to its law enforcement capacity in these communities, partly because the gangs are heavily armed but also because the Dons enjoy widespread public support (they are considered benefactors and often provide basic social services). This support is strengthened by public mistrust in the police force, which is linked to its failure to provide security and a perceived lack of accountability.”¹³⁸

Recommendation 5: Support the development of a National Security Strategy

120. Supporting the development of a National Security Strategy is a good means of testing the government’s commitment to address security and justice issues. It can also provide a valuable framework to address security and justice issues, ensure the involvement of a wide range of government and non-state stakeholders, and coordinate the support of different donors. In Jamaica, the British, Canadian and US Governments provided joint technical assistance to the development of the National Security Strategy which includes a comprehensive range of reform programmes ranging from changes in division of responsibilities between the Jamaican Police and Defence Forces; to review of the criminal justice and law-making systems; major reform of intelligence systems; dismantling organised crime organisations; and local crime prevention and community development projects in target neighbourhoods.¹³⁹

¹³⁵ Greene (2003).

¹³⁶ Case study presented by Nepalese participants at OECD Fragile State Workshop, London, 24 March 2006.

¹³⁷ UNDP Draft Programme Document, ‘Jamaica Sustainable Peace and Development Programme, June 2006 – May 2009’.

¹³⁸ Ibid.

¹³⁹ Ministry of National Security (2005).

Recommendation 6: Support government security and development initiatives

121. In deteriorating environments where the government has the political will to address security and justice issues, it is important to target support to strengthen its legitimacy in the eyes of local people. A key priority for international assistance in these contexts should be to build the capacity of security and justice providers to meet local needs. For example, USAID is supporting a community-based policing programme in Jamaica to help increase trust between the police and local communities and strengthen accountability for service delivery. It is important that programmes target the root causes of crime and insecurity in deteriorating environments. This often requires linking initiatives to regain security with projects to increase access to social welfare and alternative livelihoods, and strengthen the voice of communities in service delivery and planning processes. For example, DFID is supporting the Community Security Initiative led by the Ministry of National Security in Jamaica as a “Framework for action on revitalising security, social inclusion and the social contract.”¹⁴⁰ This approach bundles the provision of different services together in target communities to try and undermine popular support for organised crime and demonstrate a ‘peace dividend’ to local communities. In such circumstances, donors should align themselves with government initiatives and provide support directly to the ministries concerned.

Recommendation 7: Take an area-based approach

122. In many deteriorating environments the fragmentation created by neighbourhood-related violence disrupts the natural radius of local economies and makes it difficult for government to provide services to citizens. For example, “Through political and gang related activities the definition of ‘community’ in Jamaica has shrunken in some cases down to the level of city blocks. This makes it difficult for people to seek out services or employment as doing so may require them to cross dangerous and invisible borders in urban areas”¹⁴¹ This fragmentation highlights the need for an area-based approach that links support for peace-building, security and livelihoods approaches across selected communities.

Recommendation 8: Support balanced representation

123. In many deteriorating contexts, unrepresentative and unbalanced justice and security agencies may be a root cause of insecurity. If the government demonstrates the political commitment to address this issue then donors should provide assistance to attempt “to balance recruitment among different factions and even provide preferential treatment to members of groups who had been discriminated against or precluded from government positions in the past.”¹⁴² Public service reform invariably calls for a depoliticalisation of the civil service, including the justice and security agencies, however in a deteriorating context positive discrimination may be more appropriate. Such programmes are typical activities of post-conflict development and often written into peace accords, as in El Salvador, Bosnia and Herzegovina, Kosovo, and Macedonia, but if the government demonstrates commitment they will pay dividends in deteriorating environments as well.

¹⁴⁰ ‘Community Security Initiative’ Ministry of National Security (2004), p1.

¹⁴¹ UNDP Draft Programme Document, ‘Jamaica Sustainable Peace and Development Programme, June 2006 – May 2009’, p2.

¹⁴² Rondinelli (2006), p. 21. In a similar vein, even if the state were to agree to engage in civil service reform, as various World Bank studies have suggested down-sizing, “right-sizing,” consolidating public administration, although necessary, may be politically undesirable and, in fact, could be destabilising. In Yemen, for instance, civil service employment, particularly in the security services, is a stabilisation mechanism, one that reduces potential conflicts. See also World Bank, “The World Bank’s Experience with Post Conflict Reconstruction,” Operations Evaluation Department Report 18465 (Washington, DC: World Bank, 1998); World Bank (2003C), “Recent Bank Support for Civil Service Reconstruction in Post-Conflict Countries,” *PREM Notes*, No. 79, October 2003.

124. Such efforts may need to be highly localized, as was the case in southern Serbia with the establishment of an area-based ethnically-integrated security service and where development assistance included support for recruitment and selection, equipment, training, and, most importantly, mentoring. A comparable attempt was made when MONUC, in 2001, when the UN provided assistance to the state police service in Kisingani, DRC, a region which, at the time, was not entirely under the control of the state. Admittedly, neither of these programmes could be sustainable, even in the medium term, but that is not the primary issue in a deteriorating context. Instead, the need may be for immediate physical security and the challenge at hand may be to conduct initiatives that may prove productive as initial steps in a conflict resolution and confidence building programme. Over time, these initiatives might be incorporated into larger state-centric justice and security programming, as in southern Serbia, once the short-term, local needs have been accommodated.

C) Collapsed states

125. Countries or parts of countries where the state has collapsed pose significant challenges to donors trying to support justice and security delivery. In this category of fragile states, government institutions are often absent or new administrations are weak, transitional, and in their early stages of development. Social cohesion, normally, will have been severely affected by conflict. This does not mean, however, that there is a lack of local structures, organisations and service deliverers. “The collapse of state authority does not necessarily mean the end of order. Alternative -- non-state -- systems of order tend to evolve in the process of state decay.”¹⁴³

126. The experiences of East Timor, immediately after the independence referendum and subsequent violence, and Somalia illustrate this phenomenon well.

Notwithstanding the prevalence of violent crime, particularly in urban areas, and regular armed clashes between the factions, Somalia does not exist in a state of anarchy or chaos. Although lacking an effective central government, the country has had no lack of *governance* over the past decade. The latter has been established both top-down by powerful political interests seeking to entrench control over particular towns and regions, and bottom-up by Somali religious leaders, businessmen and communities, attempting to establish basic security conditions for the normalisation of social life and the expansion of trade.¹⁴⁴

127. A report on the situation in East Timor in 1999 after the brutal rampage following the vote for independence from Indonesia posits that,

There is a general perception that these societies are characterised by ‘vacuums of power’. Yet quite the opposite is the case – societies refer even more strongly to their ‘traditional’ authority structure, as this is what is left after the destruction of the state apparatus and the withdrawal of a government.¹⁴⁵

128. The range and coverage of justice and security systems in collapsed states is often surprisingly high. “According to a survey on the availability of justice systems in Somalia by the World Bank and the UNDP, community based justice systems carried out by clan/community elders were reported to be available by 94% of urban and 97.8% of rural and nomadic households, followed by council of elders (85% for urban and 86.4% for rural and nomadic) and Islamic *Sharia* (47.8% of urban and 37.4% of rural

¹⁴³ Anderson (2006) op cit, p10.

¹⁴⁴ Le Sage (2005), p13.

¹⁴⁵ Hohe and Nixon (2003) op cit, p7.

and nomadic). [Only] 35% of urban households and 25.6% of non-urban households reported availability of the [state] judiciary system.”¹⁴⁶

129. In Somalia, many of these different sources of law are contradictory or overlapping. Customary law discriminates against women; determination of primacy and jurisdiction between and among the different providers are contentious issues; and the choice of applicable law is biased in favour of the stronger party.¹⁴⁷ The systems in place have many faults, but they also all have their own strengths. Most importantly, they have functioned and provided a basic, available service for Somalis over the past decade in the absence of a state.

Recommendation 1: Undertake a comprehensive assessment of ‘who’ provides justice and security (state and non-state), where, when, how, and ‘for whom.’

130. It is all too rare for a development programme to undertake a comprehensive assessment of ‘who’ (state and non-state) provides justice and security in real terms. If a multi-layered approach is to be adopted, it is essential that the entire spectrum of purveyors of justice and security be examined and analysed. It is equally important to understand the ‘where,’ ‘when,’ ‘how,’ and ‘for whom’ justice and security is provided.

131. Time and again, little or no attempt is made to examine what the needs of local people are, who is actually providing security and justice in these contexts, and what the impact will be of international interventions on fragility. A case in point is East Timor where “no detailed and systematic study of local law...was commissioned by UNTAET [UN Transitional Administration East Timor] throughout the course of its mandate.”¹⁴⁸ A more recent example is the UN 27 March 2006 Haitian National Police Reform Plan, in which there is no mention of who may be the real security delivery actors on the ground, let alone an analysis of the non-state arena.¹⁴⁹

Recommendation 2: Be realistic and modest and support a range of service providers (state and non-state)

132. International actors need to be realistic and modest about what is feasible and sustainable in collapsed states. Even in collapsed states international intervention does not begin with a blank slate and ignoring the service delivery providers to whom the local population is loyal will lead to failure. As one Timor-Leste commentator has written about the less than optimal results on the island, “what is important to consider when making these decisions is that institutions and systems that have little or no relevance to a people’s way of life are unlikely to be adopted in the short term.”¹⁵⁰ This is true, even if the local non-state systems do not meet international human rights standards. As a consequence, a multi-layered approach to service delivery is vital to help meet the immediate local needs of collapsed states.

133. Attempts to impose a unitary justice system at the expense of all other justice providers, for example, are doomed or, worse, can unleash renewed conflict and violence. For example, in Somalia one commentator argues that “efforts to force one [justice] system across all areas would undermine those systems that function locally, and ‘rule of law’ assistance could in those circumstances create more conflict by undermining the structures that currently underpin local peace and security arrangements.”¹⁵¹ This is

¹⁴⁶ Reported in Danish Immigration Service (2004), p27.

¹⁴⁷ See *ibid* p27 and Le Sage (2005) *op cit*, p7.

¹⁴⁸ *Ibid*, p40.

¹⁴⁹ UN/DPKO (2006), Secretary-General, 27 March 2006 Haitian National Police Reform Plan.

¹⁵⁰ Hohe and Nixon (2003), *op cit*, p3.

¹⁵¹ Le Sage, *op cit*, p8.

partially what happened when the UN Peacekeeping missions (UNOSOM I and II) attempted the “top-down re-implementation of the 1962 criminal and penal laws [which] undermined local rule of law initiatives.”¹⁵²

134. Even with the best of political commitments, it takes decades to rebuild the most basic physical, human, and infrastructure capacities for state provided security and justice delivery in collapsed states. The situation in southern Sudan is stark, but illustrative. “There are presently approximately 5,000 police in Southern Sudan’s five regions, while at least 38,000 are required according to the Chief of Police... There are presently 500 prison wardens... [and] an estimated 4,800 are required.”¹⁵³ What applies to the police and prison is similarly applicable to legal education, the judiciary, court administration, and prosecutorial services. As the Head of UNDP’s Sudan Rule of Law Programme says, “only 22 of the 750 trained judges envisaged under the CPA [Comprehensive Peace Agreement] are in place, highlight[ing] the need for establishing a paralegal training centre to fill the gap in the number of qualified professionals during the Interim Period.”¹⁵⁴

135. These huge numerical deficits do begin to describe the challenge given the dearth of training; the lack of infrastructure; the absence of institutional structures, systems, and procedures; and the overwhelming capital costs required to enable the state sector to perform their assigned duties. “The judiciary has virtually no means of transportation, communication or other essential resources necessary to administer justice, such as libraries, law books or even the text of the few laws promulgated by the SPLM.”¹⁵⁵ The Multi-Donor Trust Fund is planning to support the building of 130 police stations across the south.¹⁵⁶

136. However, even once these are established, it is unclear how much justice and security 130 police stations or 750 judges can provide in a territory as large as south Sudan. Modesty, realism, and sustainability, all suggest that a multi-layered approach is needed. The capacity of the government in the South should be developed, not as the sole service provider, but as the regulator of a network of state and non-state providers, while concurrently non-state systems are given assistance.

Recommendation 3: Develop an overall strategy for justice and security development

137. The development and implementation of strategic plans face severe difficulties in collapsed states. It is highly unlikely that collapsed states possess the requisite capacity to participate fully in the design of those plans, let alone their implementation. Ongoing political disputes may impede agreement on the substance of a plan, if not scuttle them altogether. These challenges, although acute, do not negate the necessity of laying out a development framework for the justice and security sector. The absence of an overall strategic framework to guide the SSR process in Afghanistan from an early stage when the country was emerging from state collapse has been identified as a reason why the process has been characterised as reactive.¹⁵⁷

138. Given these problems, international actors will in most cases have to take the lead initially. “Planners have to determine which options are realistically achievable, with an emphasis on what is attainable given the strength of local paradigms, budgetary and time issues and political will.”¹⁵⁸

¹⁵² Le Sage (2005) op cit, p23.

¹⁵³ UNDP Sudan Final Project Document, ‘Capacity-building for Rule of Law Institutions in South Sudan’, September 2004.

¹⁵⁴ Sherif (2005), p29.

¹⁵⁵ Sherif (2005), p29.

¹⁵⁶ Interview with DFID Senior Governance Adviser, 2 May 2006.

¹⁵⁷ Sedra, op cit, p107.

¹⁵⁸ Hohe and Nixon, op cit p2

Importantly, planners will have to accept the overarching reality of fragile states that, first, the government will be unable to meet service delivery needs for the foreseen future and, second, alternative methods of justice and security provision will have to be utilised. Strategic frameworks, therefore, should anticipate the establishment of partnerships and networks between state and non-state actors and plan accordingly. Planners should balance their concentration on the state's role in delivering a direct service with its function in establishing regulatory schemes and the overall contours of service delivery by state and non-state providers. To understand the non-state sphere, local stakeholders must be involved because international actors will not be able to comprehend the complexity of the actors or systems. The involvement of local actors in planning processes is vital to help develop ownership and capacity.

Recommendation 4: Focus on addressing priority security issues that will breed confidence

139. It is often important in collapsed states to identify priority issues to focus on at an early stage, the addressing of which will have high visibility and help create an enabling environment for wider service delivery efforts. In DRC, for example, donors have focused on building the operational capacity of the police to provide security during the forthcoming elections.¹⁵⁹ This was a priority issue because if the elections were affected by riots and violence then the political transition would be seriously undermined. It also provides an opportunity for the police to demonstrate their worth to a doubtful population. Addressing this immediate security imperative also provides breathing room for the longer process of developing a strategic plan (see below) to simultaneously take place.

¹⁵⁹ Case study presented at OECD CPDC Fragile State workshop, March 2006, London.

Box 4. Pragmatic and realistic approaches to supporting policing and justice sector services in Eastern DRC

Donors wishing to support policing and justice sector service delivery in Eastern DRC face an almost unparalleled set of challenges relating to state fragility including widespread insecurity caused by foreign and national armed groups, ethnic and political tensions and a corrupt and inefficient security sector.

In addressing this context, donors have designed interventions which balance a realistic perspective about what can be achieved in the short term with providing a strategic platform for institutional reform at a later stage. In the policing sector, donors are building police capacity to provide security for holding the next elections through planning, communications, training and equipment support. In the justice sector, donors are engaged in a Restoring Justice in the East of Congo (REJUSCO) project, through supporting aspects of the criminal justice system to demonstrate it can function whilst at the same time supporting a long term planning process for reform with the Ministry of Justice.

These approaches offer lessons for donors operating in fragile states:

- Operational capacity development can be structured around achieving specific but strategic tasks (e.g. policing for election security) which can bolster support from a doubtful public and provide confidence for planning for later reform. This results-based approach may be preferable to setting unrealistic and overambitious reform objectives which, if unsuccessful, can undermine both local reformers and the case for future help from outside.
- The importance of institutional sustainability must be balanced with strategies which respond to the imperatives of service provision. Sponsoring operational police and justice service performance (e.g. to deliver a credible outcome of trials) can build confidence in the workings of the system and is a short term priority for donors.
- Where transitional or interim governments have yet to be legitimised through elections, donors cannot count on political ownership or commitment. In such cases, donors can still work with state sector institutions and act as sponsors to support short-term service delivery outcomes.
- Short term confidence-building measures buy time to allow a more in depth understanding of constraints and opportunities for longer-term reform programmes and institutional support.
- Understanding historical developments (e.g. policies to encourage soldiers to live off local populations so as to discourage coups, or the extractive purpose of the security and justice sectors) illuminates the complexity and challenges in setting service provision reform objectives. For OECD governments, this requires whole-of-government (diplomatic, defence and development) assessment and analysis.

Recommendation 5: Develop ‘islands of dependability’

140. Even in collapsed states where there is ongoing armed conflict and no political commitment to ensure an effective and accountable justice and security sector, progress on service delivery is possible. A recent evaluation of a UNDP/International Rescue Committee rule of law project in Darfur, west Sudan, highlights the advances in justice and security delivery made possible by the establishment of Justice and Confidence Centres in IDP camps and nearby towns. Each one is staffed by 20-30 paralegals (women and men), who are drawn from the local community and provided with basic human rights training. They go out into their communities “helping people to resolve differences according to human rights principles, helping people to identify grievances and bring them to the appropriate place, including providing mediation.”¹⁶⁰ The paralegals have had a significant ripple effect in their communities, empowering the IDPs, raising awareness of human rights, and increasing the responsiveness of law enforcement agencies. This has helped to begin to develop a valuable accountability mechanism for service provision in a context where none existed. This approach follows what one analyst calls “a strategy of ‘islands of dependability’” that can provide a reliable service to a certain geographic location in the worst environments.¹⁶¹ Bundling

¹⁶⁰ Maguire (2006), p17.

¹⁶¹ Meagher (2005), p25.

services together in these centres provides a base level of delivery which can be scaled up to neighbouring areas.

Recommendation 6: Start small and scale up

141. Starting small and then scaling up is an important lesson identified for service delivery in fragile states. Developing partnerships with NGOs can be a helpful means by which donors can help test approaches through pilot projects which can then be rolled out if successful. For example, in Eastern DRC, DFID are funding two international NGOs who are working with communities and supporting the establishment of a mobile court and training magistrates to provide transitional justice.¹⁶² Providing services through an NGO can be less high profile and risky for donors when working on sensitive issues, and enable innovative new approaches to be tested before committing large sums of money.

Recommendation 7: Provide incentives to attract experienced national and international staff

142. A fundamental issue is the challenge of finding experienced and able personnel (both national and international) to work on security and justice delivery programmes in fragile states. The quality and availability of staff is often a decisive factor in the success of service delivery programmes, more important than the amount of financial resources. Incentives (financial or career development) should be provided to try and attract good staff. Personnel shortages are widespread in different fragile states. In Uganda, the Government has great difficulty in getting government officials, magistrates and law enforcement officers to work in the conflict-affected north.¹⁶³ In Iraq, when the security situation was at its worst before the creation of the new Government, “manning [sic] for the CPA [Coalition Provisional Authority] was a particular problem. It hovered just above 50 per cent of authorized levels at best, and the US Government had no way of directing the civilian personnel with the right skills to deploy to Iraq. As a result, the entire effort was undertaken almost entirely with people who were in country for too short of time, working outside of their areas of expertise and often at levels of responsibility far above what they were accustomed to.”¹⁶⁴

c) Recovering States

143. The recovering category is, perhaps, the one in which the development community has the most experience. A recovering state is one in which the political situation has sufficiently stabilised so that there is “a government in place and basic state functions are being re-established.”¹⁶⁵ The government may be transitional, having assumed power after a peace accord and prior to national elections, but it has a degree of legitimacy and the political leadership is exhibiting a degree of will to lead the country out of crisis. In other cases, elections have taken place, but it should not be presumed that the elections have conferred full legitimacy on the government, as there may continue to be elements within the country for whom the government may be less than legitimate, as was the case in Bosnia and Herzegovina despite numerous local, cantonal, entity, and national elections. With regard to the recovering state’s capacity, “the performance of government is extremely weak in terms of policy development and implementation,” but these states generally demonstrate a limited but growing ability to deliver on their commitments.¹⁶⁶ Social cohesion remains debilitated and distrust may be rampant, but the country is on an upward, albeit slow, trajectory toward development.

¹⁶² Case study presented at OECD CPDC Fragile State workshop, March 2006, London.

¹⁶³ Interview with UNDP Programme Manager, April 2006.

¹⁶⁴ Rathmell et al (2005), p85.

¹⁶⁵ Meagher, p. 13.

¹⁶⁶ Ibid. p. 13.

144. It is generally recognised that there is a ‘window of opportunity’ after the signing of a peace agreement. It is important for international actors to act quickly to provide support to the delivery of security and justice. Nearly half of all post-conflict states slip back into conflict within five years of the signing of a peace agreement and a failure to provide security and justice is often a key factor in the resumption of violence.¹⁶⁷ Preventing the slide back to violence requires rapid and sustained donor support.

145. The list of countries that qualify as recovering fragile states is long, ranging from Guatemala and El Salvador to Peru, from Bosnia and Herzegovina to Albania, from the Solomon Islands to Timor-Leste, and, in Africa, from Mozambique to Sierra Leone and Angola. The range of service delivery development activities suitable for donor support is equally long and there are many successful examples, including, among others:

- strategic national security dialogues and policy frameworks, Uganda;
- national security councils, Sierra Leone;
- NGO security policy networking, Central America;
- community-based policing, Albania, Kenya, Nicaragua;
- judicial reform, court administration, ADR mechanisms, houses of justice, Latin America.

146. However, there are also a number of lessons identified about strategies to avoid in fragile states that are recovering from conflict. Important recommendations for donors include:

Recommendation 1: Focus on financial sustainability

147. Ensuring that initiatives to strengthen justice and security delivery are sustainable is a key challenge for donors. Given the degree of insecurity that exists within Afghanistan, significant levels of reform aid have been directed to the development of the Afghan military. “In the first nine months of 2005, more than 1,200 people were killed in factional and insurgent violence.”¹⁶⁸ Nevertheless, the establishment of the Afghanistan National Army (ANA) “is widely viewed as a ‘success story’ ... display[ing] a high degree of discipline, professionalism and combat effectiveness.”¹⁶⁹

148. The underlying challenge, however, is that the ANA is unaffordable as currently constituted. Setting aside monies required to fund the Afghan police services,

the recurrent costs for the ANA in fiscal year 2004/2005 were US\$171 million. This was equivalent to roughly 25 per cent of the Afghan government’s entire operating budget of US\$721 million and 57 per cent of the country’s domestic revenues of roughly US\$300 million for 2004/2005. If the ANA reached its force ceiling of 70,000 troops, expenditures for salaries alone would total US\$107 million. Adding costs associated to equipment and logistics, the recurrent budget of the ANA could reach upwards of US\$290 million, a prohibitively high figure. Even if state revenues were to increase substantially over the coming decade, the government would be

¹⁶⁷ The Human Security Centre at the University of British Columbia, 2005. *The Human Security Report 2005*, Oxford, Oxford University Press.

¹⁶⁸ Sedra p. 102.

¹⁶⁹ Sedra, p. 97.

hard-pressed to underwrite a force of this size, and international largesse will not fill the resultant funding gap.¹⁷⁰

149. According to the World Bank, international assistance to the ANA and Afghan police services was not matched by comparable development of public administration reforms, salary levels were not coordinated with those of other civil servants, and decisions on financial matters took place apparently haphazardly, without consultations and with little consideration of medium-term fiscal affordability.¹⁷¹ Strategic national security and policy framework planning was limited and Afghan reform concentrated too heavily on “train and equip initiatives,” all of which only further compounds the sector’s financial unsustainability.¹⁷²

150. As part of all strategic and policy framework planning and even in the absence of such planning, all justice and security service delivery assistance should forecast the costs to the fragile state of sustaining its development programmes over a three to five year period, correlating those costs to expected state revenues. High levels of expenditure on security are understandable in the immediate post-conflict period, but they are most likely not sustainable over time. Unless a multi-layered approach is utilised donors may be only postponing inevitable problems and new forms of insecurity when downsizing occurs.¹⁷³

Recommendation 2: Focus on managerial sustainability by strengthening management capacity

151. Donors often engage in wide-scale training programmes for justice and security providers in recovering contexts but these are most often ineffective unless embedded in efforts to strengthen management capacity. The Guatemalan Peace Accords were signed in 1996, launching the country’s recovery from civil war. One of the primary challenges to Guatemala’s sustainable service delivery has been the paucity of managerial development. Police personnel are rotated annually, if not more frequently.¹⁷⁴ There is legislation defining a police person’s career development or promotion possibilities and similarly no clear demarcation of the role of educators and trainers in the police academy. Seventy to eighty percent of all detentions appear to be for misdemeanour crimes, suggesting a fundamental mismanagement of resources, planning, and tactics and indicating that whatever police performance measurements may be employed are inadequate and/or inappropriate.

152. More telling, three sets of statistics stand out. First, “it is alleged that more than a thousand officers -- perhaps up to five thousand, though that number seems to an outside observer as somewhat high -- have been provided with varying types of investigative training, whereas less than 14 of them currently serve as police investigators” or in comparable positions.¹⁷⁵ Second, “while up to 145 police officers were given ‘train the trainers’ courses in community policing, none of these officers are now assigned to the Police Academy.”¹⁷⁶ Lastly, it has been “claimed that the Guatemalan police [are] given only 45 minutes of ‘use of force and firearms’ training and virtually all of it [is] conceptual rather than practical.”¹⁷⁷

US Embassy personnel openly acknowledged that middle management capacity is ‘zero’ while senior management capabilities are ‘almost zero.’ It was also asserted, ‘the police couldn’t care

¹⁷⁰ Sedra, p. 104.

¹⁷¹ World Bank, 'Afghanistan Managing Public Finances for Development' December (2005A), pp. 23-24.

¹⁷² Sedra, p. 107.

¹⁷³ It is forecast that the Guatemala’s attempt to replace Mayan law with state law will fail, partially because it is unsustainable, see Jan Arno Hessbruegge and García, *Mayan Law in Post-Conflict Guatemala* (USIP, forthcoming).

¹⁷⁴ USAID (2005B). p. 7.

¹⁷⁵ Ibid., p. 9.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid.

less' about managerial issues despite almost three years of dedicated internationally-provided managerial training.¹⁷⁸

In short, police reform in Guatemala has been less than successful and one of the primary reasons appears to be the lack of consistent, sustained attention to develop the requisite managerial capacities of the police. As the Guatemalan example suggests, stand-alone professional training initiatives are unproductive, ineffective, and unsustainable if not accompanied by enduring and effective managerial development in terms of policy, establishment of accompanying regulations, and, equally importantly, a systematic, human capital improvement programme in which the skills required to utilise the new managerial processes are acquired.

153. In the absence of sufficient state police management and technical capacity, one approach is to seek to involve the private sector. The Citizen Police Liaison Committee (CPLC) in Karachi, Pakistan is a hybrid organisation involving local business leaders. It plays an important role in information collection, collation, and analysis so that policing operations can be made more effective. The CPLC has had a significant impact on improving policing procedures, enhancing monitoring of police performance, setting standards, developing accountability mechanisms and providing access to justice for the poor. One analyst describes the CPLC as a 'co-production organisation' that provides public services

through an institutionalised, long term relationship between state agencies and organised groups of citizens, where both make substantial resource contributions...The sharing of core state authority with non-state actors evolved as a response to a crisis of governance. The solution may not be ideal from every perspective, but it may be the best available in situations of crisis where government agencies are unable fully to perform core roles.¹⁷⁹

Recommendation 3: Work with non-state justice systems

154. One of the reasons for providing assistance to non-state systems in recovering fragile states is the simple fact that over 80% of all disputes may be resolved by such providers and that local populations will continue to adhere to them, such as the Mayan in Guatemala.¹⁸⁰ In Burundi, "While this country did not suffer state collapse, the formal justice system is malfunctioning to the extent that the informal system has become the *de facto* court of first instance for the vast majority of the population."¹⁸¹

155. One key area for development assistance to non-state justice systems in recovering states can be supporting the resolution of land tenure disputes. Clashes over land rights, along with wrangling over other scarce resources, are often one of the major causes of conflict. In Timor-Leste an innovative programme, linking together the state with non-state conflict resolution mechanisms, is being adopted to address land tenure issues.¹⁸² The first step is to map who owns what parcels of land and under what arrangements, given the likelihood that different types of ownership covenants exist not only for the land itself, but what lies on and beneath it. The agency that conducts the mapping exercise can and should be a state organisation and be seen to provide objective data to all parties neutrally. However, this state organisation will, most likely, not possess either the national capacity to resolve disputes or the legitimacy to do so. "The preference throughout Timor-Leste [is] for local dispute resolution mechanisms where possible... [because they are] perceived as cheaper, quicker, fairer, more accessible, easier to understand,

¹⁷⁸ Ibid. p. 6.

¹⁷⁹ Masud (2002), p28.

¹⁸⁰ See unpublished paper, Hessbruegge and García, Mayan Law in Post-Conflict Guatemala (USIP, to be published).

¹⁸¹ CHD (2005), p4.

¹⁸² USAID, (2004A), A Law on Land Rights and Title Restitution and A Legal Framework for Land Dispute Mediation.

less corrupt, and more supportive of reconciliation between disputants than the court system.”¹⁸³ Fragile states may need to pass legislation authorising the establishment of such a land tenure dispute resolution mechanism, a law that could be the model for linking state actors with non-state justice and security providers.

156. There are, however, weaknesses in the Timor-Leste approach for recovering fragile states. “Local [Timorese] systems are weak in the area of women’s rights” and “Timorese disputants value access to a range of forums for matters that resist resolution at the local level.”¹⁸⁴ Mechanisms may need to be established by which disputes at one level can be applied to higher levels, which may include an application to state systems. Rights of vulnerable and excluded groups need to be protected through varying kinds of legal awareness, advocacy, and education programming.

157. Many of these admitted weaknesses can be addressed by examining how the state and non-state systems interact with one another and, in cases, interpenetrate one another. It is known, for example, that in Mozambique one of the actual functions of the police is to mediate and arbitrate disputes, including criminal ones, often in conjunction with traditional local leaders.¹⁸⁵ If this is one of their acknowledged and accepted functions, it may be appropriate to establish minimal standards and procedures by which they carry out their activities rather than to allow them to engage in such activities without guidance and direction.

Recommendation 4: Support transitional justice as part of overall capacity-building of national justice systems

158. Support to transitional justice mechanisms is important in countries recovering from conflict. This is another area where non-state systems can play a role, as shown in Rwanda, where the gacaca courts set up to deal with genocide cases have demonstrated how “the indigenous system has been successfully adapted to dealing with one of the serious obstacles to achieving healing in a post-conflict society.”¹⁸⁶

159. However, in some countries emerging from conflict substantial donor funds have gone to supporting international or hybrid tribunals with “significant resources devoted to the prosecution of a small number of individuals with only modest leftover contributions to local judicial capacity.”¹⁸⁷ It is important that support to transitional justice bodies is placed in the context of overall judicial development and capacity building, particularly with regard to the delivery of justice by state providers. The UN Mission in Burundi (ONUB) has developed an innovative programme “which links and sequences funding for a hybrid tribunal to an initial period of local judicial capacity building.”¹⁸⁸ This provides an interesting potential model for donor support to justice delivery in recovering fragile states.

Recommendation 5: Integrate security and justice issues into national development frameworks

160. National development frameworks (for example, Poverty Reduction Strategy Papers {PRSPs} or Transitional Results Matrices) provide an important opportunity to stimulate a more inclusive public debate on security issues in post-conflict societies and shift public policy towards a greater focus on service delivery. Including security and justice issues in these frameworks can help ensure that they are established as a development priority in national government and donor planning and budgeting.

¹⁸³ USAID (2004B), pp. 56 - 57 (A Legal Framework).

¹⁸⁴ Ibid. p. 57.

¹⁸⁵ Kyed, (forthcoming).

¹⁸⁶ CHD (2005), op cit, p2.

¹⁸⁷ Carlson (2006), p13.

¹⁸⁸ Ibid, p14.

161. In Uganda's Poverty Eradication Action Programme and Sierra Leone's PRSP there is a specific pillar on security issues. However, security and justice delivery can also be addressed within the framework of governance. There is often a pillar on governance in national development frameworks, while there may be sensitivity to the inclusion of a pillar on security issues.

162. Experience in post-conflict countries shows that national development frameworks provide a means to address comprehensively a wide range of issues that are important for strengthening justice and security delivery including: the disarmament, demobilisation and reintegration of ex-combatants, security sector reform, small arms control, and the provision of alternative livelihoods. It is therefore vital to involve all relevant government actors in security and development planning, including ministries of finance, defence and interior, as well as wider stakeholders including parliamentarians, non-state justice and security providers, and civil society organisations.

Recommendation 6: Develop effective donor co-ordination mechanisms

163. A large number of international actors are often involved in providing support to justice and security delivery in countries emerging from conflict. This presents significant challenges of co-ordination. As one report puts it, "from the perspective of multilateral peacebuilding efforts, 'herding cats' is therefore an apt metaphor for the work involved in post-conflict security management."¹⁸⁹ A key challenge is to develop an effective division of labour, whilst establishing common standards in areas such as training and ensuring that the important linkages between different justice and security delivery initiatives are made. As the draft OECD Implementation Framework states,

it is important to ensure that dividing roles and responsibilities does not lead to a 'stove-piped' approach to SSR, as has been seen in Afghanistan. The Bonn agreement established five pillars for SSR-related issues, each with a lead donor. But this approach failed to take into account linkages between sectors and undermined an integrated approach. It has also failed to recognise the importance of local ownership in ensuring sustainability. It is vital that all donors provide support within the context of an overall strategy and that a donor co-ordination group meets regularly to discuss and assess progress in the different areas.¹⁹⁰

¹⁸⁹ Bryden et al (2005), op cit, p3.

¹⁹⁰ OECD (2006 Draft), p. 68.