GSDRC Governance and Social Development Resource Centre

Helpdesk Research Report: Donor Support to Non-state Providers of Security and Justice
30.10.09

Query: Please identify literature on donor support to non-state providers of security and justice services in fragile and conflict-affected states, and highlight any lessons learned. In particular, any lessons related to the conditions appropriate or not suited to supporting non-state actors, how to ensure services are equitable, affordable and accessible, and how performance can be assessed.

Enquirers: DFID

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1. Overview

Whilst there is a growing body of literature analysing, and advocating for increased assistance to, non-state providers of security and justice in post-conflict and fragile situations, there is very little evidence available of how donors have supported these actors. Supporting non-state justice and security is widely acknowledged to be a highly complex and controversial area which donors have historically tended to avoid. There is, consequently, very little in the way of systematic 'lessons-learned' in this area.

General guidelines and recommendations
The following recommendations are made in the literature:

- There is a need for a 'pragmatic realism' approach, meaning that in addition to supporting state institutions, donors proportion a significant percentage of assistance, in the short- to intermediate-term, to non-state/local justice and security networks.
- This also means building more effective and accountable relationships between the different layers (state and non-state) of authority in fragile states (the 'multilayered approach') (see Scheye, 2009).
- Civil society may be better situated (than donors) to support non-state providers of security and justice because they have the requisite knowledge and understanding of political dynamics and balances of power.
- The specific needs and challenges of the state and non-state justice systems must be assessed in each case (see guidance on conducting an assessment in USAID, forthcoming).

- Support for non-state institutions may give rise to—or worsen—conflicts between state and non-state actors as well as between customary and state law. Open dialogue is key.
- Any sort of recognition of non-state justice institutions could provide non-state actors and institutions with legitimacy that they might not otherwise have at the community level.
- Working with the non-state sector in security and justice requires donors accepting a larger degree of risk than they are used to.
- Efforts to bring together state and non-state systems involve highly sensitive political choices regarding the primacy of values, and so must be entered into in as thoughtful and participatory a manner as possible. A positive relationship between state and informal systems can be shaped through a process of dialogue, mutual recognition, and small-scale practical experience.

Conditions appropriate or not suited to supporting non-state actors
Whilst some of the literature discusses the circumstances under which it may or may not be appropriate to support non-state actors - specifically in terms of the political context and the nature of the non-state actor - there are no hard and fast rules in this regard. USAID's forthcoming guidance recommends the following critical factors should determine whether, when and how to engage directly with non-state justice institutions: Prevalence of non-state justice institutions; The potential for conflict; Fairness concerns; Legitimacy of non-state justice institutions; The underlying political and social context; Other donor programs; and Time horizons. Many studies acknowledge that in some cases, the shortcomings of the non-state system are such that it may not be a feasible strategy to work directly with them. Specifically, non-state actors often fall short of international standards with regards to human rights, equity etc., although some point out that this can be just as problematic for state institutions. Some argue the key determinant is whether there is internal demand for reform. In other words, the question should not be whether non-state actors do or do not respect human rights, but whether they are amenable to change.

Ensuring services are equitable, affordable and accessible, and assessing performance in this regard
There is little information in the available literature on how donors can ensure non-state justice and security services are equitable, affordable and accessible, or how performance in this regard can be assessed. Many studies have found that often non-state actors are the preferred justice and security providers partly because they are more affordable and accessible than the state institutions. Some stress that whilst oversight of non-state institutions is important, it is also important they retain their independence, and that such mechanisms should ideally come from within communities. Attempts by the state justice system to regulate and oversee the activities of non-state justice institutions are often seen as an outside imposition and are unlikely to be successful.

2. Guidance on supporting non-state security and justice

Scheye, E., 2009, 'Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice and Security Networks', Clingendael Conflict Research Unit
http://www.clingendael.nl/publications/2009/20090707_cru_local_justice_scheye.pdf

This report reviews the policy challenges and opportunities for donors in supporting the performance of non-state/local justice and security networks. It calls for a 'pragmatic realism' approach, meaning that in addition to supporting state institutions, donors proportion a significant percentage of assistance, in the short- to intermediate-term, to non-state/local justice and security networks. It also means building more effective and accountable

relationships between the different layers (state and non-state) of authority in fragile states (the ‘multilayered approach’). In determining what constitutes a ‘significant percentage’ of donor support, donors require an understanding of the multilayered politics and dynamic balances of power that characterize most fragile, post-colonial states. However, the report stresses that support to non-state/local justice and security networks is not a cure-all, and that increasing the capacity of states to regulate service delivery and to establish appropriate standards remains an important statebuilding objective in the short-, intermediate-, and long-term.

Section 5 of the report outlines the roles that donors, international NGOs, and local civil society actors can play in implementing the pragmatic realism approach. Key points include:

- Since the best donors can achieve is an incomplete and partial understanding of the reigning politics and dynamic balances of power, they may not be the most effective agency to implement the nonstate/ local justice and security network component of a pragmatic realism policy. Local civil society organizations and NGOs are better situated because they possess the requisite knowledge and understand the choices made by citizens in obtaining local services in a world of legal pluralism.
- Implementing a policy of pragmatic realism through local civil society organizations is a challenging undertaking due to the high numbers of providers and capacity constraints. Nevertheless, it remains the correct approach.
- A deeper challenge is the need for donors to accept a higher degree of risk and unpredictability than they may be accustomed to. With limited knowledge, donors will not be able to assess the reliability and productivity of the civil society organizations and the NGOs through whom justice and security programs will be implemented. This means working with less 'safe' implementing partners and beneficiaries than in the past. ‘The emphasis, therefore, shifts to managing risk and quickly addressing unintended consequences rather than minimizing risk at the outset.’ (p. 41)
- The need for donor personnel to be able to negotiate is especially acute. Given that partner governments may be wary of donors working with non-state/local justice and security networks it will be incumbent upon donors to convince them that a proportional pragmatic realism approach aims to enhance state capacities over the long-term.
- The pragmatic realism approach does not propose to support local/non-state justice and security networks indiscriminately. ‘The human rights violations committed by some networks or armed non-state groups may be so pervasive and atrocious that donors cannot support them. Some networks or armed groups may also be involved in a range of illegal activities that puts them beyond the pale of donor engagement. At the same time, donors need to remain flexible. For example, in some cases, it may be acceptable and productive to work with these actors when the partner state has itself engaged in a peace and reconciliation process with them. Although there are methodologies that can help donors decide which groups to support based upon their structural relationships, the decision to engage with these networks is ultimately the donor’s political judgment, a choice that ought to be grounded in the realities of the local context and the donor’s national interests.’ (v)
- There will be unintended consequences, but that is endemic to development initiatives. This requires on the part of donor staff greater flexibility, political acumen, sensitivity to political changes in balances of power, and tolerance of higher levels of ambiguity and uncertainty in their day-to-day work than has

customarily been associated with development personnel, who have typically concentrated, first and foremost, on their substantive and technical expertise.

- Working with partner governments, donors may be able to establish a justice and security equivalent to the 'social development funds' that have proliferated in community-driven development programmes in the multi-layered post-colonial world.

Pavlovich, L., 2009, 'Improving the Rule of Law through Non-State Justice Institutions: Issues to Consider', Unpublished report prepared for USAID

This guidance aims to help USAID staff and other practitioners to design, implement and monitor rule of law programs that include non-state justice institutions. It outlines the case for engagement with non-state justice institutions, suggests a framework for assessment, and discusses programming options. It emphasises that given the diversity of non-state justice systems and the complex and often unwritten nature of non-state procedures and institutions, the specific needs and challenges of the state and non-state justice systems must be assessed in each case. The process for such an assessment is described on pp. 8-10. The assessment would look not only at the nature of the non-state justice system and institutions in place on the ground, but also at the justice system as a whole, including where there are gaps in services, where the state and non-state justice systems are clearly in conflict, and the overall potential for reform.

While in many cases engagement with non-state actors can prove to be an important component of a rule of law strategy, in some cases the shortcomings of the non-state system are such that it may not be a feasible strategy to work directly with non-state actors in the immediate term. The following critical factors can determine whether, when and how to engage directly with non-state justice institutions:

- Prevalence of non-state justice institutions: If non-state systems are not commonly used throughout the country, focus activities on supporting government or civil society access to justice initiatives.
- The potential for conflict: In a divided society, support for non-state justice institutions that serve only certain social groups could reinforce rather than resolve conflict.
- Fairness concerns: Where non-state justice institutions are fundamentally unfair, addressing incentives for corruption, or supporting community-based monitoring of the non-state justice system in lieu of working directly with non-state justice institutions are options.
- Legitimacy of non-state justice institutions: Where the legitimacy and effectiveness of non-state justice institutions could be negatively affected by engagement with donors, initially work with these institutions to address issues that are of interest in the community (e.g. community development or natural resource management) in order to build trust. 'It is also important to consider the role donor assistance programs can potentially play in formalizing non-state justice institutions, which may reduce the effectiveness and appeal of these institutions.' (p. 9)
- The underlying political and social context: If power imbalances are common and operate to the detriment of women or marginalized groups, these imbalances will also affect the non-state justice sector. It is unlikely that the provision of training alone will address such deeply-rooted issues; it may be necessary to also develop strategies to indirectly alter the existing imbalances through other program activities.
- Other donor programs: Where there have already been successful interventions, consider how these gains can be leveraged through co-funded or follow-on activities.

- Time horizons: Engaging with non-state justice institutions over a short time frame may be harmful; institutional and policy reform are long-term initiatives that must be pursued steadily over an extended period. Programs should be designed flexibly to adjust to changing social contexts and national politics.

Support for non-state institutions may give rise to—or worsen—conflicts between state and non-state actors as well as between customary and state law. 'Thus, open dialogue is key to ensure that actors in and users of the justice system are consulted and that solutions are developed that are responsive to and accepted by citizens and that improve the operations of the justice system as a whole.' (p.10)

The paper discusses options for, and experience of, intervention in four programming areas:

1) The Legal Framework: Supporting the harmonization of state and non-state justice systems can involve creating a pluralist system through either a constitutional or court-based model. State regulation of any kind could undermine the legitimacy of non-state justice institutions. Any sort of recognition of non-state justice institutions could provide non-state actors and institutions with legitimacy that they might not otherwise have at the community level, regardless of whether these actors and institutions abuse their power or are responsive to local concerns. 'In the final analysis, harmonization initiatives involve highly sensitive political choices regarding the primacy of values, and so must be entered into in as thoughtful and participatory a manner as possible.' (p.12)

2) Public Access to Justice: This can involve supporting legal empowerment programs, developing the capacity of non-state justice institutions and actors to provide information to their communities, or building a knowledge base to bridge state and non-state justice legal institutions. Incorporating non-state norms into alternative dispute resolution systems can help not only to make these new structures more culturally relevant, but can also build cooperation between the state justice sector and local communities in areas where this may not always have been the case.

3) Institutional capacity building: Providing joint training and supporting dialogue between state and non-state actors as well as the police can improve understanding of respective roles and responsibilities while also supporting improved coordination. Donors have also empowered and supported networks or associations of non-state justice institutions on a regional or national basis, that can share—and standardize—best practices.

4) Equality and Human Rights: 'In some countries, the norms of processes utilized by non-state justice institutions are so inherently discriminatory that it is likely not worthwhile for USAID to engage with these institutions unless and until there is internal demand for reform. In this context, access to justice issues may be more effectively addressed through work supporting alternative dispute resolution structures, including civil society access to justice initiatives.' (p. 21)

- *Supporting increased monitoring and oversight of non-state justice institutions and decisions*: Non-state justice institutions in many countries remain subject to elite capture, and may be unwilling or unable to deliver equal justice. Monitoring and oversight can improve understanding of these processes and foster greater accountability, but attempts by the state justice system to regulate and oversee the activities of non-state justice institutions are often seen as an outside imposition and are unlikely to be successful.
- *Improving oversight of non-state justice institutions*: While it is important to ensure minimum standards of practice and establish monitoring and accountability mechanisms, care should be taken to maintain the independence of non-state justice institutions, and some practitioners suggest that it is best these mechanisms and lobbying come from within communities.
- *Developing means of representation for women and marginalized groups*: Simply stipulating minimum levels of representation will not guarantee impact; often

quotas are ignored in practice. Working with local women's organizations already present on the ground may be a successful strategy.

- *Improving the accountability of non-state justice institutions*: Requiring that adjudicators be elected by popular vote may improve the transparency and accountability of non-state justice institutions in the long term, but initiatives such as these may be seen as an unwelcome interference by the state. Elections alone will not change the profile of adjudicators. It may be more productive to work with the support of chiefs and elders to secure incremental changes from below (e.g. by providing a forum for communities to work in collaboration with non-state adjudicators to devise their own solutions to rights-related issues).

Isser, D., 'Informal and formal systems of rule of law', Paper prepared for World Bank seminar on 'Rule of Law in Fragile and Conflict-Affected Situations', held July 2009

This paper discusses how donors can move beyond rhetorical recognition of the importance of traditional justice systems toward a practical approach that more fully incorporates them into justice sector strategies. It argues this would require three shifts in assumptions:

- Recognize that traditional justice systems are not a side issue or problem to be overcome, but a central part of the justice landscape.
- Recognize that justice reform is not a technical exercise but one that is bound up in the complexities of culture, socio-economic realities and politics.
- Recognize that justice reform is not a task that can be accomplished within the timeframes established for "post-conflict reconstruction," but is a transitional and transformational process that should be measured in decades, not years.

The following short-term programming options are discussed and illustrative examples provided:

- *Assessing the customary justice systems*: the internal logic of the customary system, which includes understanding the socio-cultural context in which it operates, and internal accountability mechanisms should be understood.
- *Improving linkages between the formal and customary justice systems*: While resolving the relationship between the two systems is a question for the longer term, it may be possible to improve matters on a local level in the immediate term.
- *Working to mitigate harmful practices*: Top-down prohibitions tend to be ineffective at best, and counter-productive at worst. While developing progressive legislation is a positive step, it is important not to overestimate the ability of law to change deep-seated beliefs and cultural practices. Working with communities to encourage the development of culturally acceptable alternatives to harmful practices is an alternative.

In the longer-term, programmatic options should seek to establish a constructive relationship between the two systems and an inclusive process for determining the role of the customary system in the future. This might include promoting dialogue between customary authorities, and ensuring that the policy-making process is informed not only by legal ideals.

Wojkowska, E., 2006, 'Doing Justice: How informal justice systems can contribute', UNDP Oslo Governance Centre
http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf

This paper presents the case for UNDP engagement with informal justice systems. It provides an introduction to the main issues regarding informal justice systems, describes some experiences of engaging with informal justice systems and recommends entry points for enhancing access to justice through these mechanisms.

Chapter 5 outlines recommendations for how to engage with informal justice systems, based on a review of experience. The following principles for action are suggested:

- 'Identify the claim holders – those who are most vulnerable. Policies and programmes need to ensure an explicit focus on the poor and disadvantaged. People's perceptions of justice, the obstacles they face and the ways they address them need to be understood;
- Identify the duty bearers – the ones accountable for addressing the issues (including institutions, groups, community leaders);
- Assess and analyse the capacity gaps of claim holders to be able to claim their rights and duty bearers to be able to meet their obligations and use analysis to focus capacity development strategies;
- Capacity development for access to justice requires building on existing strengths and solutions. Programmes that seek to work with informal justice systems should attempt to promote the positive aspects of the informal systems and reform the negative aspects;
- Find solutions for problems instead of imitating models. In countries with legal traditions inherited from the colonial past, discussions about general legal models can divert attention from real problems and deficits in the sector. Focus on identifying and solving problems rather than trying to match one or another model;
- Work together with a truly representative section of the national community to as great an extent as possible;
- Recognize that it is impossible to remedy at once all the shortcomings of informal justice systems' (p.30).

Richards, A. & Smith, H., 2007, 'Addressing the Role of Private Security Companies within Security Sector Reform Programmes', Saferworld, London
http://www.ssrnetwork.net/document_library/detail/3365/addressing-the-role-of-private-security-companies-within-security-sector-reform-programmes

This guidance note by Saferworld aims to equip practitioners with the information necessary to assess whether the private provision of security in a country is problematic, and consider how to incorporate it into Security Sector Reform (SSR) programmes. It argues effective private provision of security requires that legislative, regulatory and oversight safeguards be put in place and a culture of professionalism be engendered. This should encourage transparency and reduce opportunities for illegitimate or unethical activities.

All states should develop a national policy on regulation of the private security sector and its relationship with state security providers:

- Licensing should define the services Private Security Companies (PSCs) can provide and should be granted for fixed periods and only after strict criteria have been met and background checks on personnel completed. Firearms controls should also be introduced.

- Legislation should establish a clear distinction between PSCs and public security sector actors, and stipulate minimum requirements for the transparency and accountability of PSCs. Direct relationships between specific political parties and PSCs should be prohibited.
- A system of industry self-regulation should be encouraged such as voluntary codes of conduct.
- A variety of means can be used to increase oversight. These include developing an industry Ombudsperson, requiring accurate record keeping by PSCs and implementing mechanisms for monitoring relationships between PSCs and political groups or other security sector actors.
- To ensure PSCs are committed to professional and transparent service delivery, training regimes for PSC staff should be created and overseen by the state and licensing should be dependent on completion of such training.
- Enforcement can be difficult without similar regulatory frameworks at the regional and international level. Work should continue to resolve the current ambiguity over which international laws apply to the industry.
- Obstacles to reform include the potential to create a security vacuum in PSCs absence, a lack of distinction between the responsibilities of state and non-state security actors, and agreements drawn up with governments that protect PSC employees from prosecution, which thus weaken the rule of law.

3. Case studies

Dexter, T and Ntahombaye, P., 2005, 'The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi', Center for Humanitarian Dialogue
http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0C54E3B3-1E9C-BE1E-2C24-A6A8C7060233&lng=en&id=26971

This study examines the possibilities of a closer collaboration between the two legal systems which coexist in Burundi: that of the formal system (courts, tribunals, legal institutions) and the informal system (mainly the *bashingantahe*, which aims to prevent and resolve conflicts). The study outlines the interventions already undertaken by the international community and civil society and makes recommendations for how support to the two systems can better contribute to the restoration of the rule of law.

Current international interventions are based on the implementation of the Arusha Peace and Reconciliation Agreement (APRA). 'However, there are significant gaps in important areas of intervention such as the fight against impunity and the land issue, and, on the other hand, there are duplications of efforts in other areas resulting in the dispersion of resources. A focused and strategic approach for international assistance to justice is essential. The financial investment in this sector remains insufficient, considering the importance of justice in the restoration and maintenance of peace and stable institutions. The lack of coordinated action by the international community is likely to undermine the achievements of the peace process that it has patiently and generously supported.' (p.7)

Recommendations for actions required to strengthen the two systems include the following:

- *Capacity-building:* There is a need for uniform training for the *bashingantahe* on the written law regarding land, inheritance and family law, and international human rights standards. Also for a corpus of written law translated into Kirundi and then

disseminated among all the actors in the formal justice system, the administration and the representatives of the *bashingantahe*.

- *Cooperation between the two systems:* There is need for a framework for permanent dialogue between magistrates, the *bashingantahe* and the administration so that each of those parties remains well aware of its role and takes care not to interfere in other parties' roles and better understands the various means of collaboration.
- *In order to make the interventions of the international community more effective, it is necessary to:*
    - Create an independent and multi-sectoral technical commission, under the responsibility of the Ministry of Justice, to coordinate the planning, dialogue and synergy with the international organisations on the actions to be undertaken in order to support the formal and informal systems;
    - Evaluate the interventions in the justice sector to determine the best means of restoring the rule of law in Burundi.

Baker, B. and Scheye, E. 2009, 'Access to Justice in a Post-conflict State: Donor-supported Multi-dimensional Peacekeeping in southern Sudan', International Peacekeeping. 16, (2), 171-185
http://www.informaworld.com/smpp/content~content=a910740647~db=all~jumptype=rss

This article argues the donor-supported multi-dimensional peacekeeping operation in South Sudan should look beyond its traditional western 'state-building' model, recognize the realities of post-colonial mixed government, and actively support local justice networks to address immediate needs. To date, the existing donor- and peacekeeping-supported justice and security development programmes have concentrated almost exclusively on building the capacity of the nascent GoSS. While southern Sudan's national elite may perceive local justice networks as a threat to their long-term centralizing enterprise, in the short term, the local networks are the only viable means of delivering services to the vast majority in southern Sudan.

A positive step would be to make non-state services more effective and rights respecting. Support to local justice networks ought to be balanced, improving the mechanisms that link them to state systems and institutions. Some networks may provide fair and equitable justice that all claimants accept, even when the punishments handed down violate western definitions of human rights. Some systems may be perceived to be legitimate and effective, but persist in protecting the prerogatives of the local power elite to the detriment of vulnerable and excluded groups, including women. In all of these situations, the state justice system may be unable and/or incapable of replacing the local justice network. Consequently, the state ought to establish minimum standards of procedure to which local or non-state systems adhere and easily functioning processes by which cases can be appealed. Similarly, legal and human rights awareness should be promoted by local civic groups.

Barfield, T., Neamat, N., and Their, J.A., 2006, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan', United States Institute of Peace
http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/clash_of_two_goods.pdf

This report argues that the informal system is critical to dispute resolution in Afghanistan, and suggests ways in which a positive relationship between the state and nonstate justice systems could substantially benefit the justice sector and Afghan citizens. It notes an inherent tension between the goals of state-building according to international norms on one hand, and respect for local customs and practices combined with practical requirements of

sustainable development. ‘But to advocate dismantling a deeply-embedded system of social cohesion that has allowed communities to cope with conflict in the absence of governmental institutions would be a highly dangerous bid at social engineering, and unlikely to succeed.’

A positive relationship between state and informal systems can be shaped through a process of dialogue, mutual recognition, and small-scale practical experience. Practical approaches may include allowing informal decisions to be reviewed, recorded, and enforced in formal courts; referring certain types of claims from formal to informal forums; and undertaking public education programs that focus on informing citizens about their rights and obligations, and focusing on eliminating the worst abuses. Ultimately, such approaches should be developed through the establishment of pilot projects that test different options in practice.

4. Additional resources

Forthcoming Conference on ‘Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies’, to be held in Washington D.C, November 2009, organised by The United States Institute of Peace, George Washington University (Peace Studies & Culture in Global Affairs Program) and the World Bank Justice for the Poor Program
http://customaryjusticeconference.eventbrite.com/

Connolly, B. 2005, 'Non-State Justice Systems and the State*:* Proposals for a Recognition Typology', 38 Connecticut, Law Review 239
http://epress.anu.edu.au/kastom/mobile_devices/ch07.html

This article develops a framework for the range of possible relationships between state and non-state justice systems, outlining the potential advantages and disadvantages of the different models and the situations in which these models are working or not working and why.

The following papers were amongst those presented at a DFID workshop on ‘Working with Non-State Justice Systems’, held in 2003:

- **Hohe, T., and Nixon, R., 2003, ‘Reconciling Justice: 'Traditional' Law and State Judiciary in East Timor’, Paper prepared for the US Institute of Peace**
  http://139.184.194.47/docs/open/DS33.pdf

- **Nyamu-Musembi, C., 2003, ‘Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa’, Report prepared for the DFID Workshop on "Working with Non-State Justice Systems", 6-7 March 2003**
  http://www.gsdrc.org/docs/open/DS37.pdf

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