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THE ROLE OF THE JUSTICE SECTOR IN SECURITY SECTOR REFORM

By Mr I Forber, Ministry of Defence

There are two ways of fighting: by law or by force. The first is natural to man and the second to beasts

Machiavelli, The Prince

INTRODUCTION

1. The need for justice is a thread that unites all human society. Whether seeking the judgment of a witchdoctor, village elder or Supreme Court justice, we all look for ways through which we can right real or imagined wrongs. Indeed, one of the most basic foundations of any secure and stable society is to ensure that no one, not even the Head of State, can act with impunity but will be accountable for their actions to their fellow citizens and to the international community. Put simply, citizens need to feel safe and secure and to know that, should they be a victim of a criminal act, there is an authority to whom they can turn which will protect them from such acts in future and that there is a forum through which they can seek justice.

2. Most countries that embark on a Security Sector Reform (SSR) programme fail this test. Often, they are emerging from a period of conflict that has disrupted the mechanisms used by the state to provide services to its citizens, or a discredited state has itself been replaced and the levers of power it used to subjugate its population, such as the military, the police and the courts, are in need of reform. In many countries, part of the territory may remain outside government control, with active fighting still underway. Often, those in government have little experience of running a country and even less desire to be fair to their previous oppressors.

3. The international community is sometimes already involved in helping to establish a basic level of physical security for the population. The deployment of an international military force is not unusual and can have a dramatic, positive effect in providing short term local security. Consent for such external military forces is finite though and, unless significant progress can be made in the other strands of SSR programme, the security situation can deteriorate, with the external military force becoming a focus for attacks. It is in everyone’s interest to help the country move quickly to become a stable and peaceful society. There is now considerable experience on how SSR programmes can be launched, with best practice calling for an inception phase and perhaps some pilot projects, possibly building upon previous efforts at reform. This early stage is vital for ensuring that any programme of reform is sensitive to the local political context and is bought into by the key leaders who will need to drive through reform over the medium to long term.

4. Since 2003, there has been a growing interest from academics and practitioners on the contribution made by alternative justice mechanisms. This paper reviews the literature and key analyses produced to date, drawing in particular on case studies of Sierra Leone, and Rwanda but draws conclusions that may be applicable more widely. It concludes that, while each SSR programme needs to be designed to suit the specific political, economic and security environment of the country/region in question, to date the international community has systemically under-valued traditional justice mechanisms and consequently failed to take full advantage of the benefits they offer both to the international community and, most importantly, to the citizen on the ground.

5. Future SSR programmes should give such mechanisms a high priority as often they do not require extensive judicial or Parliamentary reform and, further, can be demonstrable progress in the eyes of local communities who otherwise may feel excluded from national capital-focused initiatives. They can also offer a way of engaging wider regional expertise from both state and civil society in ways that support rather than undermine inter- and intra-state security.
“Video meliora proboque, deteriora sequor,”
[I see the better way and I agree with it,
but I follow the worse way]

Ovid

BACKGROUND

6. Efforts to (re)build nation states or to reform their economic, security, justice, social and political spheres have evolved considerably in the post-colonial era, especially since the collapse of the Soviet Union removed the overarching paradigm of the late 20th Century. Rather than looking at a state through the prism of whether it was pro or anti “the West”, nations that get involved tend to do so because they wish to help a state evolve into one that can provide security and prosperity for its people and contribute positively to the security and prosperity of the region, rather than oppressing its population and presenting a threat to its neighbours. For most so-called donor countries, their logic concludes that the best way of achieving this is to help the state become a fully-fledged democracy with all that entails: a division between the executive and the legislature and an independent judiciary and police service, each providing checks and balances on the others and operating within a wider context in which the rule of law is paramount and everyone is accountable for their actions, including democratically elected representatives and security personnel.

7. For most of the nation states that have progressed successfully through a reform programme of this type, this analysis was entirely sound and sensitive to the wider political and regional context. For example, having rejected communism, the countries of Eastern Europe that had been part of the Soviet Union or Warsaw Pact emerged in the early 1990s keen to embrace what they saw as the only viable alternative: western capitalism. For these countries, their ultimate goal was membership of NATO and the European Union (EU) because such membership gave them the security and prosperity they craved and, indeed, a sense of belonging to the international community. In that context, the headlong rush to adopt a western democratic model of governance was entirely appropriate (it remains the sine qua non of membership of NATO and the EU). Crucially, it was also a model that most of their populations recognised and wanted. In the Balkan countries, although their societies have different dynamics, not least stronger inter-ethnic/clan affiliations and tensions than in central European states such as Poland, the goal of NATO and EU membership is a persuasive imperative that informs their continuing reform programmes.

8. Overall this remains an ideal example of regional partners helping their neighbours both to become stable and secure societies and to do so by aligning themselves with the mores prevalent in their region. In this context, the US and key European states developed a human rights-based approach to reforming the key structures of a modern democratic society, as distilled in the current OECD Handbook1. Given the scale of the challenge and the depth of expertise often required by donors, the various sectors are identified and then sub-divided into subject areas.

9. Africa presents a different paradigm. NATO and EU membership is not something that any of the sub-Saharan states aspire to and the African Union (AU) is not a beacon in the same way; the 53 African States are already members of the AU. Although democracy and western-style governance is espoused by the AU and most of its member states, it is not deeply rooted as it is in the major states of Europe. Equally, there are strong tribal and ethnic relationships and authority figures (especially in rural areas) which cut across or co-exist with governance institutions inherited from colonial powers. In the absence of widespread support for a particular goal-related governance template, African states have more latitude in how to enact the principles of democracy but their institutions are usually more fragile. All too often, they must cope with the after-effects of colonial rule overlaid with decades of indigenous tyranny and corruption, all of which combines to undermine faith in the institutions of government such as the police and the court system. The sheer size of many of the countries, combined with the absence of basic infrastructure, makes many of the nation states close to ungovernable.

10. Asia is different again. It shares many of the challenges faced by African states, not least the problem of geography and topography. India is a vibrant democracy, albeit not in the same way as a

democracy in Europe; China is a command society but one that is evolving rapidly in every sphere and one that has a significant challenge of maintaining cohesion as its regions develop at differing rates. Other countries, such as Afghanistan and parts of Pakistan have a tradition of resistance against central authority that makes them particularly difficult to govern in the Western sense. States such as Burma and North Korea are isolated societies whose emergence will ultimately test the international community’s prowess in SSR programming.

**TERMINOLOGY**

11. The terminology surrounding this issue is complex and open to conscious and unconscious misinterpretation by donors, host governments and citizens alike. ‘Formal’ justice systems are often assumed to be those court-based systems inherited from a colonial power or created as part of an SSR programme, applying retributive justice. Underlying this assumption is a quasi-romantic belief that indigenous systems of justice can be characterised as being more flexible, open, conciliatory and accessible to users. In fact, these systems can be just as formalised, inaccessible and feared as court-based systems, with rigid ceremonial procedures and rituals. Other commentators compare them as ‘state and ‘non-state’ justice systems, which is equally misleading as the indigenous structures can sometimes form the lower level of the formal state-run justice system. Yet others contrast them as ‘traditional’ or ‘customary’ compared to ‘modern’ or ‘western’ systems, although others dislike the term ‘traditional’ as it often implies a fixed approach to what are frequently dynamically evolving mechanisms and, indeed, suggests a level of local support which is not borne out in practice. Finally, it is not unusual for there to be a plethora of different “non-state” systems in place: chief’s courts, secret societies, paralegal mediation services, religious leaders etc.

12. For the purposes of this paper, I will use the term ‘traditional’ to describe those justice systems that have evolved indigenously and the term ‘state justice system’ to describe the court-based approach familiar to the citizens of western Europe and the United States. Other systems, such as paralegals will be identified separately.

“...because as new things change men’s minds, one must do one’s utmost to keep as much of the old as possible. If new magistrates differ in number, authority and duration of office from the old ones, they should at least retain the titles that they had.”

Machiavelli, *Discourses on Livy*

**ANALYSIS**

13. Annexes A-D set out case studies for Sierra Leone, South Africa, Rwanda and Afghanistan. This section draws together the key points and analyses wider trends, drawing also on generic policies and papers related to SSR and justice sector reform and developments in countries other than those detailed in depth in the Annexes.

14. In common with the wider trends in our societies, US-European policy development on state building generally and SSR in particular has tended to emphasise the rights of the individual. Policy development has been led by the aid and development community, often by individuals with direct experience of trying to help people who are being oppressed by their governments and/or sections of society (youth and women) who are systemically discriminated against in many parts of the world. The premise underpinning the international human rights movement is best expressed in Jefferson’s preamble to the US constitution: ‘We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness’. Such rights have been hard won in developed countries and are protected by a strong, independent judiciary. The aim of most justice sector reform programmes is, ultimately, to extend the same protection to those living in fragile and failed states. In contrast, traditional, tribal justice has, until recently, often been portrayed as a primitive, discriminatory, second-class justice system. This perception is being re-evaluated partly because of the experience of the Rwandan *gacaca* but also because of the practical need to make progress in countries such as Afghanistan, where the formal court system is a long way from operating effectively.

15. Current UNDP guidance says that ‘It is important to emphasise at the outset that traditional justice systems should only be recognised and
supported when they are consistent with the rule of law and respect for the human rights of all groups in society”\(^2\). Unfortunately, they never are. All traditional justice systems tend to suffer from one or more of the following:

**Male dominated**
- Most rural societies in the developing world orbit around male authority figures and tend to exclude women and children and discriminate against young adults of either gender;

**Ethnic/tribal/religious exclusion**
- Traditional structures can often exclude those who are not from the relevant tribe, village or religion or can deliver sentences that are nonsensical to the victim or accused (e.g. a Christian forum forgiving an accused when the victim wants retribution/reparation).

**Violate human rights**
- Sentences can include execution or violent punishment or forced marriages and other results which seem inconsistent with the European interpretation of human rights.

**Unpredictable**
- Judgments and sentences can vary wildly one day to the next, let alone from one district to the next. Laws are rarely codified and written down (even if the practitioners can read them).

**No appeal process**
- Either there is no right of appeal, or it is not widely known about, or making an appeal is likely to jeopardise an accused’s wider interests because they and their family will be penalised for undermining an elder’s authority.

16. Despite what are often seen as flaws, it is often estimated that around 90% of people living in societies with a plural legal system access justice via traditional mechanisms\(^3\). This is because most systems have one or all of the following advantages:

**Accessibility**
- The system is usually in the area where the victim lives, uses the same language he/she speaks and does not require the use of expensive solicitors and barristers.

**Culturally relevant**
- Those applying judgment to the case have similar values/religion/beliefs as those before them and base sentences in ways that make sense to all concerned.

**It is quick**
- It involves the family/ clan/ tribe/ village. Which ensure that any decision is enforced. By extension, it need not involve the police force, often feared and a further source of expense in bribes.

**Conciliatory**
- It takes the need of the entire community into account and often focuses on reconciliation as anyone found guilty will almost always continue to live in the community. Sentences often include fines or other reparative mechanisms rather than retributive violence or exclusion from the community.

**Flexibility**
- Rules and procedures are not fixed and can adapt to the specifics of the case at hand.

17. Clearly, a decision on whether to support and/or reform traditional justice systems can only be made in light of the specific circumstances of the country in question. Among the broad issues that need to be considered are: the condition and accessibility of state and traditional systems; the local support for either system, whether the traditional system is to be used for steady-state dispute resolution or for transitional justice\(^4\) and the coherence with wider international and national efforts to build the state and improve governance (i.e. the comprehensive approach). These are discussed in more detail below.

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\(^3\) ibid, p 9

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ACCESSIBILITY

18. The general position in many fragile or failed states is that state courts are concentrated in the capital city and major towns, but virtually absent from rural areas where traditional hierarchy and customs continue to dominate. On the other hand, those who live in cities may not feel that they fit in to the traditional hierarchy: urban populations are often drawn from many different areas/ethnic groupings, attracted there for the food supply and security from armed militia (international peacekeeping forces are usually concentrated in the capital). The demographic picture of many such countries is very young, many elders and men of fighting age having been killed in conflict. Those in the early 20s or younger often have a very poor understanding of traditional rituals, particularly if they are no longer living with their extended family. If a programme of justice sector reform has been conducted, it may have weakened the traditional structures in towns where there is access to the state system. This produces a situation in which those in rural areas cannot easily access the state courts but, equally, those who live in the towns and cities cannot easily access the traditional system. As UNDP advise, ‘Access to justice by disadvantaged people may require both formal and traditional systems…’

LOCAL SUPPORT

19. Just because a traditional justice system evolved locally does not mean the local population support it. A state system could be seen as more impartial or local people could be reluctant to go to a local chief for fear of reprisals. Or the traditional system could be seen as a lever of the state (e.g. the gacaca).

TRANSITIONAL JUSTICE

20. In a society that has been devastated by conflict, there is often an active demand (or latent need) to bring to justice those responsible. A line of some sort needs to be drawn under the past so that people collectively can move forward. If nothing is seen to be done, it can often disrupt society a few years later. This subject merits several theses all on its own and I will not discuss it in detail. Sufficient to say that transitional justice mechanisms include international courts (e.g. for Former Yugoslavia, Rwanda and Sierra Leone and, ultimately, the International Criminal Court), and Truth and Reconciliation Commissions. Done well, an SSR programme is also a part of this process as it helps to generate debate on how a country should deal with its past and conduct itself in future. Transitional justice mechanisms may also include traditional justice systems: the Rwandan government used gacaca for this purpose but, in contrast, the traditional justice mechanism in northern Uganda (the mato opui and other ceremonies) has not been used for transitional justice, reportedly because the scale of violence was considered so far beyond a mechanism designed for small numbers of incidents.

COMPREHENSIVE APPROACH

21. Practitioners comment that wider governance and justice reforms often follow about 18-24 months behind improvements in physical security, a delay that can itself begin to undermine the security situation. There is a balance to be struck in delivering real improvements in the lives of the local population, and access to justice must count as one of the most important such improvements, and adherence to a logical coherent framework focused on state building. It is hard to have both, easy to have neither and usual to have one or the other. The experience in Sierra Leone is a good example of this. Refocusing SSR programmes to include traditional justice mechanisms has the real potential to improve the situation. Reaching out to local communities and giving them back some measure of control over punished more severely for their role in the Soviet control of the country. Commentators observed that this demand for retribution came from those who were too young to have a say in events following the collapse of the Soviet Union but old enough to remember life in the Soviet bloc

7 “Drinking the bitter root”, a ceremony traditionally used to address intentional killings

5 UNDP, Access to Justice Practice Note, 2004, p 14
6 In Poland and the Czech Republic in the early 2000s, there were calls for the ex-Communists (many of whom were still active in politics) to be
their lives, as well as a basis to allow commercial and land disputes to be resolved and their economy to be revived would help convince them of the benefits of SSR and a reason to engage constructively. For many countries, instability and insurrection originates in the countryside, not in the towns, so engaging a rural population constructively is key.

22. Engagement does not always mean discussion with government or other official bodies. Paralegals have proved their worth in many countries in Africa and implementing other “alternative dispute resolution” (ADR) mechanisms can not only help access to justice but ensure that all the levers of power do not lie in the hands of one or two people. As Machiavelli said ‘There have to be many judges, because the few always look out for the interests of the few’ (Discourses on Livy).

23. The precise details of the reforms needed in each case are secondary. Fundamentally, what is needed is mentoring, support and oversight, ideally from regional partners who are closer to the culture of the country. The best example so far has been Eastern Europe, when legally sophisticated neighbours lent their support and expertise on governmental, legal and NGO civil society spheres to help a country (and, crucially, the entire sub-region) to identify the route it wished to take and then stick with it. There is a well established international legal network of governmental and non-governmental organisations that support state legal systems and promote discussion of legal issues (e.g. Avocats Sans Frontières and the Commonwealth Legal Education Association). The future lies in trying to replicate that approach for traditional justice systems.

24. Domestically, the oversight and support required works best when traditional justice is incorporated into the state justice system, such as is the case for the Rwandan gacaca. The experience of many ex-colonial states argues against this: they were legally plural societies but all too often the laws were implemented for the benefit of the colonial power (and, later, the dictators that replaced them) so that traditional justice really was second class. It need not be like that. In principle, the approach being adopted by Rwanda, South Africa and many other African countries could work well if resourced properly.

Magistrates, then, are a necessity. Without their good sense and close attention there can be no state. In fact the whole management of a country depends on the apportionment of their functions.

Cicero, Laws

CONCLUSIONS

25. The need for fair and impartial justice is a thread that unites humanity. Without a system that people trust, not only are they prevented from making the most of opportunities in their lives, but the state itself becomes more fragile, economically and, ultimately, militarily. If there is one message that should be stressed above all others in international relations and associated governance programmes, it is that the ‘winner-takes-all’ approach does not work. Ultimately, it creates the conditions for cycles of violence and fear. Power shared is power used wisely.

26. The imperative of any post-conflict SSR programme will be to provide physical security for the population. This often leads to a position where reform of the military and police forces take precedence over other strands of work, not least because it is hard to persuade legal experts to come and help rebuild a country still on the verge of civil war. Traditional justice is easy to forget, especially if it has been driven underground by years of conflict. It is tempting to hope that people will make a break with the past and traditional justice often relies upon existing power structures that are rooted in the past and have been partially responsible for the conflict. Often, the rituals and beliefs that play out in traditional fora (a connection with the spirit world, treating women as chattels etc) are seen as irrational and inconsistent with the principles of international justice. All valid reasons but not excuse enough to deny a community the style of justice that they believe has worked for them.

27. Most traditional justice systems offend Western sensibilities in some way. Modifying them to exclude capital punishments is relatively simple (few go to that extreme) but it is far more complicated to modify the unwritten beliefs of a community about the role of women and young people in their communities. That is a much longer-term issue and one that will need to be addressed on many different fronts. Fundamentally, there is often a conflict between
the approach of traditional justice, which frequently champions the need of the community over that of the individual, and the individual focused approach of court based systems. There is no right answer and a balance needs to be struck in each situation. We should argue our case but we should not withdraw our support if we lose the argument.

28. The international community needs to learn to work with traditional justice. It needs to develop approaches that support people seeking justice in the area where they live, rather than focusing purely on creating a Supreme Court to balance the Executive and Legislative (vital though that is). We need to help states and communities to find a way to integrate traditional justice into the state-based system. Without such integration, efforts to develop police forces are unlikely to be supported as they will be seen as irrelevant to the needs of the community. Programmes on community policing need to teach (and learn) how the police can act as a gateway/guarantor of justice through either court-based or traditional systems. Paralegals drawn from the local society can often have a positive effect in helping both to guide people towards the most appropriate dispute resolution mechanism and in providing independent oversight of whether all justice systems are operating effectively and appropriately. An international cadre or UN-led support mechanism could help.

29. The international community is changing its approach but it needs to go further and faster. We need to abandon the concept of having an ‘exit strategy’ because there is no exit in international relations. The comprehensive approach demands permanent engagement, evolving over time but constant. This is not limited to government but government often needs to facilitate such engagement between civil society groups and NGOs. We also need to look ahead. What can the AU do to provide support and learn from the considerable experience of their members – African justice in an African context? Could the experiences of the indigenous tribes in the Chittagong Hill Tracts be relevant for the people of Burma?

30. Afghanistan is possibly the most difficult environment in which to try to develop a coherent justice system. Although the low level of development is shared with many nations, the deep rooted nature of tribal resistance to any external authority is arguably unique. Even so, the average Afghan deserves justice as much as any other person. The strength of the jirga/shura tradition must be harnessed rather than fought. A comprehensive approach is only now beginning to emerge and traditional justice needs to take its rightful place in that approach.

31. Cicero’s quote at the start of this section bears examination. I may have wrenched it out of context (Cicero’s “magistrates” covered a range of posts from what we would call a Prime Minister to a tax collector) but it remains true, both in the original context and in the narrower context of justice sector reform.

Annex A

Country Case Studies - Sierra Leone

BACKGROUND

32. Sierra Leone is a small West African state that achieved independence from British rule in 1961. Following an all too brief honeymoon period, the country began a slow decline characterised by maladministration and poor economic management. Its diamond fields and gold deposits were prizes eagerly sought by rebel groups and neighbouring countries, especially the regime of Charles Taylor in Liberia. By the late-1990s, government was extremely fragile and regularly interrupted by military coups and rebel attacks. Conflicts there and in Liberia, Burkina Faso and Côte d’Ivoire had produced a generation of young west Africans that knew nothing but brutality and fighting; they had little or no
families, had no formal education or knowledge of how to farm the land and respected military strength above democracy or traditional village structures. Battle-hardened, they moved from one conflict to another in a self-generating cycle of violence.

33. Throughout this period, ECOWAS attempted to broker several peace agreements. Following an invasion of the capital, Freetown, in 1999 they and the UN (with the support of the US and the UK) oversaw a peace agreement in October 1999 and the UN deployed a Chapter VII peacekeeping mission to Freetown to replace the ECOWAS force. The fragile peace needed to be enforced robustly throughout 2000 and 2001. In January 2002, the Government of Sierra Leone declared that the war was over; elections were held a few months later, returning the governing Sierra Leone People’s Party by an overwhelming majority.

JUSTICE SECTOR

34. Ever since its formal establishment as a British colony in the Nineteenth century, Sierra Leone has operated with a two-tier legal system: traditional or customary justice based on local chiefs and an English common-law based court system. The formal status of the traditional element has varied over time but has always remained the main conduit for justice for the vast majority of the population. This is a pattern common to most African ex-colonial states. In structural terms, and in descending order, there is a Supreme Court, a Court of Appeal, a High Court, Magistrate Courts and Local Courts (also known as Chief’s courts). The Local Courts apply “customary” justice in their area and there is a right of appeal to a Magistrate (sometimes heard in a Magistrate’s court, sometimes in what is called a District Appeal Court, when the Magistrate is assisted by two experts in customary law).

35. Following the conflicts of the 1990s, three major initiatives were established aimed at helping the people of Sierra Leone seek justice for the tribulations they had experienced and to enable them to live peaceful lives in future. First, following the success of South Africa, the establishment of a Truth and Reconciliation Commission was a given. Operational for around 2 years, it worked for a week each in the main district towns but did not work in the majority of the rural areas. It is generally assessed as having little effect.

36. Second, following the example set for Rwanda, the government asked the UN to set up a Special Court to try those who bore ‘the greatest responsibility’ for serious violations of international law during the conflict. It was established as a ‘hybrid tribunal’, led by UN appointed lawyers but also involving Sierra Leoneans as part of its structure, to help increase the capacity and capability of the judiciary as part of rebuilding the country. Unlike the Rwanda court, the UN established it on a voluntary contribution basis rather than on “assessed contributions”, based it in Freetown and ensured that the international lawyers’ terms and conditions of employment remunerated them when doing their jobs in Sierra Leone, rather than from an office in New York or London (as was the case for Rwanda). It was hoped that this would help reduce the length of time taken to bring prosecutions and reduce the overall cost of the organisation.

37. Finally, there was an overarching governance and SSR programme. From the outset, DFID took the lead and applied their logical framework for long term assistance to a country. Much progress was made. A senior UK military officer headed the International Military Assistance and Training Team, not only organising the conversion of the Sierra Leone Army into an effective fighting force, but also acting as Military Adviser to the President of Sierra Leone. A senior UK police officer was appointed as Head of the Sierra Leone Police and he embarked on an ambitious process of reform. NGOs flooded Freetown with the aim of helping the average person on the street and to help build a strong civil society and a functioning Parliamentary democracy. Similar reform programmes were put in place for other sectors.

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9 It was not unusual for rebel groups to “recruit” child soldiers by forcing them to murder their families so that they would be cast out of their village and be forced to fight with the rebel group in order to survive.

10 Assessed contributions are those elements of the UN budget that are automatically added to Member States contributions to the overall cost of the UN. States have no choice about whether they pay their element or not.
38. In 2003, a team from the UK visited Sierra Leone to check on progress. As a member of that team, I recall our findings were mixed but broadly positive. What it did demonstrate was the need for coherence and the ease with which incoherence can develop, even when dealing with a relatively constrained issue with a clear international lead. As far as the justice sector was concerned, it was just that – a separate sector and not one fully integrated into wider SSR activity. Army personnel had been players in previous rebellions and the institution was often feared by the local population; much effort had gone into addressing this, not least through demobilisation, disarmament and reintegration (DDR) schemes and through integrating representatives of the various armed factions into the Army. In contrast, although not exactly welcomed, the police had stayed aloof from armed insurrection and were therefore generally less feared by the population. The police reform programme aimed to refocus them on community policing – a largely alien concept in much of West Africa where police are more often seen manning checkpoints at junctions (and extracting tolls for passage through the checkpoint) rather than investigating crime. Even so, any reasonable high profile person had a large degree of impunity from the law: police officers would not arrest someone they considered more important than themselves, not just for fear of reprisal but because of Sierra Leone’s hierarchical culture.

39. In 2003, the progress made in encouraging police officers to make arrests was being undermined by the fact that, there were only around 12 magistrates in the country (most based in Freetown) and all openly corrupt. If the police arrested someone (e.g., for stealing), in the unlikely event that the case actually made its way to the courts, the magistrate was simply bribed to release the accused. As a result, ordinary Sierra Leoneans saw little point in using the official state channels of justice and remained reliant on their traditional justice mechanisms (delivered by village elders or by witchdoctors) as a way of seeking redress.

40. The traditional justice system is based upon a hierarchy of chiefs: village chiefs, town chiefs, sector chiefs and, at the top, a paramount chief, each of whom was responsible for administering justice in their specific area. This structure had been recognised formally by the colonial authorities in 1937, when the chiefs were allowed to preside over court cases affecting people in their area. Following independence, this power was repealed by the 1963 Local Court Act, which limited the chiefs’ powers to minor civil cases and created local courts led by court chairmen (appointed by the Government) and assisted by a panel of elders and others. Despite these provisions, the chiefs continued to be the first point of call for most citizens seeking justice.

41. Today, the picture is even more complex. The conflict destroyed much legal infrastructure in rural communities and violence was also directed at chiefs seen to be favouring the “wrong” side. Knowledge of the (unwritten) customary laws became weak (even by those supposed to be applying them) and many chiefs invented new laws. As a result, judgments can be wildly different from one case to the next. With little knowledge of the laws that are supposed to apply to them (state and traditional) and a low literacy rate, hindering clarification, people have turned to alternative mechanisms to help mediate in disputes: family headmen, faith groups, secret societies, youth associations etc. A study for the UK-supported Justice Sector Development Programme counted 16 different justice mechanisms of some sort in Sierra Leone.

42. The government of Sierra Leone is currently reviewing its justice system with the help of the UK, the UN and the World Bank (not always in a joined up way) with a view to replacing the 1963 Local Court Act with a modern equivalent. In addition to overhauling the state justice system, the review is looking to provide training for the Council of Chiefs and tribal headmen and for groups where people seek justice to get disputes and grievances resolved in the informal sector, e.g. Mammy Queens and chairmen of associations.

11 35% adult literacy rate according to UNICEF, although rates can be much lower in rural areas, http://www.unicef.org/infobycountry/sierraleone.html, accessed 18 July 2008
12 IBRD, World Bank Sierra Leone Justice Sector Development Programme Inception Report, June 2005, p 15
13 Sierra Leone has a long tradition of powerful female leaders, either as Chiefs/Queens in their own right or as leaders of the female population in an area. The term Mammy Queen has evolved over time and can refer to a respected elder female or, following the conflict of the 1990s, to a woman who was
This will be basic training in awareness and general and customary law, human rights and the choices people have for referral and what can be expected out of this process.

Annex B
Country Case Studies - South Africa

BACKGROUND

43. Fought over by the Dutch and English since the late 17th Century, South Africa became a British colony in the early 19th Century, although Dutch settlers (who constituted the majority of white settlers) and black peoples continued to resist colonial rule. Resistance by the Dutch settlers (known as Boers) led to the development of four self-governing colonies. In the early 20th Century, the British government encouraged negotiations among white representatives of these colonies with the aim of establishing a single state. Negotiations held in 1908 and in 1909 produced a constitution that embodied three fundamental principles: South Africa would adopt the Westminster style of government and would become a unitary state in which political power would be won by a simple majority and in which parliament would be sovereign. The question of voting rights for blacks would be left up to each of the four self-governing colonies to decide for itself (the Cape and Natal based their franchise on a property qualification; the Orange River Colony and the Transvaal denied all blacks the vote). In May 1910, the Union of South Africa was established as a dominion of the British Empire.

44. The Union severed its formal ties with Britain in 1961 and became the Republic of South Africa. Between 1961 and 1990, the government of South Africa became increasingly isolated as it enforced policies that segregated and discriminated against non-white citizens. These policies became known as apartheid. In 1990, the government accepted that their position was untenable and began to relax their policies. A difficult period of transition produced democratic elections in 1994, which allowed all South African citizens to participate regardless of their colour or creed. President Mandela and his African National Congress party were installed in power and the reform of the country continues to this day.

JUSTICE SECTOR

45. Much has been written on the reform of all institutions in post apartheid-South Africa, which I will not repeat here. Overall, efforts since 1994 have been a remarkable success compared to the efforts of most countries, not least because of the integrity and professionalism of the ANC leadership (and the time they had to prepare and support they received from the international community). Many problems persist and access to justice is far from perfect, but in this South Africa shares much with most developed nations: the exclusion of those on the margins of society and the prevalence of white males within the system.

46. In structural terms, the formal court structure has the following elements: a Constitutional Court, a Supreme Court of Appeal, High Courts, Regional Magistrates’ Courts and District Magistrates’ Courts. In addition, there also exist a range of specialist courts: the labour court and labour appeal court, the land claims court, divorce courts, special (consumer) courts and the income tax courts. There are also the Chiefs’ Courts, which exist at Magistrate Court level to apply “customary law” (see below) and Community Courts.

47. As far as the formal, state-based justice sector is concerned, South Africa has a complex

particularly feared/brutal combatant (often as a child soldier)
spectrum of laws, traditional, English and Roman-Dutch, with each potentially informing judgments made today. Post-apartheid society has retained respect for the rule of law and an independent, well trained judiciary. Indeed, the judiciary is if anything more powerful since the end of apartheid given that the country’s constitution changed from one of a British-style Parliamentary supremacy (Parliament makes the laws and the courts interpret/implement them) to a US-style Constitutional supremacy (the written constitution is supreme and any laws passed by Parliament may be judicially reviewed by the courts and made invalid if found to be inconsistent with the constitution). In common with several colonial African countries, South Africa accommodated local customs and laws not only by acknowledging that they existed but by allowing courts to apply such laws16 if both parties were considered subject to them (ie they were black) and provided the conclusion passed a ‘repugnancy test’ of not being contrary to public law or ‘natural justice’. Unfortunately, this commendable principle was distorted as applied by a racist regime and tended to disadvantage black people. As a result, there is a strong tradition of ‘paralegals’ in South Africa: lay persons with a good understanding of laws (formal and traditional) who could help people navigate the system to best effect. This tradition survives today.

48. Given their exclusion from the formal system (including the way it applied customary justice) and the complete absence of policing of crime in black townships, a wide range of alternative mechanisms developed, as Scharf17 has explored in detail. Under apartheid, Street Committees governed densely populated urban black areas and arbitrated disputes and so-called ‘Self-defence units’ acted as a rudimentary police force; some of these were benign but many mutated into private armies serving powerful figures in the community. The situation has deteriorated since 1994 with the South African Police Service not configured adequately to provide services to poor black areas but with the politically-run Street Committees having largely disintegrated, what is left is a plethora of private security organisations enforcing the will of whoever pays them (including local governments, for whom they act as a local police force), an increased rate of vigilantism by groups of people seeking retribution and armed Neighbourhood Watch schemes formed by people to deter criminals. In response, the SAPS crack-down on violence and criminality, which swamps the formal legal system with cases, leading to severe delays in processing prosecutions, adding to the frustration felt by the victim and causing them to look to other means to find ‘justice’.

Annex C

Country Case Studies – Rwanda

Background

49. In common with many countries in the African interior, the 19th Century was a period during which their land was fought over by European colonial powers. Initially, Belgium was dominant in this region but had been ousted by Germany by the late 19th Century. Following the collapse of German rule at end of the First World War, however, the League of Nations handed control of Rwanda to Belgium. Under colonial rule tensions developed between the Hutu and the Tutsi, with German and Belgian authorities favouring the Tutsi. In 1959, following independence, ethnic violence erupted and peaked again in 1962 and 1972 when Hutu killed and expelled thousands of Tutsi. In response to a Tutsi invasion in 1990, the Hutu regime planned the elimination of Tutsi from Rwanda. This plan was enacted in 1994 when hundreds of thousands of Rwandans were formed into militia and in a 4

16 This continues post-apartheid and is enshrined in Section 211 of the South African constitution
month period massacred an estimated 800,000 people. In June 1994, the Tutsi-led Rwandan Patriotic Front invaded and took power, killing tens of thousands of Hutu in the process and causing around 2 million Hutu to flee the country, many of whom subsequently died of disease or starvation in refugee camps in Congo.

JUSTICE SECTOR

50. These events left a country in which almost everyone was both a victim and guilty of appalling human rights violations against strangers, neighbours and even members of their own families. Over 120,000 prisoners were held awaiting trial – way beyond the capacity of institutions available to process them. The current state court structure hierarchy is: the Supreme Court, High Courts, Magistrate courts (at provincial and district level) and the gacaca (see below).

51. Several mechanisms were developed to help process the overwhelming number of individuals suspected of involvement in the conflicts (not all of whom were in prison). These included the International Criminal Tribunal for Rwanda (ICTR), conducting trials under foreign jurisdictions, the creation of special chambers within the national court system to hear cases of genocide, the National Unity and Reconciliation Commission and the localized courts – the gacaca.

52. It is the way in which the government adapted the gacaca system that is of particular interest to those who study justice sector reform. Oomen has reported on the process in detail. Four years after the genocide, although around 9,000 people had been tried in the domestic courts, progress in the ICTR was slow and 110,000 prisoners remained in custody. With only 40 out of 800 judges and lawyers left alive in the country in 1994 and those being trained by the international community starting from a very low level of education (often with no primary or secondary school education), the Government of Rwanda concluded that it needed to take action to speed up the process. It decided to adapt the traditional gacaca process for the purpose. Legislation was passed in 2001, pilot gacaca courts were established in 2002 and, following further legislation in 2004, the system was implemented fully in 2005. It was modified again in 2007.

In summary, following the amendments included in the 2004 legislation:

- Gacaca consist of general assemblies in each of Rwanda’s 11,000 cells (ie local areas); sector level gacaca and, finally, appeal gacaca
- Each cell-level gacaca has three components
  - The general assembly, consisting of all the adults in the cell. Participation is mandatory and the assembly can only meet legitimately if at least 100 members are present;
  - The bench, consisting of 9 lay judges and 5 deputies, each of whom must not have participated in the genocide and may not hold political or administrative office;
  - A coordinating committee, chosen by the bench from among themselves.
- These cell-level gacaca make a record of the events in the cell during the period October 1990 – December 1994 (with the focus on April – June 1994), categorize the crimes committed and pass judgment in the least severe cases (property crimes). Sanctions for these crimes are limited to civil reparation
- Second-level crimes (killing and assault) are referred to the sector-level gacaca, with sanctions of up to 30 years imprisonment;

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18 In comparison, the UK has around 80,000 prisoners in jail at any one time

22 The gacaca are limited to crimes committed during this period
23 There are three broad categories of crimes: masterminding the genocide, killing and assault, and crimes against property
• Appeal-level gacaca hear appeals from the sector-level gacaca;

• The worst crimes (genocide) are referred to the domestic courts with sanctions including the death penalty available;

• Persons of authority are always exposed to the most severe penalty handed out in a given category. Accused who were between 14 and 18 at the time of the genocide will have their sentence mitigated, while children who were under 14 cannot be prosecuted at all;

• Those convicted for crimes in the first and second category can also lose their civil rights, including the right to vote and to exercise functions like being a teacher or a medical staff member;

• There is a strong emphasis on confession and repentance;

• Sexual abuse is included amongst the worst crimes and sexually offended women have recourse to a special, more anonymous procedure for testifying.

53. According to the International Committee of the Red Cross (ICRC), by the end of 2007, although not fully complete as originally intended, considerable progress had been made in processing genocide-related cases; over 1 million cases had been heard and 800,000 judgments delivered.

54. For all this, the gacaca are reportedly not popular in Rwanda, especially among Hutus. The forced participation and tendency to promote a Tutsi-version of events is not even-handed. Nor has the process been simple and quick. It has taken 10 years to process 800,000 judgments and, despite this, around 97,000 people remain imprisoned in Rwanda’s 16 jails. The gacaca are also not popular with some international legal experts, who emphasise the shortcomings of the process compared to international legal standards:

• Impartiality is questioned (both of the judges and of those giving evidence). There is always the possibility of the gacaca being used to settle scores unrelated to the genocide violence – people can be convicted on the basis of evidence that resulted in legal benefit to fellow accused.

• There is no legal assistance or protection of witnesses

• The emphasis on confession undermines the principle of presumption of innocence.

• There is no appeal for Cat 3 crimes (ie those judged and sentenced in the gacaca court itself)

55. The gacaca also bear little resemblance to the reconciliation-focused forum that existed prior to 1994. Ingelaere reports some elders as referring to the current gacaca as an ‘instrument of the state’; other ways are being found to replicate the previous style of gacaca dispute resolution on matters other than genocide. Sometimes the forum is called gacaca, sometimes abunzi, sometimes it has no name.

Annex D

Country Case Studies – Afghanistan

28 Ibid, p 34-35

24 The death penalty was formally abolished in Rwanda in July 2007
26 The classical court-based system only processed around 10,000 cases between 1997 and 2004.
BACKGROUND

56. Afghanistan has a turbulent history with conflict of some form being the norm rather than the exception, either inter-tribal or against foreign invaders. There are around 20 tribal/ethnic groups with Pashtuns the largest (~50%). What we now know as Afghanistan took shape in the late 18th Century and since then has been controlled largely by ethnic Pashtuns. The late 19th Century was a period of fitful control by the British Empire, culminating in a peace treaty in 1919 in which the British recognised Afghan independence. During the 20th century, the usual internal struggles are overlaid by the events of two World Wars and the Cold War; in this time the country changes from a kingdom to a constitutional monarchy to a republic until, in 1979, it was invaded by the Soviet Union. The ensuing conflict between the Soviets and the Islamic mujaheddin destroyed much of the country, displacing over 3 million people, most to camps in Pakistan.

57. Throughout in 1980s western nations (principally the US) support the mujaheddin, helping to arm and train them. The camps in Pakistan become fertile recruiting grounds and clerics whipped up Islamic fervour in a population that had no access to any other education or alternative points of view. Ultimately, this process produced the Taliban – a group of militant fundamentalist islamist fighters who seized power in Kabul in 1994, leaving them in control of all of the country except the mountains to the north of Kabul. The Taliban ran their territory as an extreme Islamic state and with a very cruel interpretation of shari’a (Islamic) law (in practice, they knew as little about shari’a as about the state laws). They also aligned themselves with other extremists, including the leadership of Al Qaeda, which based itself in Afghanistan. Events following the 9/11 attacks will be familiar to all. The US, aligned with the forces north of Kabul, bega attacks in October 2001; the Taliban lost Kabul in November and were forced out of their home city of Kandahar in December; President Karzai was installed as Head of State in December 2001, subsequently confirmed by democratic elections. The international community committed to help his government build a functioning state. Meanwhile, the US continued to hunt those they believed to be responsible for 9/11 and the Taliban continued to exist in the south and east of the country, especially in Kandahar province.

JUSTICE SECTOR

58. Afghan law has been influenced by English and French law, moderate and extreme Islam and radical Marxism. Formal state structures do not have much of a role in the lives or ordinary Afghans, especially in the rural (Pashtun) areas to the south and east. Here many Afghans, like rural communities around the world, have always used traditional justice mechanisms such as the jirga/shura to mediate disputes. These are run using a combination of shari’a and customary law (known as orf), each influencing the other. Many issues are dealt with privately within the extended family without even being exposed to a jirga/shura. The state structure is still under development and Afghanistan is composed of the Supreme Court, Courts of Appeal and Primary Courts. Travelling courts may be established when needed, on recommendation by the Supreme Court and approval of the President. Unfortunately, in a country where few officials can read or write and even fewer have received any formal education, where warlordism is the order of the day and where resistance against any ‘external’ authority is deeply ingrained, the court system faces an uphill battle to establish itself.

59. As part of the analysis of the justice sector, the Center for Policy and Human Development (a unit co-sponsored by UNDP and Kabul University) last year produced a paper recommending that ‘In Afghanistan, rebuilding the justice sector in a manner that bridges modern with traditional justice institutions holds the key to a successful political transition’. In welcoming the report, President Karzai stated that “While remaining committed to universal principles of human rights and Afghan laws, we believe that the state and traditional

30 Jirga (pashtun) and shura (non-pashtun) are equivalent terms used to describe a meeting of elders, usually convened in order to discuss a specific issue and to decide how to proceed. They often meet principally to discuss serious matters, leaving minor issues to a similar grouping called a maraka

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justice bodies working together can help make justice and the rule of law more readily available to Afghans. Much remains to be done and the early stages of the SSR programme in Afghanistan have been characterised by false starts and dead ends rather than substantive progress.

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