

HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS IN AFRICA



UNITED NATIONS



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OFFICE OF THE HIGH COMMISSIONER

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INTRODUCTION

This publication examines traditional justice systems in sub-Saharan Africa¹ from a human rights perspective and, in particular, with reference to the rights enumerated in international human rights treaties. These traditional justice systems have historically functioned as an alternative or as a complement to the formal State court system. They are typically based on customary practices, traditions and rules of communities that have, over time, been deemed to be customary law. There may be a significant number of traditional justice systems within a given country, as different communities often have their own customary law. Customary law may be oral or written, and decisions may or may not be recorded as jurisprudence.²

Traditional justice systems based on oral traditions are often referred to as “living customary law”. It has been argued that living customary law is dynamic and flexible because it is based on the circumstances of a particular case and evolving social norms. Written customary law is often associated with colonial-era attempts to codify customary law, which has been criticized for removing the flexibility of customary law and not allowing it to evolve with time. However, others have noted that written customary law as used in the postcolonial era provides a measure of predictability as to what the law requires, while retaining a measure of flexibility and adaptability.³

¹ All references to Africa in this publication refer to sub-Saharan Africa.

² In some systems, the lower levels of the formal court system have adapted and incorporated traditional justice mechanisms. Although these forums are not alternatives to the formal system per se (the party cannot choose a different official forum, but rather must begin with the traditional forum), they are included here because they were created with the goal of providing a more accessible alternative to the court system.

³ See generally Janine Ubink, “Stating the customary: An innovative approach to the locally legitimate recording of customary law in Namibia”, in *Customary Justice: Perspectives on Legal Empowerment*, Janine Ubink, ed., and Thomas McInerney, series ed., Legal and Governance Reform: Lessons Learned, No. 3/2011 (Rome, International Development Law Organization (IDLO), 2011), pp. 132–143. See also Chuma Himonga, “The living customary law in African legal systems: Where to now?”, in *The Future of African Customary Law*, Jeanmarie Fenrich, Paolo Galizzi and Tracy Higgins, eds. (Cambridge University Press, 2011).

Traditional justice systems may operate outside of State control, although in some States they are legally recognized as part of the domestic legal order. Their decisions may be legally binding, but in some types of traditional justice systems the outcome is similar to mediation, where the parties are free to accept or reject the suggested settlement of a dispute. In most cases where traditional justice systems are legally recognized, there are limits on subject matter and personal jurisdiction, although some traditional justice systems have competence to decide serious crimes, including murder.

The objective of this publication is to analyse the human rights concerns that traditional justice systems may present. Such a focus should be understood as part of an overall effort at the international level to encourage and support national legal systems, whatever their nature, to function in a manner that is compatible with international human rights law. National judicial systems, for example, are regularly the subject of examination by United Nations human rights bodies. The Human Rights Committee, for example, has demonstrated that it will continue to review not only formal justice systems for possible human rights violations but, where they exist, customary justice systems as well. International human rights law recognizes legal pluralism within States, provided that whatever type of legal system is used conforms with international human rights standards. Many of the human rights concerns addressed in this publication may also be problems in formal justice systems.

This publication aims to assist those involved in human rights work to have a better understanding of traditional justice systems, and is intended for use primarily by lawyers and others who have legal training. The publication identifies specific human rights concerns that traditional justice systems may present, and it refers to law and jurisprudence that may be helpful in understanding their implications. The human rights issues in a given country will always have unique features, and this publication does not attempt to define or promote a one-size-fits-all approach.

The subject of traditional justice systems has been addressed by a number of different parts of the United Nations system. The United Nations

Development Programme (UNDP), the United Nations Children’s Fund (UNICEF) and the United Nations Entity for Gender Equality and the Empowerment of Women (UN-Women) have studied traditional justice systems and informal justice systems more broadly.⁴ Similarly, the World Bank⁵ has also undertaken work in this area. This publication is intended to complement those efforts, and focuses on human rights consistent with the mandate of the Office of the United Nations High Commissioner for Human Rights (OHCHR).

⁴ Ewa Wojkowska, “Doing justice: How informal justice systems can contribute” (UNDP Oslo Governance Centre, 2006); UNDP, *Programming for Justice: Access for All – A Practitioner’s Guide to a Human Rights-Based Approach to Access to Justice* (Bangkok, 2005); UN-Women, UNICEF and UNDP, *Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (2013).

⁵ Minneh Kane and others, “Sierra Leone: Legal and judicial sector assessment” (World Bank, May 2004).



- **DEFINITIONS AND TERMINOLOGY**



This chapter explores both the definitions that have been used in reference to traditional justice systems, sometimes called customary justice systems, as well as the appropriate terminology used to describe the actors in a traditional justice process. These subjects merit to be examined in depth as the existing literature uses a wide variety of terms, sometimes with a considerable lack of precision. It is important to understand what the terms used in this publication mean before analysing the human rights concerns that may arise in traditional justice systems.

A. DEFINITIONS

Many studies have been undertaken on what is frequently termed “non-State justice” or “informal justice”. An international conference in Denmark concluded, however, that neither of these descriptions was accurate, but recognized that there was no international consensus on what it should be called.⁶ The term “non-State justice” is inaccurate given that, in a number of countries in Africa, customary law systems are, by law, a recognized part of the legal system. Similarly, the term “informal justice”⁷ has been found inappropriate because it encompasses a wide variety of justice systems other than those based on customary law. For example, it may include justice systems organized and run by non-governmental organizations (NGOs) or business associations that organize alternative dispute resolution outside of the legally established order.

⁶ Access to justice and security: Non-State actors and the local dynamics of ordering, hosted by the Danish Institute for International Studies, Copenhagen, 1–3 November 2010.

⁷ UNDP refers to both alternative dispute resolution and traditional and indigenous justice systems as “informal justice systems”, although it acknowledges that there is much debate about this term, as in some cases these systems may be set up by the State (e.g., State-sanctioned alternative dispute resolution) and therefore can be considered formal. In this case, informal justice systems refers to traditional justice systems as well as different forms of alternative dispute resolution. The UNDP definition refers to traditional and indigenous justice systems separately, but presumably mentions them together given that they are both based on customary law. See UNDP, *Programming for Justice: Access for All*, p. 97.

UNDP has attempted to define relevant terms.⁸ It has indicated, for example, that “traditional and indigenous systems of justice refer to the types of justice systems that exist at the local or community level which have not been set up by the State. It can also be seen as a system of justice that usually follows customary law or an uncodified body of rules of behaviour, enforced by sanctions, varying over time.”⁹ UNDP appears to acknowledge that traditional and indigenous justice systems are two distinct types of the broader category of customary justice. The International Labour Organization (ILO) has differentiated between indigenous peoples and tribal peoples,¹⁰ but has not addressed the terminology to be used for the specific justice systems that these groups may have.

The Human Rights Committee has referred to two types of legal systems other than formal legal systems: those based on customary law and those based on religious law. In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Committee refers to the situation when “a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out ... judicial tasks.” Conceptually, both traditional justice and indigenous justice systems can be considered customary justice systems because both are based principally on the customs and practices of communities.

This publication does not cover indigenous systems of justice, because they are either not specifically recognized by States that take the view that all ethnic groups that have historically resided within the country’s borders are

⁸ UNDP makes a distinction between what it terms “alternative dispute resolution” and “traditional and indigenous justice systems”. Alternative dispute resolution refers to processes that are available for the resolution of disputes outside the formal courts of justice. This includes not only State-sanctioned alternative dispute resolution, such as court-annexed alternative dispute resolution, but also community-level alternative dispute resolution mechanisms and alternative dispute resolution services provided by other non-State actors (e.g., civil society). *Ibid.*, pp. 97 and 100.

⁹ *Ibid.*, p. 100.

¹⁰ See article 1 of its Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), which refers separately to tribal peoples and to indigenous peoples, although it should be noted that traditional justice systems may not always be tribal in nature.

indigenous or because communities recognized as indigenous peoples are numerically very small.¹¹ A study of indigenous peoples in 24 African States by ILO and the African Commission on Human and Peoples' Rights,¹² found that many States had reservations concerning the use of the term "indigenous peoples", and there was very little formal constitutional or legislative recognition of indigenous peoples.¹³ Only one¹⁴ has ratified the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples is not legally binding.¹⁵ The term "indigenous peoples" has been used in some African States to refer to specific groups. These groups may be nomadic, although they can also be pastoralists or hunter-gatherers living from the land or the forests. They may also be groups living in the desert.¹⁶ The term "indigenous peoples" has also been used to describe persons of very short stature, who are referred to as "Pygmies" in some States, particularly in Central Africa. In most cases, these groups are

¹¹ *Country Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples: Uganda* (Geneva, 2009). See also the Constitution of Uganda, Third Schedule (names the 65 ethnic groups of Uganda and is entitled "Uganda's indigenous communities as at 1st February, 1926").

¹² *Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries* (Geneva, 2009), pp. vi and 154.

¹³ The Congo, however, adopted a law on the promotion and protection of the rights of indigenous populations in 2011 (Law No. 5-2011 of 25 February 2011).

¹⁴ The Central African Republic ratified ILO Convention No. 169 in 2010.

¹⁵ ILO Convention No. 169 provides that indigenous peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights" (art. 8 (2)). The United Nations Declaration on the Rights of Indigenous Peoples provides that "Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State" (art. 5). Although 35 States from the African continent voted for the adoption of the Declaration, few have enacted national implementing legislation.

¹⁶ See also African Commission on Human and Peoples' Rights, Report of the African Commission's Working Group on Indigenous Populations/Communities, document DOC/OS(XXXIV)/345, pp. 58–64.

relatively small, poor and among the most marginalized. They frequently have an attachment to the land and its resources, as well as a specific cultural identity.¹⁷ There may be groups that would qualify for international recognition as indigenous even if they are not specifically recognized as such at the national level.¹⁸

In a number of African States, indigenous peoples are distinguished from traditional communities that are subject to leadership by traditional authorities. This is the case, for example, in Botswana, Namibia and South Africa.

Traditional authorities tend to be community-based, hierarchical and organized, and may govern a specific territory either *de jure* or *de facto*, although frequently with some limitations. Indigenous peoples in Africa tend not to have well-defined hierarchical organizations and to be among the most marginalized groups. This has limited their political influence and legal recognition, particularly compared with the relatively well-organized traditional communities located within specific geographic areas and which may have legal and political representation.

The Association of Customary Chiefs in the Democratic Republic of the Congo, for example, does not have indigenous members because the country's societies of indigenous peoples are not organized in a hierarchical manner and do not recognize central authority.¹⁹ In the few African States that do recognize indigenous peoples, national law often addresses indigenous peoples and traditional communities as distinct groups with different characteristics.

While indigenous peoples are not specifically recognized in law in many African States, traditional authorities and their communities have gained

¹⁷ *Overview Report*, pp. 4–7 and 20–22.

¹⁸ *Country Report: Uganda*. According to the Constitution of Uganda, “everything shall be done to promote a culture of cooperation, understanding, appreciation, tolerance and respect for each other’s customs, traditions and beliefs.”

¹⁹ *Overview Report*, p. 48.

much wider legal recognition, including official recognition of their use of customary law.

In South Africa, for example, the Constitution provides for the recognition of “the institution, status and role of traditional leadership, according to customary law ... subject to the Constitution” (chap. 12). Additionally, the Traditional Leadership and Governance Framework Amendment Act No. 41 of 2003 recognizes traditional communities whose customs recognize traditional leadership and customary law, although it does not include indigenous groups because they do not have established structures recognizing traditional leadership. The 2003 White Paper on Traditional Leadership and Governance, issued by the Ministry for Provincial and Local Government, does not provide for indigenous peoples. The only reference to the Khoi-San indigenous peoples in the Constitution is in connection with a national Pan South African Language Board to promote and create conditions for the development and use of “the Khoi, Nama and San languages” and sign language, in addition to the 11 official languages.

The Constitution of Namibia also recognizes traditional authorities and customary law as part of its legal system (art. 66 (1)). Nevertheless, the United Nations Special Rapporteur on the rights of indigenous peoples has identified the San and Himba people as indigenous groups in Namibia and distinguished them from traditional communities in that country. Namibia has a significant presence of traditional communities, which have a recognized and structured system of traditional justice mechanisms.²⁰

While traditional justice systems in Africa have been the subject of numerous studies and analyses, there are few studies of indigenous justice systems in Africa.²¹ Such studies have largely focused on other regions of the world, in particular the Americas and the Asia-Pacific region.

²⁰ OHCHR, “Namibia: Indigenous peoples ‘not seen promises of independence fulfilled’”, news release, 2 May 2013. Available from www.ohchr.org.

²¹ See *Overview Report*, pp. 61–68.

This publication does not address religious justice systems either. Religious justice systems in Africa frequently, although not exclusively, refer to the application of Islamic law by religious courts. By their nature, Islamic courts are based on written religious sources. Although there are differences within the Islamic faith on how to interpret them, these sources represent the guiding reference for the application of Islamic justice. Traditional justice systems, in contrast, tend to be locally derived, and reflect the values, customs and traditions of specific communities, unless a given customary law system has been recognized to have widespread application across different ethnic and tribal groups.

While some traditional justice systems may be underpinned by spiritual values or influenced by a specific religion with respect to certain issues, there is no unifying religious written text that provides a foundation for their existence as is the case for sharia courts, which apply Islamic law. It should be highlighted that, while religious values may play an important role in some traditional justice systems, in others they may not play any significant role or any role at all. Hence, one can have multiple types of traditional justice systems within one country, and the nature of these traditional justice systems can vary widely. Religious justice mechanisms do not share these characteristics and merit a separate examination, as they have a different conceptual basis from that of customary justice systems.²²

This publication does not address what could be broadly termed civil society or NGO-supported legal initiatives. These programmes seek to broaden access to justice by promoting a greater use of paralegals or legal aid lawyers. NGOs also support alternative dispute resolution procedures that focus on negotiation, mediation or arbitration in various forms, and promote education of disadvantaged groups to make them more aware of their rights and how to access them. These

²² UN-Women, UNICEF and UNDP, *Informal Justice Systems*, p. 257. In addition to the important place of Islamic law and sharia courts in some States, Christian churches may also play a role in providing mediation services. *Ibid.*, p. 58.

initiatives are important because they can potentially improve access to justice, but they fundamentally differ from how traditional justice systems function.

This publication, therefore, focuses solely on traditional justice systems because it is a subject that merits a separate and specific examination. This is particularly true because such systems are relatively widespread in many countries in Africa, and many communities may look to them as the primary source of dispute resolution. Traditional justice systems appear to have an enduring cultural legacy in large parts of Africa. In some States they are the subject of specific constitutional or legislative provisions that recognize them and regulate their authority and jurisdiction.

The diversity of traditional justice systems—and the unique political and historical context of each—make broad characterizations difficult. Even at the State level, precise classification is difficult: in Uganda, for example, each ethnic group has a separate justice system.²³ In Namibia, there are 49 recognized traditional authorities, each with its own system of governance and adjudication. It is estimated that there are also a number of unrecognized traditional communities governed by their own customary laws.²⁴ In Ethiopia, there are 62 separate tribal groups, which include at least seven distinct ethnic groups. It has been reported that these groups prefer to use their own traditional justice systems, including for conduct that could be qualified as criminal in character.²⁵

²³ Refugee Law Project, “Peace first, justice later: Traditional justice in northern Uganda”, Refugee Law Project Working Paper No. 17 (Kampala, July 2005), p. 23.

²⁴ Manfred Hinz, “Traditional courts in Namibia – part of the judiciary? Jurisprudential challenges of traditional justice”, in *In Search of Justice and Peace: Traditional and Informal Justice Systems in Africa*, Manfred Hinz and Clever Mapaura, eds. (Windhoek, Namibia Scientific Society, 2010), p. 93.

²⁵ Julie MacFarlane, “Restorative justice in Ethiopia: a pilot project”, University of Windsor, Canada, 2006.

B. WORKING DEFINITION FOR THIS PUBLICATION

The term “traditional justice” is used in this publication because it reflects the terminology used in the national law of a number of African countries²⁶ as well as that used by the African Commission on Human and Peoples’ Rights.²⁷ Traditional justice systems are normally community-level dispute resolution mechanisms with non-State origins, even if subsequently recognized and regulated by the State. They normally have long-standing cultural and historical foundations, and frequently predate colonialism.²⁸

Although these institutions have in many cases been in existence for centuries, they are not static and may have changed significantly since their original form, including through interaction with both the colonial legal traditions and the formal justice system in the independent State. Traditional justice systems generally apply customary procedural and substantive law. They frequently operate in an environment where traditional authorities are recognized, formally or informally, as having a leadership role in a community and in relationship to a given territory. Some may exist in relation to a specific tribal or ethnic community; others may function across a number of tribal and ethnic groups.

²⁶ For example, Liberia, Malawi, Namibia and South Africa recognize “traditional courts” or “traditional communities”, including the right to their own justice systems based on customary law. The term “traditional justice” has also been used in other publications concerning Africa. See, for instance, Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm, International Institute for Democracy and Electoral Assistance, 2008).

²⁷ See Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), article S, Use of Terms: “‘Traditional court’ means a body which, in a particular locality, is recognized as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition.”

²⁸ The requirement that the traditional system should have precolonial origins has been challenged on the grounds that it leads to the incorrect assumption that the institution has remained unchanged, and may neglect consideration of its interaction with colonial powers, other external actors and developments in the justice sector in the postcolonial period. See Celestine Nyamu-Musembi, “Critical evaluation of ‘Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems’”, p. 2 (recommending against the use of a temporal definition because a distinction on this basis is contested and unnecessary). For these reasons, the definition presented here purposefully avoids requiring that a traditional justice system should have precolonial origins.

This publication includes traditional justice systems that are recognized as being part of the State legal system. Some States retain a vertical structure (e.g., Malawi, Namibia and Zambia), with the traditional system forming the lowest levels of the court system. Others have a parallel system (e.g., Uganda), with the traditional forum and the formal court serving alongside one another and providing the parties with a choice of forum.

In some countries, a traditional justice forum in the State legal order may not be recognized as a court and the outcome may not be binding on the parties. If a party is dissatisfied with the suggested settlement of the dispute, the outcome can be rejected and the case can be entirely relitigated in a formal court. In other States, traditional forums can function more or less like courts of first instance, with the proceedings being recorded and the record forming the basis for any appeal. The appeal may be to a specified formal court, although in some countries customary courts of appeal have been established to hear such appeals. In States that provide a legislative framework for traditional justice systems, there may have been changes to the nature of the traditional justice systems themselves, with limits on jurisdiction, specific rules applicable to the selection of who will decide disputes and minimum representation of women in decision-making forums. In some countries, the traditional justice system is not recognized by the State and is outside the legal order of the State. In such cases, the traditional justice mechanism is more like a non-recognized form of alternative dispute resolution.

C. TERMINOLOGY

Because traditional justice systems do not normally make the legal distinction between criminal and civil jurisdiction that is made in the formal courts, terms such as *parties*, *disputants* and *complainants/respondents* are used here without reference to whether a dispute could be characterized as civil or criminal.²⁹ While it has sometimes been claimed that traditional justice processes provide only a civil rather than a penal response to a

²⁹ This approach follows that in Penal Reform International (PRI), *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London, 2001), p. 12.

wrongful act, this is incorrect. In a number of cases, the traditional justice mechanism may deal with a wrongful act by imposing community service, corporal punishment, banishment or another punitive action, which may or may not be combined with an obligation to make reparations.

The traditional justice systems mentioned in this publication are by no means a comprehensive list of such systems in Africa. While they were selected to represent different systems, the limited availability of research and empirical data was a limiting factor. The term “traditional justice system” is used in this publication so as not to prejudge whether a mechanism can be labelled a court, recognized in the State’s legal order and with the capacity to make binding legal decisions, or a forum for alternative dispute settlement. This is a major issue under human rights law because the Human Rights Committee’s requirement that customary courts should conform with article 14 of the International Covenant on Civil and Political Rights applies only to the former.

The permutations with respect to traditional justice systems are quite diverse. There are situations when such systems could be correctly identified as courts and others where the traditional forum more closely resembles a structured effort by community leaders to find a solution to a wrongful act that is fair to all concerned and based on extensive negotiation and mediation.



● **NATURE AND
CHARACTERISTICS OF
TRADITIONAL JUSTICE SYSTEMS**



A. REASONS FOR USE AND ROLE IN PROVIDING ACCESS TO JUSTICE

Unique features set traditional justice systems apart from formal courts. Community leaders as decision makers, public participation by community members and proceedings that aim at reconciliation and maintaining harmony are among the characteristics of traditional justice systems. Despite the cultural, historical and political differences of traditional justice systems, common themes do emerge. Perhaps the most important observation is the widespread use of these forums in Africa and the central role they play in dispute resolution.

In many communities, traditional justice systems deal with the vast majority of disputes. This is particularly true among rural populations, where access to the formal court system may be especially difficult. For example, in South Africa the Constitution makes express provision for the recognition of the courts of traditional leaders and, while magistrates' courts and high courts dispense justice in urban areas largely in accordance with Western legal principles, approximately 1,500 traditional rulers bring affordable justice to the rural population according to a familiar style of law, language and procedure.³⁰ There have been estimates that, in some African States, traditional justice systems handle between 80 to 90 per cent of the total caseload. They may also play a role in urban areas where the State justice system is functional and accessible, and "town chiefs" in urban areas are known in certain States.³¹

Another prominent feature of traditional justice systems is their distinctive procedures and philosophy. Given their role as alternative forums, the factors which contribute to a community's reliance on traditional justice systems deserve to be mentioned. Some of the most common explanations for the resolution of disputes outside the formal legal system are: insufficient resources; unfamiliarity with and distrust of the procedural and substantive law; and philosophical differences with the methodology and approach

³⁰ Tom Bennett, "Traditional justice under the South African Constitution", in *In Search of Justice and Peace*, p. 67.

³¹ UN-Women, UNICEF and UNDP, *Informal Justice Systems*, pp. 307–310 and fn. 13.

of the formal courts.³² The use of local leaders, informal procedures, community participation, and a primary focus on reconciliation and reparation differentiate them from formal courts, where procedures are adversarial, complex and long, and outcomes such as a prison term or a large monetary award may appear ill adapted to reality and the philosophy of dispute resolution in traditional communities.

In many countries, the cost, travel and time required to bring a case in a formal court make it inaccessible or at least impractical to a large percentage of the population.³³ The use of formal procedures may necessitate legal representation, and legal aid or other forms of support are often lacking. Language barriers are another common problem. The formal courts may not always be well equipped to hear disputes and render judgments promptly and equitably. Poor countries commonly have difficulty recruiting and training judges with the requisite experience and education. The courts may lack the infrastructure and resources to enable the judges to do their jobs effectively, in particular in rural areas.³⁴ The magistrates often lack training in customary law, even though they have the jurisdiction to apply it. In a number of African States, the formal court system lacks funding and there are not enough courts to adequately serve the population, particularly in rural and remote areas. The wider institutional context is also relevant: the capacity of the police forces to maintain peace and security affects whether the community is able to rely on State institutions or will rely on traditional, community-based mechanisms. Finally, delays in judgments and problems with enforcement present additional obstacles for users of the formal courts.

³² For a full list of common barriers to access to justice, see UNDP, "Access to justice", practice note, 9 March 2004, p. 4.

³³ Costs include user fees and attorney fees, as well as the cost of travelling to the court (few courts are located in rural areas) and costs incurred by lost work. Even in cases where the disputant has sufficient resources to use the court, these costs may render the final judgment inadequate.

³⁴ In Malawi, for example, magistrates do not have law books or other legal references. See Wilfried Schärf and others, "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" (Malawi Law Commission, 2003), p. 22.

In some African States, there are few lawyers in relation to the size of the population and these lawyers are mainly concentrated in urban areas. It is not unusual for the number of lawyers in a given State to number just a few hundred.³⁵ The traditional justice system consequently constitutes an essential component of the justice sector and may in fact solve most disputes.

Decisions to forgo formal litigation, or to consider it only as a last resort, also reflect a calculation of the likelihood of receiving a satisfactory judgment. Judgments of the formal courts are frequently interpreted as inadequate or even harmful. This is particularly true in the criminal context: punishment (rather than compensation to the victim) is commonly thought of as an inappropriate remedy. First, communities are concerned about the effect that incarceration would have on the defendant's family and their ability to provide for themselves. Second, formal hearings are seen as a possible cause of division among the community. Some communities prefer traditional justice systems over formal courts because the former is focused on conciliation and working to restore social cohesion, whereas the latter is "remote, alien and intimidating."³⁶ The formal court system is unfamiliar to many, especially among illiterate or uneducated populations. Unfamiliarity contributes to the negative perceptions, even where the State system is functioning well.

Context-specific factors present additional incentives to use alternative forums. In some countries, especially those experiencing or recovering from conflict, the State legal system may be obsolete or defunct.

In contrast to the formal courts, traditional justice systems are accessible. In virtually all of the countries surveyed for this publication, alternative forums are described as more accessible—they are cheaper, faster and

³⁵ According to various studies, there are approximately 300 lawyers in Malawi (UN-Women, UNICEF and UNDP, *Informal Justice Systems*, p. 306); 150 in Sierra Leone (Kane and others, "Sierra Leone: Legal and judicial sector assessment"); and fewer than 100 in Burundi (Tracy Dexter and Philippe Ntahombaye, "The role of informal justice systems in fostering the rule of law in post-conflict situations: The case of Burundi" (Centre for Humanitarian Dialogue, July 2005), p. 27).

³⁶ UNDP, "Access to justice", p. 8.

more familiar.³⁷ For example, proceedings are held in the evenings or on weekends and in the local language. In addition, the sanctions imposed or reparations awarded may be more appropriate to the context. They typically seek to preserve social harmony, facilitate reconciliation and judgments are generally made with attention to the resources of the respondent. They are generally perceived as less corrupt than the formal courts as well.

While the continued pervasiveness of traditional justice systems may, in some measure, be connected to the failure of the formal system to meet the needs of the population, this is by no means a full explanation. Even where the formal courts are functioning relatively well, communities may, and often do, prefer traditional mechanisms for conflict resolution. It is important, therefore, not to restrict the analysis to a comparison of the two—improving the formal system will not necessarily eliminate or even reduce the role that traditional systems play. Likewise, although traditional justice systems offer certain advantages—particularly in terms of accessibility, as highlighted above—they also come with drawbacks, and care must be taken not to present an idealized picture.

B. SUBJECT MATTER AND PERSONAL JURISDICTION

In a significant number of countries that have regulated traditional justice systems, jurisdiction has often been limited to family matters, juvenile issues, inheritance or minor criminal offences. In practice, traditional forums may actually exercise more extensive jurisdiction—either because there is confusion about the limits of their jurisdiction or because litigants prefer to use them or both.

However, in some countries, serious crimes such as murder are still heard in traditional forums and capital punishment may result, although this type of punishment appears to be exceptional. The use

³⁷ See, e.g., United Kingdom Department for International Development, “Non-State justice and security services”, Policy Division Info series (May 2004), pp. 1–2, available from www.gsdrc.org/docs/open/ssaj101.pdf, and UNDP, “Access to justice”, p. 4.

of capital punishment by a traditional justice mechanism was referred to by the Human Rights Committee in its consideration of the report of Madagascar in 2007.³⁸

In addition to family matters, juvenile issues, inheritance or minor criminal offences, the following types of cases could be considered by traditional justice systems, depending on the community: compensation for wrongful acts and accidental personal injury, liability for animals, inheritance (including oral wills and funeral rites), assignments of rights and duties, rights in land, taxation, contractual agreements, including matters relating to the exchange of goods, bailment, loans, employment and trade, matters relating to murder, acts of cruelty and punishment.³⁹ Additional areas of jurisdiction exercised by traditional authorities have included issuance of liquor licences, permits for firearms, permits to transport livestock, regulation of building materials, administration of conservancies and community forests, and regulation of the tourist industry.⁴⁰

Other types of subject matter jurisdiction that appear to be unique to traditional justice systems are royal succession (of a chief, king or queen), retaliation, curses and witchcraft.

It is common practice to try first to resolve the dispute within the family, or extended family, and to move to a customary forum if that fails. The substantive and procedural law applied is often oral, although there are some traditional justice systems where customary law or decisions or both are written.

Traditional justice systems commonly exercise jurisdiction over a wide range of civil and criminal matters. There is often little or no distinction

³⁸ See CCPR/C/MDG/CO/3, para. 15. See also CCPR/C/MDG/2005/3.

³⁹ Effa Okupa, "Traditional and informal justice systems in Africa", presentation to the OHCHR Expert Meeting (in cooperation with the University of Namibia Law Faculty), Windhoek, June 2007.

⁴⁰ Hinz, "Traditional courts in Namibia – part of the judiciary?", in *In Search of Justice and Peace*, p. 97.

between the two concepts, with the traditional justice forum considering the dispute or specific conduct in question only as wrongful.⁴¹ This may reflect the nature of the customary law, the disputants' need to resolve the entire conflict in one proceeding, and the fact that a satisfactory outcome needs to include aspects that are both restorative and punitive.

Where jurisdiction is formally specified through statute or constitutional provision, it is limited by either the available remedy—maximum fines, for example—or by the subject matter of the case. In States that do not have such a provision, custom or general practices serve as informal guidelines. A significant number of traditional justice systems do not take jurisdiction over serious crimes, but refer them to the police and the formal courts. Jurisdiction is also normally indirectly limited by the lack of power of most traditional justice systems to enforce their decisions.

Parties expecting problems with enforcement may go to a formal court, where they will have a better chance of securing enforcement of the award or punishment of the offender.⁴² If the subject matter of the case involves, for example, rape or the inheritance rights of women, they may also go directly to the formal courts, expecting that they would probably have a better chance of achieving the desired outcome.

An interesting question is whether traditional justice systems may exercise jurisdiction over someone who comes from outside the territory that is subject to governance by the traditional authorities. Historically, the answer has been that jurisdiction would not be exercised and the wrongful act by the person foreign to the community, particularly if the act could be characterized as criminal, would be dealt with by the formal courts.

⁴¹ PRI, *Access to Justice in Sub-Saharan Africa*, p. 29.

⁴² Traditional leaders in Limpopo, South Africa, have explained that they refer child support disputes to the magistrates' courts, as they do not have the resources to ensure that the award is enforced. Boyane Tshehla, "Traditional justice in practice: A Limpopo case study", Monograph Series No. 115 (Pretoria, Institute for Security Studies, April 2005), p. 19.

C. INSTITUTIONAL STRUCTURE

The structure of a traditional justice system may be closely connected to that of the formal court system, as well as to the organization of the communities using them. Because traditional justice systems frequently fill the gap between the needs of the community and the services offered by the formal court system, the shape and design of traditional justice systems change as the formal court system changes and as the needs of the community evolve.

Traditional justice systems have undergone considerable change in response to colonialism and, later, independence. Dual models—where the traditional and official State systems exist alongside one another—are a product of colonialism. Dual models were historically quite prevalent in colonies of Italy and the United Kingdom of Great Britain and Northern Ireland, which could help explain why there continues to be widespread legal recognition of traditional communities, customary law and traditional justice systems in these former colonies. However, in countries once colonized by France, legal pluralism was less tolerated as it was viewed as a threat to State power and, post-independence, there is only limited legal recognition of customary justice in these States.

Following independence, there was an attempt in some States to suppress traditional justice systems and, in some, traditional justice mechanisms continued to exist without legal recognition. In other cases, the two systems developed an integrated and complementary structure. This has happened in a variety of ways: traditional forums were integrated into the official system and became the lowest levels of the official system (e.g., Mozambique, Malawi and the Sudan); traditional forums served as a parallel forum over which the formal courts would have appellate jurisdiction (e.g., Zimbabwe, Uganda and South Africa); or the formal court system recognized and incorporated aspects of the traditional system's customary substantive or procedural law (e.g., the Niger). In some countries, the disputants have a choice of going to the traditional justice system or the formal court system. In others, the traditional justice mechanism is the sole forum initially available.

The movement to incorporate the traditional forum into the formal court system is not universal, however, and in a significant number of States the two operate in isolation from one another. Likewise, even in countries where the formal courts have incorporated elements of traditional justice systems or are authorized to apply customary law, traditional justice systems may continue to operate independently in their original form. Nevertheless, many States have frequently tried to confine the jurisdiction of traditional justice systems in favour of the formal justice system. However, expediency and lack of resources have led many States to continue to rely, at least in part, on traditional justice systems to settle disputes and dispense justice, particularly in rural and remote areas.

D. COMPOSITION OF TRADITIONAL JUSTICE MECHANISMS

In traditional justice systems decisions are made by members of the community—whether by the chief or subchiefs, headman or headwoman, a group of elders who provide leadership for the community, or by direct decision of the community itself in the form of a general assembly. In some communities, traditional leaders are chosen for the explicit purpose of performing a judicial or quasi-judicial role. In others, a person’s position as a traditional political leader of the community includes the responsibility to hear and resolve disputes. In some States, community courts have been established by the State, and they often fall under the indirect control or influence of traditional leaders, who nominate candidates for the posts to be filled. Less commonly, the disputants select those exercising decision-making functions.

The authority of the traditional leader derives from his or her status as a respected member of the community, and in some cases the position may be inherited. Formal qualifications are generally not required; reports of unfamiliarity with statutory law and illiteracy are not uncommon.⁴³

⁴³ Bashingantaha, the customary leaders in Burundi, are reported to be largely illiterate. See Dexter and Ntahombaye, “The role of informal justice systems”, p. 21.

Prior familiarity with the parties and the case is understood to benefit the process because it helps the decision maker to arrive at the most just result. The often close relationship between the disputants and the leaders of the dispute resolution process can be problematic for many of the same reasons that it is praised: while familiarity with the disputants can be helpful in the fact-finding process, it also opens up the opportunity for corruption, as well as bias in favour of the more powerful members of the community. Nevertheless, traditional justice systems are generally considered less corrupt than formal justice systems.

Similarly, the status of the decision makers as powerful members of the community creates the risk that their decisions will take into account their own interests in maintaining power. Leaders of traditional systems may be susceptible to politicization, in many cases as a result of the involvement of external actors such as government officials or elected political leaders. Interestingly, however, in many instances it has been claimed that the views of the chief and the subchiefs are impartial by the very nature of their functions. This has been observed in the jurisprudence of the South African courts: "The believers in and adherents of African customary law believe in the impartiality of the chief or king when he exercises his judicial function. The imposition of anything contrary to this outlook would strike at the very heart of the African legal system, especially the judicial facet thereof."⁴⁴

Some African States have prohibitions on traditional leaders taking positions in political parties or having political functions in government. The rationale is to reinforce the impartiality of the chief or his or her subchiefs, and removing such persons from the political control of the State or the governing political party.

⁴⁴ *Bandindawo and Others v. Head of the Nyanda Regional Authority and Another*, 1998 (3) SA 262 (TK) (Justice Madlanga).

E. COMMUNITY INVOLVEMENT

The participation of the community is another feature of traditional justice systems. Traditional systems are often present in communities that have “multiplex relationships”—where community members are connected through economic, social and familial bonds.⁴⁵ Because of the close connection among community members, the group as a whole often assumes responsibility for regulating the actions of its members.

The level of community involvement ranges from the inclusion of the parties and witnesses in the proceedings to the participation of the entire community. Public participation and collective responsibility for the judgment are additional illustrations of the various levels of community involvement. Most commonly, proceedings involve interested members of the community in the fact-finding and reconciliation process. In some communities, statutes governing the procedure require that the forum be open to the public. Public hearings are prevalent in traditional justice systems and reflect their primary emphasis on reconciliation at the community level. One consequence of community involvement is that decisions must be viewed as acceptable by the community.

In South Africa, for example, the officially recognized customary (traditional) courts allow disputants to bring supporters, particularly family and friends, and permit the community members in attendance to ask questions and offer comments.⁴⁶ In *xeer* proceedings for inter-clan disputes in Somalia, the parties, together with their clans, choose to accept or reject the decisions of the elders (representatives from each clan and sometimes a third-party clan as well), and choose to appeal the case or to have a new hearing with a different set of *xeer beegti* (group of elders).⁴⁷ The agreement of the clan to the decision makes sense given its collective responsibility for offences committed by one of its members.

⁴⁵ PRI, *Access to Justice in Sub-Saharan Africa*, p. 22.

⁴⁶ *Ibid.*, p. 42.

⁴⁷ Andre Le Sage, “Stateless justice in Somalia: Formal and informal rule of law initiatives” (Centre for Humanitarian Dialogue, July 2005), p. 35.

The involvement of the community in traditional justice systems serves several purposes. First, it lends authority to the process, which is necessary to ensure that judgments are implemented and that these systems continue to be used. Normally, the authorities are obeyed not because their power is feared, but rather because the society accepts the legitimacy of the process. Respect in the community for the authority of traditional leaders has also probably been an important factor in the decision of some States to legally recognize traditional justice systems as part of their justice systems.

Second, community involvement fosters reconciliation and maintains the social order, both of which are viewed as important goals of the traditional justice systems. Maintaining consensus is especially important in communities where the members are in mutually dependent relationships. Contested decisions could threaten these relationships. Finally, participation is particularly important where the family or community share responsibility for complying with the judgment and implementing the remedy or punishment.

F. GUIDING PRINCIPLES AND COMMON PRACTICES

Reconciliation and maintaining harmony in the community are the guiding principles of traditional dispute resolution. As a result, the processes developed and followed by traditional justice systems attempt to leave both parties, as well as the community, satisfied with the outcome. Compromise and obtaining consent to the outcome are highly valued. Individual responsibility and retribution are considered less important.

These principles are not just philosophical differences; they also reflect practical considerations. The environment in which these systems typically operate helps explain the contrast with formal justice models that place a high value on the assignment of guilt or innocence and the discovery of the truth. Traditional justice systems are most prevalent in close-knit communities, where maintaining harmony is important for keeping the community together. In many communities, removing an individual

(generally the male provider) from the community and placing him in prison would make the family dependent on others; for this reason, imprisonment is commonly viewed as impractical.

The proceedings generally resemble arbitration or mediation rather than an adversarial hearing. In the criminal context, confession and apology play a large role, with fact-finding generally taking on less importance than is common in formal courts. An interesting anecdote from Somalia *xeer* proceedings sheds light on the value placed on consent and prompt resolution. In *xeer* tribunals, clans can choose either mediation or arbitration. Even though mediation generally results in a lower award, the aggrieved party often prefers it over arbitration, as it comes with the consent of the community and will lead to a quick resolution of the dispute.⁴⁸

The vast majority of traditional systems do not use lawyers and many actually prohibit lawyers from the proceedings. This is the case, for instance, in Sierra Leone, South Africa and South Sudan.⁴⁹ Similarly, the members of the traditional justice mechanism do not have formal legal training and are often unfamiliar with their country's written legal code. The use of simple, well-known and generally accepted procedures and reliance on local customary law arguably lessen the need for lawyers and judges with legal training.

Traditional authorities generally seek to reach a decision that has the consent of the parties and the consensus of the community. Whether true consent has been achieved is another matter however, as the leaders or the community may exert pressure on the parties to agree with the decision. The variables that play into the decision-making process of customary courts in Malawi have been described in the following manner: "Pressure

⁴⁸ Le Sage, "Stateless justice in Somalia", p. 35.

⁴⁹ See Kane and others, "Sierra Leone: Legal and judicial sector assessment", p. 12; PRI, Access to Justice in Sub-Saharan Africa, p. 42; and Aleu Akechak Jok, Robert A. Leitch and Carrie Vandewint, "A study of customary law in contemporary southern Sudan" (World Vision International, March 2004), p. 42.

is used to reach an agreement that satisfies the parties, social hierarchy, community expectations and the chief.”⁵⁰ Unequal bargaining power and decisions by leaders with a great deal of power in the community may open up the possibility that the decision does not truly satisfy the parties.

Following the resolution of the dispute, it is common practice in many traditional forums for the parties and the community to express their reconciliation through a ritual or ceremony. In Burundi, for example, the parties would share a drink to thank the *bashingantahe* (leaders) and to mark the beginning of a new relationship.⁵¹

G. JUDGMENTS

The reconciliatory nature of traditional justice systems and the types of judgments awarded are in many ways a reflection of the goal of restoring equilibrium and harmony in the community, and encouraging collective responsibility. Restoration is particularly important in intrafamily disputes and other situations where the parties are in continued close contact with one another. The judgments also reflect the practical necessities of solving disputes in an effective manner, one which is satisfactory to the disputants and provides for the safety and security of the community. As traditional justice mechanisms normally do not distinguish between criminal and civil causes of action, but rather deal broadly with what is considered to be a wrongful act in the community, their judgments may have both punitive and compensatory elements. Even when an award appears to be only compensatory, decision makers may also incorporate extra payment, similar to a fine, to condemn the wrongful act.

Judgments most frequently result in orders to provide some form of payment to the aggrieved party, either in money, livestock or crops from the harvest. More punitive orders include service to the community or to the aggrieved party. Corporal punishment was widely used historically

⁵⁰ Schärf and others, “Access to justice for the poor of Malawi?”, p. 40.

⁵¹ Dexter and Ntahombaye, “The role of informal justice systems”, p. 13.

and is still used in some traditional communities, though many States have outlawed the practice.⁵² In some traditional justice systems, a severe type of punishment is banishment from the community. This has been curtailed in South Africa,⁵³ but continues to be used in a number of other States.

Imprisonment has historically not been used in the traditional justice systems, reflecting their primary focus on reconciliation in dispute resolution, as well as practical realities, such as the need for individuals to support their families and the lack of infrastructure for imprisonment. However, traditional justice systems are dynamic and do reflect interaction with the formal State justice sector, a reality that has led some to make limited use of imprisonment. It has been reported, for example, that traditional justice systems make limited use of detention in Liberia,⁵⁴ and that in Malawi, the Niger and Uganda traditional authorities may detain individuals accused of serious crimes while waiting for the police to arrive.⁵⁵

In some communities, the offender's extended family or clan takes collective responsibility for the judgment. In Somalia, for example, the penalty for murder is the payment of 100 camels for a man's life or 50 for a woman's. Payment is made by the offender's *diya* group. One dozen go to the victim's immediate family, two dozen to the closest relatives and the remainder go the *diya* group. Collective *diya* payments are also used for physical harm, rape, theft and defamation.⁵⁶

⁵² For reports of corporal punishment, see PRI, *Access to Justice in Sub-Saharan Africa*, p. 33.

⁵³ South Africa, Department of Justice and Constitutional Development, "Policy framework on the traditional justice system under the Constitution", p. 35.

⁵⁴ International Crisis Group, "Liberia: Resurrecting the justice system", Africa Report No. 107, 6 April 2006, p. 8.

⁵⁵ UN-Women, UNICEF and UNDP, *Informal Justice Systems*, p. 57.

⁵⁶ Le Sage, "Stateless justice in Somalia", pp. 33–34. Le Sage offers two explanations for the use of collective responsibility: nomadic individuals would not have the resources to pay without the help of the community and non-payment could lead to more violence or acts of revenge, which would hurt the community; also, property is thought of in a collective rather than individual sense.

H. EXAMPLES OF TRADITIONAL JUSTICE SYSTEMS IN AFRICAN STATES

This section sets out information relating to customary justice mechanisms in eight States to illustrate the nature and functions of traditional justice systems in Africa, as well as their diverse character.

Malawi

The traditional justice system is based on the recognition of traditional authorities. The Chiefs Act of 1967 provides that traditional authorities are the administrative head of local communities. Although the Chiefs Act does not specifically provide for any adjudicator function for traditional authorities, it is considered to be part of their functions and is recognized as such in local communities. Article 110 of the Constitution recognizes customary law, which the traditional authorities generally apply in resolving disputes. They have a hierarchical structure that goes from village headman to group village headman, sub-traditional authority, traditional authority, senior traditional authority and, finally, principal chief. It has been estimated that there are approximately 18,000 village headmen; 2,400 group village headmen; 61 sub-traditional authorities; 500 traditional authorities; 28 senior traditional authorities; and 7 principal chiefs. Traditional authorities at all levels receive a monthly payment according to their rank from the Office of the President and Cabinet. The traditional authorities form part of the executive branch and not the judiciary.⁵⁷

Their functions include preserving the peace and carrying out the traditional functions of office under customary law, provided that this is not contrary to the Constitution, any written law, or repugnant to natural justice or morality. Traditional authorities are reportedly involved in dispute resolution in a variety of matters, including civil disputes, family law matters, inheritance, minor damage to property and boundary disputes.⁵⁸ Although criminal cases do not fall within their jurisdiction, traditional leaders often deal with minor disturbances of the peace. Cases involving criminal conduct are

⁵⁷ UN-Women, UNICEF and UNDP, *Informal Justice Systems*, pp. 307–310.

⁵⁸ *Ibid.*, p. 310.

to be referred to the police. However, the weakness of the formal justice system and the preference for dispute resolution by traditional authorities mean that in practice traditional authorities do deal with some situations involving criminal conduct.⁵⁹

Mozambique

In the colonial period until 1975, there were two separate legal systems: a formal one, primarily for the European and assimilated populations; and a customary one for the rest of the population, based on kinship or colonially appointed traditional leaders. After independence, there was an official ban on traditional leaders resolving disputes. “Popular tribunals” were established in 1978. They could draw on customs and usage in local regions, but the State strongly discouraged polygamy, marriage payment and child marriages. In 1992, a law was adopted to establish community courts as a substitute for popular tribunals, which were abolished.

In 2000, Decree 15/2000 recognized that community authorities could be drawn from the ranks of traditional leaders and chiefs, as well as village secretaries. These persons have an obligation to cooperate with the community courts to settle small conflicts of a civil nature in accordance with the local customs and within the limits of the law. However, chiefs courts are not recognized by law. In 2004, Mozambique recognized legal pluralism in article 4 of its Constitution, provided dispute resolution systems did not apply norms contrary to the fundamental values of the Constitution. Today, community courts exercise jurisdiction over minor civil and criminal offences; judgments are limited to fines and community service. More serious offences and larger civil cases are adjudicated in the formal district and provincial courts.⁶⁰

⁵⁹ Schärf and others, “Access to justice for the poor of Malawi?”, p. 6.

⁶⁰ PRI, *Access to Justice in Sub-Saharan Africa*, pp. 57–58.

Namibia

There are two key laws relevant to traditional justice systems in Namibia: the Traditional Authorities Act (No. 25 of 2000) and the Community Courts Act (No. 10 of 2003). Both have been adopted, but the latter has yet to be implemented. There are 49 recognized traditional authorities and most have a traditional court at the level of the chief, who is the community's supreme traditional leader. The territories of many traditional communities are subdivided into districts under the leadership of "senior headmen", who preside over cases in district traditional courts. Within districts, there are villages under persons known as "headmen", who adjudicate cases in their village courts. The Traditional Authorities Act has nominally changed the titles of these persons to senior traditional councillors and traditional councillors. For instance, the Ondonga territory is divided into 10 districts, each under the leadership of a senior headman. Each district includes hundreds of villages, each normally under the authority of a headman. A case is normally first brought at the village level. Depending on its nature, the headman may deal with it himself, or he may refer it to the district level or even the highest level, or he may at least advise that the matter should go to those higher levels. Serious matters, such as murder, go directly to the chief.

According to the Traditional Authorities Act, the principal functions of the traditional authorities are to promote peace and welfare. They have the power to adjudicate cases that come before them and to make customary law. They also exercise executive functions. Hence, there is no separation of powers. The Community Courts Act has not been implemented. There may be a number of reasons for this. The first is that the Ministry of Justice has not processed the applications for appointments of the traditional justices. It has been questioned whether the Ministry of Justice is the best placed to do this, or whether a council of traditional leaders would have better insights into who is qualified to be a traditional justice. Although the Act nominally provides for appeals to Magistrates' Courts, it is an open issue whether the judges of these courts have sufficient expertise in customary law or whether it would be better to have a customary law court

of appeals, which exists, for example, in Nigeria. Finally, the question has been raised whether these mechanisms can really be qualified as courts and, if so, whether they would meet the constitutional requirements for such institutions.⁶¹

Niger

The legal framework of the Niger provides that, subject to ratified international instruments, legislative provisions or fundamental rules relating to public order, the courts should apply the customs of the parties to disputes relating to contracts, the status of persons, family matters, inheritance and gifts, and real estate, except where the legal action concerns real property that is registered or for which documentation of the transfer is evidence according to law. When the customs of the parties are applied, the judge must associate two customary assessors who have knowledge of the customs of the disputants.⁶² The customary assessors are proposed by the traditional chiefs of the pertinent area to the court of first instance. The court can reject certain candidates and the Ministry of Justice makes the final selection on the basis of the list of candidates sent by the chief judge of the court. In practice, the customary assessors are relied upon not only for their knowledge of local customs, but also for evaluating the evidence and the context of the dispute.

The customary assessors have an important role as they stay in the community, while the judges of the court rotate geographically. The former are normally closely associated with the chiefs and other elders and speak the language of the community, whereas the latter may not. The customary assessors are thus seen as a key intermediary between the formal courts and the chiefs and other elders of a particular community, and not only advise on customs in the community and help evaluate the evidence, but also

⁶¹ Hinz, "Traditional courts in Namibia – part of the judiciary?", in *In Search of Justice and Peace*.

⁶² Law on Judicial Organization and Powers (*Loi organique No. 2004-50*) of 22 July 2004, arts. 63–64 and 43.

transmit the judgment of the court back to the community. Some customary assessors may hold the rank of traditional chief in their communities.⁶³

Normally dispute resolution is first attempted through the traditional chiefs. It should be noted that there is a structured hierarchy with traditional chiefs in villages or in specific subdivisions within villages, and then traditional chiefs at the cantonal level, which is the larger geographic area. It is normally thought of as disturbance of the local peace to bring a person before a court, and the parties are encouraged and in some types of cases required to attempt to settle the matter within the traditional justice structure before bringing a case to the formal courts. There are two reasons for this. The first is to promote harmony and conciliation through the traditional dispute resolution process, and the second to relieve the caseload of the formal courts.⁶⁴

Nigeria

Nigeria has a federal structure and is composed of 36 States. Customary courts are recognized at both the federal and State level. There are 250 ethnic groups with their own customary laws. The Constitution recognizes the customary laws of tribal and ethnic groups. Most States have their own customary courts and customary court of appeal structure, although some of the northern States operate sharia courts and sharia courts of appeal. An appeal can be taken from a State customary court of appeal or from a sharia court of appeal to the federal court of appeal. The customary courts are treated as part of the State judiciary system. Jurisdiction extends to personal and family matters, including marriage, divorce, guardianship and custody of children. It also covers matters of inheritance, land and commercial transactions.

Decisions made by a traditional justice process must satisfy three conditions to be recognized by and enforceable by the formal courts: (a) they must not be incompatible with international human rights; (b) there must a case

⁶³ UN-Women, UNICEF and UNDP, *Informal Justice Systems*, pp. 256–260.

⁶⁴ *Ibid.*, p. 260.

record; (c) the process must be voluntary for the parties. According to the Evidence Act, custom must be proved by the party asserting its existence. Custom is defined as a rule which, in a particular district, has from long usage obtained the force of law. Proving a custom directly is usually done with a statement from traditional chiefs who know the customary laws of the community, although a formal court is not bound to accept it. A formal court can also legally recognize a custom by taking judicial notice of it. In addition, statutory laws provide that customary laws can be disregarded if: (a) they are deemed not to be in accordance with “natural justice, equity and good conscience”; (b) the parties agreed to exclude the application of customary law; or (c) the transaction in question is unknown in customary law. Some States in Nigeria have codified customary laws.

Rwanda

Rwanda established *gacaca* courts after 1994, inter alia, to judge the very large number of persons who had been accused of crimes committed during the genocide. It is estimated that approximately 800,000 persons were killed in the genocide, mainly members from the Tutsi minority although moderate Hutus were also murdered. Many judges and lawyers were either killed or fled the country and the judicial infrastructure was decimated. In the months immediately after the genocide, approximately 120,000 suspects were detained in prisons with a capacity of only 45,000 in very harsh conditions. What remained of the country’s judiciary was not able to process and judge in a reasonable time frame the large number of persons accused.⁶⁵

As a way of addressing this situation, the Government established “new” *gacaca* courts by national legislation as a temporary, transitional measure to prosecute and judge those who had participated in the genocide and to promote reconciliation. Although the formal courts of Rwanda and the International Criminal Tribunal for Rwanda located in Arusha, United Republic of Tanzania, had a mandate to try the key actors in the

⁶⁵ Phil Clark, “The legacy of Rwanda’s *gacaca* courts”, *Think Africa Press*, 23 March 2012.

planning, organization and supervision of the genocide, the vast majority of the prosecutions, including for “ordinary” murders, took place in the new *gacaca* courts. These were broadly inspired by the traditional or “old” *gacaca* courts, although the new courts had far greater powers. The old *gacaca* courts had diminished in importance in Rwanda before the genocide and, where they continued to exist, had focused on resolving mostly minor disputes at the community level. During the colonial era, the *gacaca* courts had been prohibited from judging serious crimes. The goal of the old community-level *gacaca* courts was to restore order and social harmony, whereas the function of the new *gacaca* courts was largely punitive. One of the Government’s stated reasons for establishing the new *gacaca* courts was to ensure that there would be no impunity for those who had participated in the genocide.⁶⁶

Unlike the old *gacaca* courts and indeed other traditional justice systems mentioned in this publication, these new *gacaca* courts were expressly designed to judge very large numbers of persons who had engaged in serious crimes, including murder, during the genocide. The new *gacaca* courts could sentence defendants to life in prison for the most serious crimes. Accused persons were not allowed to have a defence lawyer even for the most serious crimes. Also, persons who confessed to crimes rather than contested the charges against them were given significantly reduced sentences.⁶⁷ The new *gacaca* courts were also able to fashion judgments that focused on community service, although it has been argued that community service as a sentence was too lenient for the crimes found to have been committed by some perpetrators.⁶⁸ The new *gacaca* courts were dissolved in 2012 after most of the accused had been either judged

⁶⁶ See Huyse and Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict*, pp. 30–46; Stephanie Wolters, “The *gacaca* process: Eradicating the culture of impunity in Rwanda?”, Situation report, Institute for Security Studies, 5 August 2005, pp. 1–2; L. Danielle Tully, “Human rights compliance and the *gacaca* jurisdictions in Rwanda”, *Boston College International and Comparative Law Review*, vol. 26, No. 2 (Spring 2003), pp. 397–400.

⁶⁷ Huyse and Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict*, pp. 39–41.

⁶⁸ Clark, “The legacy of Rwanda’s *gacaca* courts”.

or released. It has been estimated that approximately 12,000 *gacaca* courts were established and that as of 2011 they had tried over one million cases relating to the 1994 genocide, while the national courts had tried only 1,290.⁶⁹ It has been estimated that approximately 30 per cent of cases resulted in acquittal.⁷⁰

South Africa

The Traditional Leadership and Governance Framework Act, adopted in 2003, legitimized traditional leaders and mandated State support for them. There are approximately 800 officially recognized traditional communities in South Africa, each with at least its own officially recognized senior traditional leader and headman or headwomen, as well as its own officially recognized traditional council. In addition, the pre-1994 (before the advent of constitutional democracy) dispensation of an officially recognized hierarchy of customary courts was retained.⁷¹ (Senior) traditional leaders appointed before 24 September 2004, when the Traditional Leadership and Governance Framework Act entered into force, and those who have since been officially recognized by the South African Government, have been issued with formal letters of civil and criminal jurisdiction, which form the legal basis for their powers to hold, and preside over, customary courts. The informal (not officially recognized) community court decisions are appealable to the area committee, which is not part of the officially recognized traditional court system either.⁷² The officially recognized traditional courts apply what has been termed “living customary law”, while other State courts apply both State law and recorded

⁶⁹ Human Rights Watch, “Rwanda: Mixed legacy for community-based genocide courts—Serious miscarriages of justice need national court review”, 31 May 2011.

⁷⁰ Daniel Gakuba, “Rwanda ends *gacaca* genocide tribunals”, *Deutsche Welle*, 19 June 2012.

⁷¹ Customary court is the name recommended by the South African Law Reform Commission. These forums have also been referred to as traditional courts, chiefs courts and community courts. See Tshehla, “Traditional justice in practice”, p. 19.

⁷² Joanna Stevens, “Traditional and informal justice systems in Africa, South Asia, and the Caribbean” (PRI, March 1999), pp. 24–25.

customary law, or “official customary law”.⁷³ In 2003 the South African Law Reform Commission published its “Report on traditional courts and the judicial function of traditional leaders” on a proposed constitutionally compliant system of recognized customary courts, with accompanying draft legislation. As this Traditional Courts Bill has not yet been adopted, the colonial and apartheid era framework for traditional courts has yet to be replaced. The 2003 Act set up the Commission on Traditional Leadership Disputes and Claims, which provides a more accessible forum for the resolution of traditional leadership disputes, which would otherwise be brought to the formal court system, an action that is usually taken as a last resort.⁷⁴

The criminal jurisdiction of traditional courts is very limited; they do not have jurisdiction, for example, over serious crimes such as rape, murder and serious assault.⁷⁵ Traditional courts cannot impose physical punishment or fines, and remedies range from restitution, service and compensation to the most severe, namely eviction from the area. Their power to order resettlement has recently been limited and traditional leaders have raised this restriction as a concern.⁷⁶ There are also some limitations on their jurisdiction over civil matters.

The South African courts have decided a number of interesting cases regarding the compatibility of customary law administered by traditional courts with the rights as set out in the State’s Constitution. In *Bandindawo and others v. Head of the Nyanda Regional Authority and another*, 1998 (3) SA 262 (Tk), a case involving only civil jurisdiction, the argument was made that a litigant appearing before a traditional court would experience a lower standard of justice than that offered by a magistrates’ court, thereby violating the principle of equality before the law. The court conceded that considerable differences distinguished customary courts from the formal judicial system, but held that these differences were

⁷³ Tshehla, “Traditional justice in practice”, p. 20.

⁷⁴ *Ibid.*, p. 18.

⁷⁵ *Ibid.*, p. 19; PRI, *Access to Justice in Sub-Saharan Africa*, p. 42.

⁷⁶ Tshehla, “Traditional justice in practice”, pp. 33–34.

consonant with a particular cultural orientation and that, consequently, the right to equal treatment could justifiably be infringed. However, in *Mhleka and Feni v. Head of the Western Tembuland Regional Authority and another*, 2001 (1) A 574 (Tk), in respect of criminal proceedings, the court reached a different result, noting that criminal cases involved complex legal issues and potentially drastic penalties, and there was no justification for dispensing with procedural rights such as the right to legal representation.

Zambia

The courts include the Supreme Court, the High Court, the subordinate courts and the local courts. A small claims court has also been recently established in the capital, Lusaka. It has been estimated that approximately 80 to 90 per cent of adjudications are by local courts.⁷⁷ Local courts deal with the administration of customary law and their justices normally do not have formal legal education, although training is provided by the judiciary and sometimes by aid projects. Their jurisdiction varies, but they deal with torts, contracts, family matters, inheritance and petty crime.⁷⁸ The local language is used, procedures are informal and proceedings are carried out orally. Lawyers are not allowed with a view to making the proceedings less expensive and less technical.⁷⁹ An appeal of decisions based on customary law made by local courts and the High Court can be taken to the subordinate courts and the Supreme Court, respectively. Local courts are community courts while subordinate courts are district courts. A decision based on customary law will be upheld on appeal provided it is not repugnant to natural justice. As local courts are not considered courts

⁷⁷ Paralegal Alliance Network, "Mapping of legal aid service providers in Zambia: final report" (University of Zambia School of Law, 2007), p. 14.

⁷⁸ See Alfred S. Magagula, "The law and legal research in Zambia", updated version (Hauser Global Law School Programme, 2014). Available from www.nyulawglobal.org/globalex/Zambia1.html#thelocalcourts.

⁷⁹ Local Courts Act, sect. 15.

of record, all factual issues must be fully relitigated and determined again if brought on appeal. In other words the matter is heard de novo.⁸⁰

Zambia has a system that recognizes both statutory law and customary law, with the latter being practised mainly in rural areas. Although traditional justice systems administered by traditional chiefs are not recognized by the State legal order, they still play a role in settling disputes. The traditional chief also puts forward possible names for appointments to vacancies on the local courts within his or her territory, frequently three male candidates.⁸¹ The Constitution (art. 23) prohibits discrimination on the grounds of sex and marital status, although it exempts discrimination that arises as a result of the application of customary, family and personal law.⁸²

Traditional justice systems play a key role in the administration of land in rural areas, where approximately 80 per cent of the land is held under customary law. Land is meant to secure the livelihood and the well-being of the community as a whole, and not the individual or the family. Therefore, land rights are not secured through written proof of ownership or binding agreements, but rather in trust relationships by persons designated by the traditional leadership. This practice has led to discrimination against women regarding land rights when they are married pursuant to customary law.⁸³

⁸⁰ Subordinate Courts Act, sects. 11 and 16.

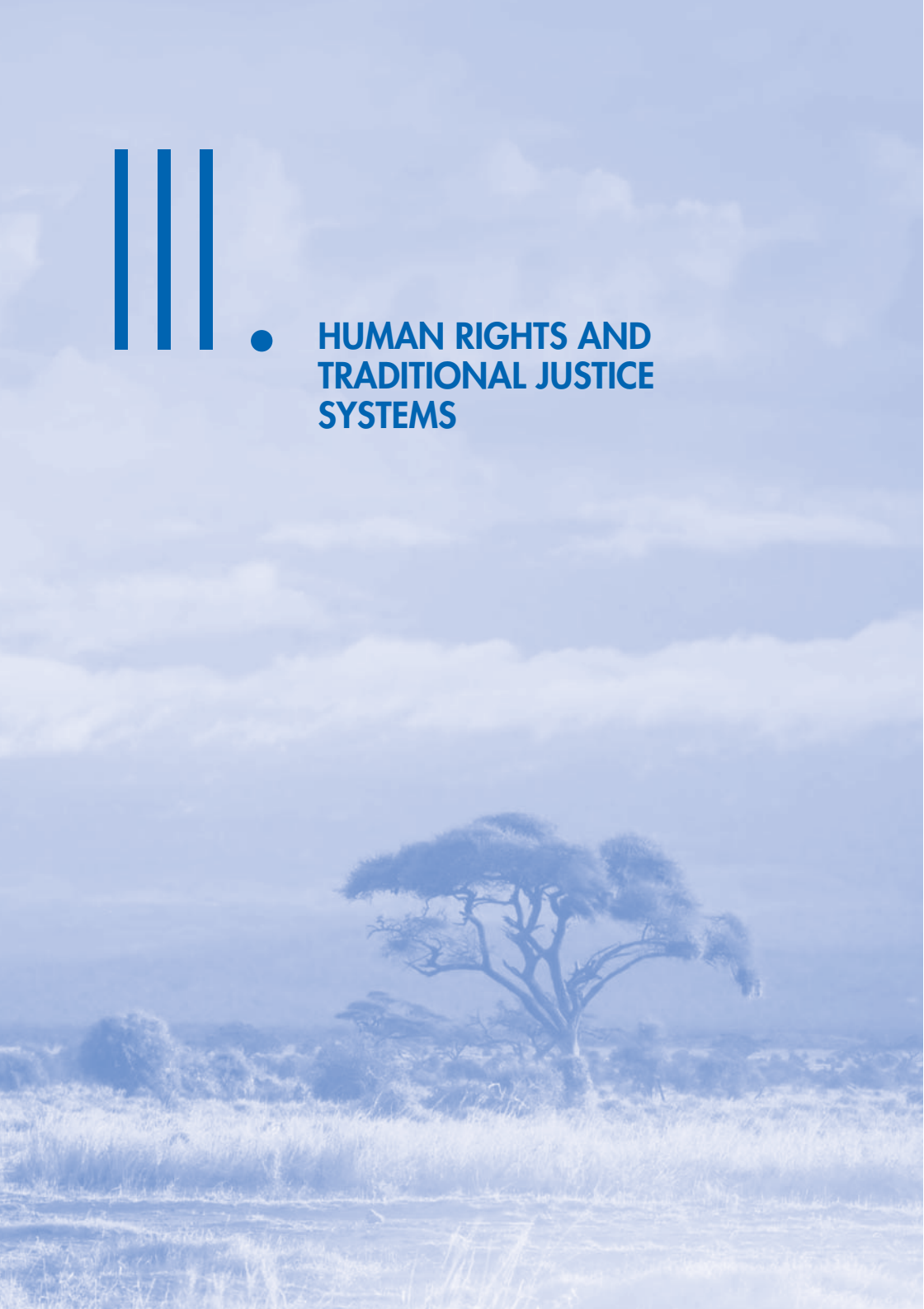
⁸¹ Afronet, "The dilemma of local courts in Zambia", 1998.

⁸² See also, Muna Ndulo, "African customary law, customs, and women's rights", *Indiana Journal of Global Legal Studies*, vol. 18, No. 1 (Winter 2011), p. 89.

⁸³ Human Rights Watch, *Suffering in Silence: The Links between Human Rights Abuses and HIV Transmission in Girls in Zambia* (New York, 2002), pp. 54–60.



HUMAN RIGHTS AND TRADITIONAL JUSTICE SYSTEMS



This chapter analyses traditional justice systems from a human rights perspective. Many African States that have recognized customary law as part of their legal order have generally done so on condition and to the extent that it is compatible with their constitution or international human rights standards or both. International human rights standards set minimum legal standards and specifically recognize the diverse nature of legal systems in various parts of the world, including those that have embraced legal pluralism.

International human rights instruments also recognize both individual and collective rights, and protect the rights of individuals and those of indigenous peoples, minorities and culturally distinct communities. Traditional justice systems present novel challenges to human rights analysis. Possible human rights violations by traditional justice systems need to be carefully considered by courts or human rights bodies before they express their views on the compatibility of a given practice with human rights standards. For example, the High Court in Namibia, in a case involving a challenge to procedures employed in a case decided pursuant to customary law, stated that, in making any determination, considerations of fairness and reasonableness should be considered pursuant to article 18 of the Constitution.⁸⁴ However, there is little doubt that some practices which clearly violate human rights standards, such as corporal punishment or gender discrimination, will continue to be condemned by international and regional human rights bodies.

A. INTERNATIONAL AND REGIONAL HUMAN RIGHTS STANDARDS

The International Covenant on Civil and Political Rights has a number of provisions relating to human rights in the administration of justice. Its article 14 has provisions relating to fair trial, in particular the right to equality before the courts, the entitlement to a fair and public hearing by

⁸⁴ *Erastus Tjiundika Kahuure and Others v. Mbanderu Traditional Authority and Others*, Judgment of 13 April 1997, Case No. (P) A 114/2006 – unreported. See Hinz, “Traditional courts in Namibia – part of the judiciary?”, in *In Search of Justice and Peace*, pp. 108–109.

a competent, independent and impartial tribunal established by law, the presumption of innocence, the right to be tried without undue delay, the right to remain silent and not to be compelled to testify against oneself or confess guilt, the right to a lawyer and to have legal counsel appointed without payment if the accused cannot pay and the interests of justice so require, the right to judicial review of one's sentence and conviction, and the prohibition of being tried or punished more than once for an offence for which one has been finally convicted or acquitted.

In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee stated that article 14 is relevant when "a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out ... judicial tasks." The Committee indicated "that such courts cannot hand down binding judgments ... unless the following requirements are met: proceedings ... are limited to minor civil and criminal matters, meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14..."

The Dakar Declaration on the Right to a Fair Trial in Africa, adopted by the African Commission on Human and Peoples' Rights in 1999, also addressed this question: "Traditional courts are not exempt from the provisions of the African Charter relating to fair trial" (para. 4).

The question of the applicability of human rights instruments to traditional justice systems raises several threshold issues. For example, has a traditional justice system been recognized as part of the legal order of a State to carry out judicial tasks, and has the State conferred on such an institution the authority to make binding judgments? If the answer to both these questions is "yes", the traditional justice systems would, in principle, have to comply with the procedural guarantees for fair trial set out in the International Covenant on Civil and Political Rights. However, at least in minor civil matters, there might be some flexibility in the application of

article 14 as interpreted by the Human Rights Committee in its general comment No. 32 (2007). For example, there are small claims courts in a number of developed and developing countries with relaxed rules of evidence and, in some cases, no use of legal counsel.

Whether traditional forums led by traditional leaders or elders have a legal status in the State legal order to hear disputes and make binding decisions is not always clear. In some States, customary forums are not considered courts in the judicial sense and can be established and abolished by the executive. Also, such forums do not have the power to issue binding judgments as the proceedings are oral and there is no authority to have decisions enforced. In other States, there may not be a record of the proceedings or only an inadequate record that would not be sufficient to be considered by an appellate jurisdiction. Typically, in such cases, if the disputants are unhappy with the outcome rendered by the traditional justice forum, the case would have to be entirely relitigated in a formal court. For analytical purposes, this is not an appeal, but rather an initial failure of an alternative dispute procedure to arrive at a satisfactory result, and a decision by one or both of the litigants to bring the matter before a formal court for a *de novo* hearing and judgment.

To summarize, when traditional justice systems are a recognized part of a State's judicial system and are in a position to issue binding judgments that can be appealed, then in principle the provisions of the International Covenant on Civil and Political Rights relating to procedural protections would be applicable. However, when traditional justice forums are not considered to be courts that carry out judicial proceedings, they should be considered more as alternative dispute resolution mechanisms falling outside the ambit of the procedural requirements of the Covenant.⁸⁵

International and regional instruments provide for fair trial guarantees in criminal cases, and serious criminal offences in particular should be tried

⁸⁵ Article 14 of the Covenant applies to "courts and tribunals" and further specifies that "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing....".

in formal courts. An accused may not have a choice of forum, and, as was recognized by a South African court, criminal cases involve complex legal issues and potentially drastic penalties; procedural protections such as the right to legal representation are therefore very important.⁸⁶ Nevertheless, a number of States continue to permit traditional justice systems to judge cases that involve serious criminal charges. The failure of many traditional systems to distinguish between the criminal and civil context may complicate the analysis, particularly when the judgment requires reparation to be made to the claimant only in terms of money, livestock or crops. Sometimes reparations also include a punitive element—much like punitive damages that are permitted in tort cases in some common law countries—making the analysis even more challenging. Nevertheless, such cases, without meaningful punitive sanctions, raise questions about impunity when serious violations of criminal law have occurred.

Traditional justice systems operating independently from the State are the least likely to be bound by international human rights law. By its terms, article 14 of the International Covenant on Civil and Political Rights does not apply to alternative justice forums that operate independently from the State. Moreover, general comment No. 32 (2007) of the Human Rights Committee provides that article 14 is applicable only when a State has made customary courts part of its system of the administration of justice.

Even where the State is not responsible for ensuring that the practices of traditional forums comply with human rights standards, the State does have an obligation to provide a forum for the adjudication of disputes and the prosecution of persons accused of criminal conduct. To the extent that the community's reliance on alternative justice systems is a result of a failure on the part of the State to provide these services, the State should be held accountable under international human rights law for this failure.

In some countries, such as South Africa, legislative or constitutional limits on traditional justice jurisdiction define and protect human rights.⁸⁷

⁸⁶ *Mhlekwana and Feni v. Head of the Western Tembuland Regional Authority and another.*

⁸⁷ PRI, *Access to Justice in Sub-Saharan Africa*, p. 43.

Other States have, or have had, provisions that have the opposite effect, exempting the application of customary law from some human rights guarantees.⁸⁸

Overlapping jurisdiction between the formal courts and traditional justice systems opens up the possibility for conflict of laws, particularly when the customary law applied by a traditional justice forum conflicts with statutory law or the jurisprudence of the formal courts.⁸⁹ This is especially important from a human rights perspective, as comparing the treatment of similar cases pursuant to customary law in the formal courts and traditional justice forums will help to discern the degree to which each system complies with human rights standards.

This chapter addresses specific international standards and areas of concern, as well as the positive aspects of traditional justice systems. Although in some cases human rights instruments may not have binding legal status, they nonetheless provide the framework for analysing the human rights practices of traditional justice systems.

B. RIGHT TO A FAIR TRIAL

Article 14 of the International Covenant on Civil and Political Rights sets out the standards for civil and criminal trials and is the principal

⁸⁸ Kenya, Zambia and Zimbabwe historically exempted areas of customary and religious law from the non-discrimination provision of the constitution. See United Kingdom Department for International Development, "Non-State justice and security services", p. 20.

⁸⁹ South Sudan is an example of the former. There, conflicts between customary law and statutory law, as well as between customary law and sharia, are increasingly common. See Jok, Leitch and Vandewint, "A study of customary law in contemporary southern Sudan", pp. 29–31. Malawi provides an example of the latter. Magistrates of the lower State courts are more willing to strike down as unconstitutional customary law than statutory law, and their jurisprudence in this differs from the customary law applied by the forums run by traditional leaders. See Schärf and others, "Access to justice for the poor of Malawi?", pp. 19–20.

international human rights instrument on this subject.⁹⁰ Regional human rights instruments also spell out procedural protections.⁹¹

1. Right to a fair and public hearing

The right to “a fair and public hearing by a *competent, independent and impartial tribunal*” applies equally to civil and to criminal cases.⁹² According to the Human Rights Committee, the right to an independent and impartial trial by a competent tribunal is an absolute right.⁹³ The structure and procedures of traditional justice systems pose concerns for the fulfilment of this right. Traditional justice systems appear in some ways to be incompatible with these standards, at least as they are conventionally defined. It is important, therefore, to examine the policy reasons for the standards and the extent to which these concerns are allayed.

Members of traditional justice mechanisms rarely have legal training and often lack an understanding of the written law. The relevance of these skills depends on the role of the traditional justice mechanism. If it applies oral customary law, it may be of little or no consequence. Other measurements of competence—such as familiarity with the disputants and experience in dealing with similar cases—may be more important. Closely related to the issue of their competence is that of their selection. The absence of standards may make it harder to ensure that the individuals making the decisions are qualified to hold positions of authority. Increasingly, there is a need to ensure gender representation.

⁹⁰ The Convention on the Rights of the Child (art. 40), the International Convention on the Rights of All Migrant Workers and Members of Their Families (art. 18) and the International Convention for the Protection of All Persons from Enforced Disappearance (art. 11) also address fair trial.

⁹¹ See the American Convention on Human Rights (arts. 8.1 and 27.2), the European Convention for the Protection of Human Rights and Fundamental Freedoms (art. 6.1) and the African Charter on Human and Peoples’ Rights (arts. 7.1 and 26).

⁹² International Covenant on Civil and Political Rights, art. 14.1 (emphasis added).

⁹³ *González del Río v. Peru*, communication No. 263/1987, Views adopted on 28 October 1992.

While the requirement set out in article 14 that tribunals should be independent refers to their independence from the State's executive and legislative branches as well as other types of pressures, such as financial inducements, the same underlying principles also apply to traditional justice mechanisms: the concern that political or financial or other external influences will corrupt the process. Indeed, this has been raised as a problem in some systems. Assessing a tribunal's independence requires a twofold inquiry: its independence with respect to the State and its independence with respect to community governance. The former is a concern when a traditional justice mechanism is dependent on or established by the executive branch of government, but less so for those traditional systems that operate apart from the other branches of government or entirely outside the ambit of the State. There may also be reason for concern at the community level, as leaders of traditional communities may play a role both in traditional justice mechanisms and in local governance. This concentration of power increases the risk of improper influence or corruption. Although corruption has been raised as an issue in the proceedings of traditional justice mechanisms, this also has to be seen in the context of the formal justice system, where corruption may also be a problem. A number of commentators have concluded that corruption is less prevalent in traditional justice systems than in the formal justice sector, bolstering the confidence of ordinary people in these forums.⁹⁴

The impartiality of traditional justice mechanisms is difficult to assess, as many are structured in a manner that emphasizes and even relies on traditional leaders' familiarity with the disputants. Knowledge of the parties may help to establish facts and provide relevant information on the background of the disputants. As a citizen of Burundi explained in the context of the *bashingantahe*, this promotes accessibility and efficiency: "The *bashingantahe* generally know, in the slightest details, the origin of the disputes they are called upon to settle, and thus it is easy to establish facts. It seems that, without the *bashingantahe*, the courts would be

⁹⁴ See, for instance, *Customary Justice: Perspectives on Legal Empowerment*, p. 92, and Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, IDLO, 2011), p. 25.

overwhelmed by disputes that would stifle their normal functioning.”⁹⁵ While the closeness of the traditional justice mechanism to the disputants may help achieve important aims, it also poses several risks. The key question here is whether the structure of traditional justice systems fails to protect against or even facilitates forms of undue influence.

Any unequal bargaining power of the parties may also undermine the process in less conspicuous ways. Distinctions along the lines of family, wealth or gender may play a greater role here than in the formal court system, given the traditional leaders’ knowledge of the parties and their position in the community. One report calls this “*the major weakness*” of a traditional justice mechanism, explaining further that “the process of compromise inherent in the system tends to reinforce existing social attitudes whether desirable or not.”⁹⁶ This problem may be exacerbated in forums where the community as a group holds the decision-making authority, as the disputants’ respective statuses in the community likely affects its decision.

Although it does not appear to be a concern relevant to most traditional justice mechanisms reviewed here, trial by ordeal or trial based on evidence derived from spiritual rituals or other types of inherently unreliable evidence has been reported in some countries. In Liberia, for example, despite trial by ordeal having been outlawed by jurisprudence since 1916,⁹⁷ non-violent forms of trial by ordeal appear to be still practised in parts of the country and permitted by regulations known as the Hinterland

⁹⁵ Dexter and Ntahombaye, “The role of informal justice systems”, p. 20. The *bashingantahé’s* knowledge of land boundaries, prior court decisions, and contracts and wills are examples of how their memory facilitates the process.

⁹⁶ Stevens, “Traditional and informal justice systems in Africa, South Asia, and the Caribbean”, pp. 52–53.

⁹⁷ *Jedah v. Horace* (1916) 2 LLR 63, in which the Supreme Court outlawed sassywood, a form of trial by ordeal that involves drinking a liquid that has poison in it, on the rationale that spiritual powers will protect the innocent. According to the Supreme Court, the practice sought to unlawfully extort a confession from the accused and was incompatible with the law that “no person shall be compelled to give evidence against himself”. See also *Tenteah v. Republic of Liberia* (1940) 7 LLR 63, in which the Supreme Court stated that trial by ordeal was unconstitutional and illegal.

Regulations. The most common form is designed to incite individuals to tell the truth and may involve identifying a guilty person by supernatural means or through a process called *kafu*, where all parties to a complaint share food specifically prepared so that those who do not tell the truth will suffer supernatural consequences.

Other harmful but not deadly types of trial by ordeal have also been reported, such as dipping a hand in boiling water or putting hot metal against the skin. These various tests are premised on the idea that supernatural power will protect the innocent and punish the guilty. Even violent trial by ordeal is still occasionally practised and tolerated in communities in some States. For example, the President of Liberia granted clemency to 14 individuals convicted for a death they caused in the course of a trial by ordeal.⁹⁸

In certain parts of Guinea-Bissau, inherently unreliable evidence derived from spiritual tests, animal sacrifices or boiled palm tree leaves is allowed at trial, which is incompatible with the requirement of fair trial to determine whether a person has committed a crime.⁹⁹

Finally, traditional justice systems based on the premise of collective responsibility, such as those found in Kenya and Somalia, rather than individual responsibility would appear to be inconsistent with the notions of individual responsibility for criminal conduct set out in article 14 of the International Covenant on Civil and Political Rights.¹⁰⁰

⁹⁸ Amanda C. Rawls, "Policy proposals for justice reform in Liberia: Opportunities under the current legal framework to expand access to justice", in *Customary Justice: Perspectives on Legal Empowerment*, pp. 104–105. See also Hanibal Goitom, "Trial by ordeal in Liberia", *Custodia Legis: Law Librarians of Congress*, 14 July 2011.

⁹⁹ "Final report of the project for the collection and codification of customary law in force in the Republic of Guinea-Bissau", prepared by the Faculty of Law of Bissau, and funded by UNDP and the European Union, pp. 51–54.

¹⁰⁰ Harper, *Customary Justice: From Program Design to Impact Evaluation*, p. 24.

2. Protections specific to the criminal context¹⁰¹

Article 14 of the Covenant outlines detailed procedural protections for defendants in criminal cases. This section focuses on those human rights standards that traditional justice systems may fail to meet.

Victims or their families may choose to bring their case to a traditional forum rather than to the formal courts. The accused, however, may have no choice in the matter. So even where the formal system provides adequate procedural guarantees, the defendant is not able to take advantage of them. Consequently, and if there is no procedure for transferring the case to the formal courts at the request of the accused, traditional justice mechanisms that exercise jurisdiction over serious criminal matters should be held to the same standard as formal courts. Such a situation is, however, unlikely to occur, as States have tended to restrict the civil and criminal jurisdiction of traditional justice mechanisms. Nevertheless, traditional justice mechanisms may go beyond their mandate, for example, when the formal courts are far away or do not exercise their jurisdiction in practice.

It should be noted that traditional justice systems and formal courts often formulate different outcomes, and the judgment by a traditional justice mechanism for conduct that could be characterized as criminal may be less severe than would be the case in a formal court system. This raises two questions: should traditional proceedings have more relaxed procedural standards if the act in question cannot be considered as a serious criminal offence?; and if the judgment by the traditional mechanism includes little or no punitive action, would this raise concerns about equality before the law?¹⁰²

¹⁰¹ For the purposes of this analysis, criminal cases are those where the proceedings (in whole or in part) are for actions that are commonly considered criminal, regardless of whether the tribunal makes this distinction.

¹⁰² As stated previously, traditional justice mechanisms should, in principle, not try cases involving serious criminal charges, according to the Human Rights Committee. See its general comment No. 32 (2007).

Traditional processes that resemble mediation or arbitration typically do not place strong emphasis on determinations of guilt and innocence. These reconciliation-focused, non-adversarial procedures may come into conflict with the right of the accused to be presumed innocent until proven guilty. Similarly, the emphasis on confession in some traditional justice mechanisms may violate the requirement that the accused should not be required to testify against himself or herself or to confess guilt.¹⁰³

(a) Right to counsel

The right to counsel¹⁰⁴ poses problems too, as the overwhelming majority of traditional justice systems surveyed ban lawyers from the proceedings. Like the requirement for impartiality, the right of the accused to retain counsel conflicts with some of the basic principles underlying the processes used by traditional justice mechanisms. The exclusion of counsel is thought to ensure that neither party will have an advantage over the other and serves to protect the informal procedures used by traditional justice mechanisms. The ban on formal legal representation does not, however, preclude a member of one's family or even a friend from speaking on behalf of the accused and this is often expected.

(b) Right to be tried without undue delay

The right to be tried without undue delay¹⁰⁵ and other rights related to access to justice may be the most apparent way in which traditional justice systems comply with human rights standards, often to a far greater extent than the formal courts.

¹⁰³ International Covenant on Civil and Political Rights, art. 14.2 and 3 (g).

¹⁰⁴ *Ibid.*, art. 14.3 (d).

¹⁰⁵ *Ibid.*, art. 14.3 (c). The right "to be tried without undue delay" is listed as a minimal guarantee for criminal trials.

(c) Right to appeal

The right to an appeal in criminal cases¹⁰⁶ may be in jeopardy in systems which do not have an appellate mechanism or where parties do not have access to a formal court to challenge the proceedings and judgment rendered in a traditional justice forum. In many traditional justice systems, the lack of paper records and written legal decisions makes review difficult or indeed impossible. As noted earlier, if the accused is not satisfied with the result of the traditional justice process and the outcome is not binding in the domestic legal order, he or she can in principle challenge the result and ask that the matter be judged *de novo* in the formal courts.

(d) Protection against being tried again for an offence for which a person has been finally convicted or acquitted

The protection against being tried again for an offence for which a person has been finally convicted or acquitted¹⁰⁷ might be at risk where the formal system can exercise concurrent jurisdiction over the accused. The possibility of being tried more than once for the same criminal conduct has been an issue in some States. Where both justice systems exercise jurisdiction, ideally the different justice systems can take into account each other's actions with a view to arriving at an overall result that is considered fair and just for both the accused and the victim.¹⁰⁸

(e) Victims' rights

Another positive feature of traditional justice systems is the inclusion of victims in the proceedings. Their participation is a right prioritized in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.¹⁰⁹ The importance of access to justice is emphasized as follows:

¹⁰⁶ *Ibid.*, art. 14.5.

¹⁰⁷ *Ibid.*, art. 14.7.

¹⁰⁸ See Hinz, "Traditional courts in Namibia – part of the judiciary?", in *In Search of Justice and Peace*, pp. 111–113.

¹⁰⁹ General Assembly resolution 40/34, annex. See, for instance, para. 6.

“Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are *expeditious, fair, inexpensive and accessible*” (para. 5, emphasis added). The Declaration notes the potentially valuable role of alternative forums in promoting victims’ rights: “Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims” (para. 7).

C. PROHIBITION OF TORTURE AND OTHER FORMS OF ILL-TREATMENT OR PUNISHMENT

The International Covenant on Civil and Political Rights provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (art. 7).¹¹⁰ With the exception of certain forms of trial by ordeal and certain practices relating to witchcraft, torture does not normally appear to be an issue in traditional justice systems. However, the Human Rights Committee has found other forms of ill-treatment used by traditional justice systems, such as corporal punishment, to be a violation of the Covenant’s prohibition of cruel, inhuman and degrading treatment or punishment.¹¹¹ It should be recalled that, historically, corporal punishment in the form of whipping has been used by many traditional justice systems in Africa. Although a number of States have abolished its use, it may continue to be practised in some traditional justice systems.

Another question is whether banishment from a specific geographic area by a traditional justice mechanism would constitute cruel, inhuman and

¹¹⁰ See also the Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹¹¹ See its General comment No. 32 (2007). See also Human Rights Committee, *Osbourne v. Jamaica*, communication No. 759/1997, Views adopted on 15 March 2000; *Higgison v. Jamaica*, communication No. 792/1998, Views adopted on 28 March 2002; and *Sooklal v. Trinidad and Tobago*, communication No. 928/2000, Views adopted on 25 October 2001.

degrading treatment or punishment within the meaning of article 7 of the Covenant or even be a violation of its article 12.¹¹² Article 12 provides that “everyone lawfully within the territory of a State shall, within that territory, have the right of liberty of movement and freedom to choose his residence”. It should be noted, however, that the rights under article 12 can be restricted, *inter alia*, for reasons of public order or to protect the rights and freedoms of others. South Africa has taken the position that banishment should not be used as a sanction,¹¹³ although some traditional leaders have criticized this and at least one (non-African) constitutional court has reached the opposite conclusion.¹¹⁴ It should be noted that banishment is not necessarily permanent but may be limited in time, even for the most serious crimes.¹¹⁵

D. RIGHT TO LIFE

As mentioned earlier, the Human Rights Committee has addressed the use of capital punishment by a traditional justice system in Madagascar in its concluding observations on the State party’s report. The Committee was concerned about the existence of a system of customary justice (*Dina*) which did not always produce fair trials. It regretted that summary executions had been perpetrated on the strength of *Dina* decisions. It took note of the assurance by the State party that *Dina* could no longer intervene in anything other than minor offences, and under judicial supervision. The Committee recommended that the State party should ensure that the *Dina* administer a fair justice system under the supervision of the State courts and invited

¹¹² See also “Access to justice for children” (A/HRC/25/35), para. 31.

¹¹³ “Policy framework on the traditional justice system under the Constitution”, p. 35, para. 6.7.5.2.

¹¹⁴ The Constitutional Court of Colombia, in its Decision T-523/97, upheld the practice of banishment of a person by an indigenous justice mechanism from a specific indigenous territory, reasoning that it was a culturally protected sanction and limited in scope, given that the banishment was limited to a specific indigenous territory and that the individual could live in other indigenous territories or non-indigenous areas of Colombia and therefore was not incompatible with article 34 of the Constitution.

¹¹⁵ Ezekiel Pajibo, *Traditional Justice Mechanisms: The Liberian Case* (Stockholm, International Institute for Democracy and Electoral Assistance, 2008), pp. 19–20.

it to ensure that no further summary executions were perpetrated on the strength of *Dina* decisions and that every accused person benefited from all the safeguards set forth in the Covenant.¹¹⁶ In South Sudan, it has been reported that a customary court sentenced an accused to death, although it was also acknowledged that the customary court had exceeded its jurisdictional authority granted to it by legislation.¹¹⁷

It has been reported that, in customary proceedings in Somalia, families of murder victims have the right to choose between compensation and the execution of the perpetrators.¹¹⁸ To put such a choice in the hands of the victim's family is clearly incompatible with the right to life.

As noted above, trial by ordeal has sometimes resulted in death. Moreover, persons, normally older women, who have been identified as witches have been executed.¹¹⁹ All such cases are clear violations of the right to life.

E. FREEDOM OF RELIGION OR BELIEF

The subject of witchcraft also presents issues relating to the right to freedom of religion or belief. Although belief in the supernatural and witchcraft are by no means confined to Africa, witchcraft is a subject that merits discussion in relation to traditional justice systems because, in some countries, traditional justice mechanisms address it as part of their subject-matter jurisdiction. Accusations of witchcraft, for example, may bring into the open disputes in the community between different individuals, and traditional leaders may have a role in mediating or otherwise finding a resolution to the conflict.¹²⁰ It should be noted that local authorities

¹¹⁶ See CCPR/C/MDG/CO/3, paras. 15–16. See also CCPR/C/MDG/2005/3.

¹¹⁷ International Commission of Jurists, "South Sudan: an independent judiciary in an independent State" (2013), p. 23.

¹¹⁸ Harper, *Customary Justice: From Program Design to Impact Evaluation*, p. 24.

¹¹⁹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (A/HRC/11/2).

¹²⁰ Maakor Quarmyne, "Witchcraft: A human rights conflict between customary/traditional laws and the legal protection of women in contemporary sub-Saharan Africa", *William & Mary Journal of Women and the Law*, vol. 17, No. 2 (2011), Article 7, p. 482.

may be reluctant to interfere in such matters and may, depending on the circumstances, defer to traditional leaders.

Spiritual beliefs of various kinds may be an important aspect of traditional communities and play a role in reinforcing the power of chiefs, subchiefs, headmen or councils of elders in exercising their functions in traditional justice systems. These spiritual beliefs may be associated with a wide variety of belief systems and have positive as well as negative associations. For example, such beliefs can help explain certain occurrences or inexplicable coincidences, and help with articulating and coping with psychological problems, or assist in rituals designed to heal or cleanse a person's spirit. It has been reported that, in some traditional communities, elders sometimes function as mediums in communicating with the spirits of the dead.

However, they may also be associated with accusations of witchcraft, sorcery and curses, which are frequently directed at women, in particular older women, as well as children. Although witchcraft is difficult to define, these five criteria can help to define witches and witchcraft: (a) witches use non-physical means to cause misfortune or injury to others; (b) harm is usually caused to neighbours or kin rather than strangers; (c) strong social disapproval follows, in part because of the element of secrecy and in part because their motives are not wealth or prestige but malice and spite; (d) witches work within long-standing traditions, rather than in one-time only contexts; and (e) other humans can resist witches through persuasion, non-physical means (counter magic), or deterrence including through corporal punishment, exile, fines or execution.¹²¹

In practice, persons accused of being witches and having exercised witchcraft are blamed for misfortunes that have affected a person or a family in the community. These could be one or more deaths that are otherwise unexplainable, sickness, inability to bear children, impotence, mental or physical disability, underdevelopment in the community or

¹²¹ Ronald Hutton, "Anthropological and historical approaches to witchcraft: Potential for a new collaboration?", *Historical Journal*, vol. 47, No. 2 (June 2004).

other unexplained and painful phenomena. Anecdotal evidence suggests that accusations of witchcraft may be directed against persons in the community who are simply different, unpopular or for some reason feared or intensely disliked. If the woman is forced to leave the community as a result of these accusations, then her children will often be forced to leave with her. If the woman is killed, then her children are sometimes forced to leave the community because no one will care for them. In some cases, it is believed that being a witch is either hereditary or handed down from parent to child, so that if the adult is categorized as a witch, then the children may be too.¹²²

Although witchcraft has been examined only to a limited extent by human rights mechanisms,¹²³ an OHCHR report has addressed it with reference to persons with albinism.¹²⁴ The report focuses on ritual attacks against persons with albinism, reportedly with the aim of using their body parts for witchcraft.¹²⁵ These attacks, mutilations and killings are clearly incompatible with human rights, including the right to life, the right to security of person and the prohibition of torture and ill-treatment. OHCHR received information about more than 200 ritual attacks against persons with albinism in 15 countries between 2000 and 2013.

Witchcraft may also be relevant in the context of refugee protection. The United Nations High Commissioner for Refugees (UNHCR) has issued guidelines on religion-based refugee claims, in which it recognizes that

¹²² Quarmyne, "Witchcraft", pp. 478–479.

¹²³ See, for instance, A/HRC/11/2.

¹²⁴ A/HRC/24/57. Albinism is a rare, non-contagious, genetically inherited condition present at birth. It results in a lack of pigmentation in the hair, skin and eyes, causing vulnerability to the sun and bright light. Almost all people with albinism are, consequently, visually impaired and prone to developing skin cancer.

¹²⁵ See also Special Representative of the Secretary-General on Violence against Children and Plan International, "Protecting children from harmful practices in plural legal systems with a special emphasis on Africa" (New York, 2012), which states that persons with albinism are perceived as "a curse from the gods and a charm made from their body parts is considered to have magical powers that bring wealth, success and good luck".

women continue to be identified as witches in some communities and may be burned or stoned to death.¹²⁶

The Special Rapporteur on extrajudicial, summary or arbitrary executions identified a number of situations in, for example, Burkina Faso, Gabon, Kenya and the United Republic of Tanzania where accusations of witchcraft had resulted in the death of women or children. The Special Rapporteur noted that the Committee on the Elimination of Discrimination against Women had received estimates that up to 1,000 persons were being killed annually in the United Republic of Tanzania because they had been found to be witches. In the Democratic Republic of the Congo and Nigeria, civil society reports suggested that many children were being abandoned on the grounds that they were witches.¹²⁷

The legal response to this phenomenon has been problematic. The criminalization of witchcraft in a number of African States has not yielded significant results and these laws do not appear to be always widely enforced. In 1998, a national conference in South Africa called for the repeal of the Witchcraft Suppression Act of 1957, in part because it could inadvertently be fuelling witchcraft violence. The problem is that witchcraft is seen as part of a larger belief system in which many also see positive features and not only negative aspects. Also, the nature of the conduct that is to be condemned is somewhat vague; hence, the alternative approach is not to condemn the belief system itself, but rather the criminal conduct that may be related to it, such as murder, physical abuse or the abandonment of children.

The traditional authorities and the formal justice sector should both work to ensure that such cases are investigated, prosecuted and punished as appropriate. Moreover, information, dialogue and education are required at the level of the traditional leadership and the community about what may

¹²⁶ HCR/GIP/04/06, para. 24. See also Jill Schnoebelen, "Witchcraft allegations, refugee protection and human rights: a review of the evidence", *New Issues in Refugee Research*, No. 169 (UNHCR, 2009); Nathalie Bussien and others, "Breaking the spell: responding to witchcraft accusations against children", *New Issues in Refugee Research*, No. 197 (UNHCR, 2011).

¹²⁷ A/HRC/11/2, para. 49.

cause unexpected deaths, physical and mental disability, unusual medical conditions, as well as impotence or the inability to bear children.¹²⁸

F. RIGHT TO EQUALITY AND NON-DISCRIMINATION

The International Covenant on Civil and Political Rights sets forth the applicable legal standard for the right to equality and non-discrimination: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law” (art. 26). Bias in the justice system, whether hidden or explicit, can threaten this right in several ways.

1. How discrimination can manifest itself

It has been claimed that traditional justice systems tend to reinforce existing power relations in a community and, in some cases, may discriminate against certain groups. Groups that face discrimination on the basis of gender, race, colour, age, property, birth, disability or national or social origin are some of those that may have difficulties in traditional justice systems. This section explores how such discrimination can manifest itself. The first and most apparent problem is the effect that discrimination has on judgments. As respondents, members of groups subject to discrimination may face excessive punishment or fines; as complainants, such persons may receive an insufficient judgment (low award or light punishment for the offender). Even if the substantive and procedural customary law is not in itself discriminatory against persons belonging to certain groups, its application may be. Arguably unwritten customary law presents a high risk that it could be applied unfairly or unevenly.

There are several other related consequences of bias or discrimination in the system. First, barriers to the formal justice system are often higher for members of groups facing discrimination. This means that challenging the law or “moving the law” in a direction that favours groups subject to discrimination may prove particularly difficult. In short, the individual’s

¹²⁸ *Ibid.*, paras. 51–59.

ability to assert his or her rights is compromised where the choice of forum is limited and access to appeal is difficult. What is important to note here is that the relationship between the traditional justice system and the formal court system must be taken into consideration, as the individual's access to one or the other or both will influence his or her ability to assert the right to equality and non-discrimination.

The subject-matter jurisdiction of traditional justice systems can also be a factor in discrimination. If, for example, traditional justice systems commonly deal with types of disputes or crimes that have an impact on individuals or groups subject to discrimination, these persons will be disproportionately affected by deficiencies in these system. On the other hand, the homogeneity of traditional justice systems may limit certain types of discrimination. If all or virtually all of the members of the community share the same ethnic background, for example, there would be little or no opportunity to discriminate on the basis of ethnicity.

2. Discrimination against women

The non-discrimination clauses of the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women ban discrimination on the basis of sex. The latter defines discrimination against women as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, social, cultural, civil, or any other field" (art. 1). According to its article 15, women shall be equal with men before the law and, in civil cases, women shall have the same legal capacity as men (specifically, the right to execute contracts, administer property and be treated equally in all stages of the procedure). Article 16 requires that States parties "take all appropriate measures to eliminate discrimination against women", for instance, in matters of rights and responsibilities upon marriage and divorce, and in the "ownership, acquisition, management, administration, enjoyment and disposition of property."

Discrimination against women is one of the most commonly cited human rights issues in the context of traditional justice systems. The level of female leadership in such systems remains low, although there is evidence of positive developments in recent years. In Namibia, for example, it has been reported that since independence women have had a much greater role in traditional court meetings and been encouraged to play an active role, and have had leadership roles in certain villages. A large majority of respondents indicated that men and women were treated equally before traditional courts and had an equal chance to obtain a fair decision.¹²⁹

In South Africa, women have been installed as traditional leaders. In a landmark case in 2002, a woman was officially installed as a traditional leader, but her uncle's son challenged this in the High Court in Pretoria claiming that it was in conflict with customary law. Relying on written customary law, the High Court ruled in favour of her uncle's son, and this decision was upheld by the Supreme Court of Appeal, saying that succession followed particular customary rules. On appeal to the Constitutional Court, the judgment was made in favour of the woman. The Constitution Court said, "customary law is by its nature a constantly evolving system. [...] the content of customary law must be determined with reference to both the history and the usage of the community concerned."¹³⁰

Concerns about gender discrimination may stem in part from the reliance on mediation and reconciliation in dispute resolution, which may favour the more powerful male members of society, who may hold stereotypical views of women. Similarly, decisions made by the leaders of the community, or by the community as a whole, may disadvantage women, who typically are less powerful. More broadly, deep-seated stereotypes about the role of women in the community may play a role.

¹²⁹ Janine Ubink, "Gender equality on the horizon: The case of Uukwambi traditional authority, northern Namibia", in *Working with Customary Justice Systems: Post-Conflict and Fragile States*, Erica Harper, ed. (Rome, IDLO, 2011), p. 67.

¹³⁰ *Shilubana and Others v. Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC), Judgment of 4 June 2008, paras. 45–49.

Gaining access to a traditional justice forum and guaranteeing enforcement of awards may present particular difficulties for women. Pressure by the family and community can make it more difficult to take the dispute outside the traditional forum. Property division upon divorce or becoming a widow under customary law in most traditional justice systems may see the property pass to the husband's family. Following divorce or the death of the husband, women often return to their families rather than trying to keep part of their land or house. Pressures arising from customary law or tradition also discourage them from taking land disputes to the formal courts.¹³¹

Inheritance by women is particularly problematic in countries that define the family on the basis of matrilineal descent, i.e., with family descent traced through the mother and maternal ancestors. This is in contrast to the more common system in most developed countries, where descent is traced through both parents. As matrilineal descent systems are common in much of Africa, this has resulted in situations where, on the death of a husband, the wife inherits nothing because she is not considered part of his family, and inherits only from her own family. Despite the customary obligation on the husband's family to support the widow and her children, it has been reported that widows and their children have been chased out of the family home. If the woman stays in the home or on the land she occupied with her husband, there is usually a customary norm that requires her to make a payment to the traditional leaders for the land in question.¹³² Patrilineal systems, which are present in some parts of Africa, also discriminate against women, as property devolves through the male line from father to son.¹³³

¹³¹ Amrita Kapur, "Two faces of change: the need for a bi-directional approach to improve women's land rights in plural legal systems", in *Working with Customary Justice Systems*, pp. 77–85.

¹³² Ubink, "Gender equality on the horizon", p. 65.

¹³³ See Amrita Kapur, *Enhancing Legal Empowerment through Engagement with Customary Justice Systems*, Customary Justice Working Paper Series, No. 2 (IDLO, 2010), pp. 7–8.

Additionally, in some traditional communities customary law applicable to inheritance provides that property should be passed on only to the male, sometimes either the first-born or last-born son or closest male relative, depending on the customs of a particular community. The rationale is that this is the only way of preserving the wealth of the extended family and that women, if allowed to inherit, would take that wealth to another family.

There have, however, been some legal and legislative challenges to customary law in this regard. In some countries, there have been reform movements either in the customary law itself or through legislation to allow the woman to stay in the family home as a matter of right and without paying compensation, even when lineage is defined by matrilineal descent or the custom otherwise favours transmission of property only through sons or closest male relatives.¹³⁴ In Botswana, customary law was successfully challenged by four sisters who had lived with their mother after their father had died and had looked after their mother until her subsequent death. They argued successfully that they had financially contributed to the upkeep of the home, that they had used their own finances to renovate the property, and that it was the only home they had ever known. Although the Customary Court of Appeal found that under the traditional community's customs the women could not inherit the family home, an appeal to the High Court and the Appeals Court in the formal court structure both ruled in their favour.¹³⁵

In a number of African countries, traditional justice systems may discriminate against women in other ways as well. Perpetrators of rape may escape with relative impunity, victims of domestic violence may have little or no redress, and child marriages or forced marriages may be accepted by local customs and values. In rural communities in particular, widows may be expected to marry the brother of the deceased husband, a custom known as levirate. Under *xeer* law in Somalia, forced marriages are not

¹³⁴ *Ibid.*, pp. 65–67.

¹³⁵ Pumza Fihlani, "The four sisters who took on Botswana's chiefs – and won", *BBC News*, 23 October 2013. Available from www.bbc.com/news/world-africa-24623692.

uncommon: widows must marry a male relative of the deceased husband, the sister of a deceased wife must marry the widower and rape victims may be forced to marry their attacker. Women also do not have the right to inherit certain forms of property.¹³⁶

The Human Rights Committee has addressed the issue of discriminatory treatment of women by customary laws and practices in African States and frequently found violations of the Covenant. For example, in its concluding observations on the report of Botswana,¹³⁷ it said that the State party should outlaw polygamy, which violated the dignity of women, and take effective steps to discourage the persistence of customary practices that were highly detrimental to women's rights. The State party should increase its efforts to raise awareness of the precedence of constitutional law over customary laws and practices, and of the entitlement to request the transfer of a case to constitutional law courts, and of appeal before such courts. It added that the State party should ensure the full participation of women in its review of customary laws and practices.

In its concluding observations on the report of Zambia,¹³⁸ the Committee expressed its concern at the persistence of customary practices that were highly detrimental to women's rights, such as discrimination in the area of marriage and divorce, early marriages and childbearing, bride price and polygamy, and reported restrictions on women's freedom of movement. The Committee indicated that the State party should strengthen its efforts to ensure compliance of customary laws and practices with the Covenant and adopt concrete steps to discourage the persistence of customary practices that are highly detrimental to women's rights. It should also pay particular attention to ensuring the full participation of women in the ongoing review and codification of customary laws and practices.

¹³⁶ Le Sage, "Stateless justice in Somalia", p. 38

¹³⁷ CCPR/C/BWA/CO/1, paras. 11–12.

¹³⁸ CCPR/C/ZMB/CO/3, para. 13.

In its concluding observations on the report of Kenya,¹³⁹ the Committee concluded that the continued application of some customary laws, including the permissibility of polygamous marriages, undermined the scope of the non-discrimination provisions in the Constitution and other legislative texts. The Committee made similar concluding observations with regard to polygamy in Benin and Gabon.¹⁴⁰

The Convention on the Elimination of All Forms of Discrimination against Women has a number of provisions to protect women from discrimination that are potentially applicable to traditional justice systems, including articles 5 (elimination of stereotyped roles for men and women, and the idea of inferiority of either of the sexes), 15 (equality before the law) and 16 (elimination of discrimination against women in all matters relating to marriage and family matters).

The Committee on the Elimination of Discrimination against Women has called for an end to customary laws that discriminate against women in a number of its concluding observations on State party reports. In its concluding observations on the report of Zimbabwe,¹⁴¹ it has called for an end to customary norms that discriminate against women with regard to polygamy, bride price, marriage and its dissolution, inheritance and property rights. In its concluding observations on the report of Equatorial Guinea, the Committee identified a number of customary norms that discriminate against women, including matters involving the minimum age for marriage, the grounds for and the effects of the dissolution of marriage, polygamy, child custody, the legal effects of marriage, division of property acquired during marriage, inheritance rights, and the lack of access of women to civil courts to defend their rights.¹⁴² In its concluding observations on the report of the Democratic Republic of the Congo, the Committee found that customary norms that discriminate against women include levirate, “pre-marriage” authorized before the legal age of

¹³⁹ CCPR/CO/83/KEN, para. 10.

¹⁴⁰ CCPR/CO/82/BEN, para. 10, and CCPR/CO/70/GAB, para. 9.

¹⁴¹ CEDAW/C/ZWE/CO/2-5.

¹⁴² CEDAW/C/GNQ/CO/6, paras. 43–44.

marriage and polygamy, and urged the State party to raise the awareness of traditional groups and leaders on the importance of reviewing these discriminatory practices against women.¹⁴³

The African Charter on Human and Peoples' Rights and its Protocol on the Rights of Women in Africa also have provisions that are relevant to traditional justice systems. These include, in particular, the Protocol's articles 4 (prohibition of all forms of violence against women), 5 (obligation to eliminate all harmful practices against women), 6 (prohibition of marriage without the free and full consent of both parties and fixing the minimum age of marriage for women at 18), 20 (the right of a widow to remarry and to marry the person of her choice; widows shall not be subject to inhuman, humiliating or degrading treatment) and 21 (a widow shall have the right to an equitable share in the inheritance of the property of her husband; a widow shall have the right to continue to live in the matrimonial house).

While this analysis focuses primarily on the potential for human rights violations, the possible benefits to women of the traditional justice systems also need to be mentioned. Where formal courts are inaccessible, traditional justice systems may be the only option available to women to obtain redress. Despite the problems outlined above, a traditional justice forum for women may provide an opportunity to adjudicate a dispute and receive a judgment. The possibility to access a less intimidating traditional justice forum located in the community, the lower costs involved and the possibility of obtaining a relatively prompt settlement of a dispute may make the traditional justice process attractive, at least in some situations, compared to taking a dispute to the formal courts. This observation speaks to the need to improve access to the formal courts as well as to reform gender bias in traditional justice systems. At present, however, most traditional justice systems are probably vulnerable to criticism regarding gender discrimination. On a wide range of issues, including early or forced marriage, divorce, inheritance rights, restrictions on freedom of movement, as well as criminal matters such as assault, sexual violence and

¹⁴³ CEDAW/C/COG/CO/6.

rape, women would normally be better off by pursuing claims in the formal courts rather than in traditional forums.

G. RIGHTS OF THE CHILD

Traditional justice mechanisms tend to be more available to children and their families and provide for less formal means of conflict resolution than the formal courts. The Special Representative of the Secretary-General on Violence against Children has noted that customary justice systems tend to use more accessible language, have a greater potential for healing, are less costly and promote more direct involvement between the accused and the victim, as well as between their families and the community more generally. A child normally appears in a traditional justice proceeding with a member or members of his or her family, and the focus tends to be on reparation, reconciliation and ensuring the child remains part of the community.¹⁴⁴ Customary justice processes do not normally involve the detention of children, either in the pretrial stage or after judgment, avoiding the harmful effects of detention on children and the risk of violence to children in detention.

Human rights concerns may, nevertheless, also arise for children in proceedings before traditional justice mechanisms.¹⁴⁵ One of the disadvantages of reliance on customary law with regard to children is that in many communities the age of maturity is 10 years or even younger, leading to the risk of such children being treated as adults at a very young age.¹⁴⁶ Corporal punishment and banishment of children may still occur as well.¹⁴⁷ It has also been argued that customary justice systems may support harmful traditional practices that directly affect children such as early and

¹⁴⁴ Special Representative of the Secretary-General on Violence against Children, "Promoting restorative justice for children" (New York, 2013), p. 25.

¹⁴⁵ *Ibid.*, pp. 25–26. Special Representative of the Secretary-General on Violence against Children, "Protecting children from harmful practices in plural legal systems," p. 9.

¹⁴⁶ Special Representative of the Secretary-General on Violence against Children, "Promoting restorative justice for children", p. 25.

¹⁴⁷ A/HRC/25/35, para. 31.

forced marriage.¹⁴⁸ Children, like adults, should have the possibility of accessing the formal courts if they wish to assert their rights, and it is not clear that this is always respected in practice.

As mentioned previously, traditional leaders in charge of customary justice mechanisms may not be literate or, if literate, may not be familiar with the Convention on the Rights of the Child and the concept of the best interests of the child. Similarly, they may not be familiar with the African Charter on the Rights and Welfare of the Child, which stresses the obligation of States to take appropriate measures to eliminate “harmful social and cultural practices affecting [...] the child” (art. 21), and also states that any customary or traditional practice that is inconsistent with the Charter shall be “discouraged” (art. 1).

¹⁴⁸ Report by the Special Representative of the Secretary-General on Violence against Children, “Protecting children from harmful practices in plural legal systems”, p. 9; see also CCPR/C/ZMB/CO/3; CEDAW/C/GNQ/CO/6; and CEDAW/C/KEN/CO/6.

IV



PROGRAMMATIC STRATEGIES



A. STATE RECOGNITION OF TRADITIONAL JUSTICE SYSTEMS

States should consider recognizing traditional justice systems and incorporating them into their legal framework to improve compliance with human rights. Whether doing so will improve the legal system is, nevertheless, a topic of debate, with some arguing that integrating traditional justice systems into the legal framework would undermine the voluntary nature of the traditional process, defeat the concept of social consensus and public participation, and create the risk that decisions would be overturned on appeal due to the lack of strict procedural rule in traditional forums, according to this argument.¹⁴⁹

Others support efforts at incorporation, arguing that the two systems can be complementary, and that many traditional justice systems function as a type of alternative dispute resolution mechanism that has a number of positive features for the parties.

While State recognition of traditional justice systems would normally be desirable, States should proceed carefully to ensure that traditional justice systems do not lose their positive aspects, that the authority of the leaders of these systems is not undermined, and that human rights are respected and protected in proceedings before such forums. A legal framework providing for State recognition should provide the option for any party to such proceedings to oppose his or her participation and have the matter tried in the formal courts, particularly in cases where a fundamental right protected by the constitution or a regional or international human rights instrument is concerned.

B. LIMITATIONS ON JURISDICTION

Jurisdictional limitations on practices that pose a threat to human rights standards are one means by which States can limit the potential for human rights violations.

¹⁴⁹ See PRI, *Access to Justice in Sub-Saharan Africa*, p. 129.

Many States require serious criminal offences to be tried in the formal courts and, if such offences are initially brought before traditional justice mechanisms, they must be transferred to the formal courts. This approach should be embraced as it ensures that persons charged with serious crimes receive the full procedural protections of the formal courts. The imposition of jurisdictional restrictions, however, has met with complaints from traditional leaders. In Burundi, for example, limitations on the *bashingantahe* to exercise jurisdiction over criminal offences has resulted in offenders going unpunished.¹⁵⁰ Traditional leaders who preside over customary courts in Limpopo, South Africa, have reportedly expressed similar concerns over limitations imposed on them.¹⁵¹ Respect for their authority is seen by traditional leaders as essential for compliance with their judgments.¹⁵²

C. WOMEN'S RIGHTS

States should vigorously enforce the prohibition of discrimination against women, violence against women, including sexual violence, and harmful practices affecting women, in accordance with national, regional and international human rights standards. Traditional authorities and others involved in traditional justice mechanisms should be educated and trained to ensure that customary law or practices that are incompatible with the human rights of women are no longer applied by traditional justice systems.

Increased representation of women in traditional justice systems should be encouraged. There have been some promising efforts to improve the human rights practices of traditional justice systems. For example, in Limpopo,

¹⁵⁰ Dexter and Ntahombaye, "The role of informal justice systems", p. 18.

¹⁵¹ Tshehla, "Traditional justice in practice", pp. 33–34.

¹⁵² See, for instance, Dexter and Ntahombaye, "The role of informal justice systems", p. 13: "Normally, the person who lost the case would comply with the judgment spontaneously (before the tribunal) to avoid the opprobrium of his community and the authority of the chief to confiscate all his goods, or to impose the worst of all punishments—exile. Because of the prestige of the *bashingantahe* and the confidence in their process, the person who lost a case may call into question the result, but never the *bashingantahe*."

South Africa, at least one third of the members of traditional councils must be women.¹⁵³ In Namibia, there have been gender mainstreaming efforts to include women in traditional courts.¹⁵⁴ The hope is that, by including more women from the community in the traditional justice mechanisms, the problems experienced by women will be reduced and the political influence of women strengthened.

D. LEGISLATIVE OR CONSTITUTIONAL REFORM

Constitutional or legislative reform may facilitate human rights protection in traditional justice systems.¹⁵⁵ Some legal reforms merit further study for potential replication elsewhere. For example, in some States customary laws of inheritance disenfranchise the widow, and the house, land and personal property pass to the deceased husband's family. This often leads to the widow losing her house and the personal and household property it contains, as well as the surrounding land, a phenomenon referred to as "land grabbing". However, in Zambia, the Intestate Succession Act provides the widow with a right to a specified percentage of the estate, and a life tenancy in the matrimonial house, and ensures that she will inherit the personal and the household property contained in it.¹⁵⁶

E. EDUCATION AND INFORMATION

Improving knowledge of traditional justice systems is an important avenue for gaining a better understanding of these mechanisms and a better appreciation of the specific needs for legal reform. It is important to promote

¹⁵³ Limpopo Traditional Leadership and Institutions Act 6 of 2005, art. 4 (6)(a).

¹⁵⁴ Ubink, "Gender equality on the horizon", pp. 61–63.

¹⁵⁵ See, for instance, Denmark, Ministry of Foreign Affairs, Danida International Development Cooperation, "How to note: Informal justice systems".

¹⁵⁶ See also Daphne Chabu, "A critical analysis of the efficacy of the Intestate Succession Act chapter 59 of the Laws of Zambia in protecting the rights of widows", Master's dissertation, Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe, September 2005.

national research and for educational institutions to undertake this work over time. A number of States already have university programmes that have extensive knowledge of these systems. The University of Namibia's Faculty of Law offers certificate programmes in traditional justice, which include field research. The programme trains lawyers who are versed in both traditional justice systems and the formal courts, creating important expertise for understanding and moving between both.

The criminology section of the University of Cape Town's Law Faculty has a long history of studying these issues from a criminal perspective. The Faculty at the University of Pretoria has developed expertise in human rights and traditional justice systems, including how land rights in particular are affected. Human rights expertise is also available at the National University of Lesotho, the Cheikh Anta Diop University of Dakar and no doubt many other African universities and research institutions. International organizations and donors have financed a number of interesting studies in recent years and should continue to do so.

F. HUMAN RIGHTS TRAINING

Human rights training for traditional leaders could be another promising avenue for technical assistance. The focus should be on a State's constitution and laws, the African Charter and its protocols, and international human rights treaties. The framework for a training course for its traditional leaders has been developed in South Africa and it includes a component on human rights. States may wish to consider making participation in training courses a condition for traditional leaders to continue to exercise their functions in traditional justice mechanisms. Donors, international organizations and NGOs have to some extent already supported some training programmes for traditional leaders.

Training should also be required for judges and legal professionals who work in the formal courts so as to increase their understanding of customary law and how it is applied by traditional justice mechanisms, while taking into account the need to protect human rights.

G. INCREASED ROLE FOR EMPOWERMENT INITIATIVES BY NON-GOVERNMENTAL ORGANIZATIONS

States, donors and international organizations should increase support to civil society initiatives to empower individuals and groups, and women in particular, to have a better knowledge of their legal rights, to exercise those rights and to access formal courts in addition to traditional justice mechanisms. A number of initiatives by NGOs have focused on human rights training programmes for traditional leaders, with a view to ensuring that they have a better understanding of when customary norms are incompatible with human rights. NGOs have also provided assistance to rural and poor populations to access both traditional justice mechanisms and formal courts. NGOs should continue to support awareness-raising concerning women's rights in traditional communities.

H. TECHNICAL ASSISTANCE TO STATES AND TRADITIONAL COMMUNITIES

Technical assistance on human rights issues to States as well as to traditional communities could improve the protection of human rights. It is important to provide advisory services on economic, social and cultural rights, the rights of women, children and persons with disabilities, as well as on civil and political rights.

V



**FINAL
OBSERVATIONS**



Functional and accessible dispute resolution systems are important for a State's legal system to function effectively. Accessibility is a necessary prerequisite for the protection of human rights. As noted in a study on Malawi: "It is therefore imperative that justice strives to adjust to people's realities otherwise they will create extra-State institutions and remedies for their immediate needs."¹⁵⁷ The prevalence of traditional justice systems demonstrates this point, as they often serve to fill the gaps of the formal courts, which may not be easily accessible to persons in traditional communities.

Legal pluralism, where formal and traditional justice systems complement each other, may be the best option for many States. Each system can fulfil needs that the other cannot, or at least not easily. For example, traditional justice mechanisms may be best suited to minor disputes in traditional communities, while serious criminal offences require the procedural safeguards of the formal courts. Disputants before a traditional justice mechanism should have the choice to bring their claims to a formal court, particularly if they do not feel the traditional justice forum will adequately protect their human rights.

Accessibility and choice of forum alone are not sufficient, however.¹⁵⁸ All justice systems, including both the formal courts and traditional justice forums, must serve the needs of the population while upholding human rights standards. Improving the human rights practices of traditional justice systems requires a delicate balance between preserving their positive aspects and unique approach and ensuring that human rights are respected. Interventions should be designed to address the specific problems facing traditional communities and take into account the possible consequences of any changes that are introduced, as well as the broader social and political context.

¹⁵⁷ Schärf and others, "Access to justice for the poor of Malawi?", p. 4.

¹⁵⁸ "Access to justice is, therefore, much more than improving an individual's access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable." UNDP, "Access to justice", pp. 5–6.



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