## Helpdesk Research Report

# Policy approaches and lessons from working with non-state actors in security and justice

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## Question

*What are the different donor policy approaches to working with non-state actors in security and justice? (Refer to the differences and similarities with DFID's approach). What lessons emerge from other donors' work?[1]*

## Contents

## 1.  Overview

This rapid literature review collates information about donor policy approaches and lessons in working with non-state actors in security and justice activities. While terms vary, DFID (2004) defines non-state justice and security systems as 'all systems that exercise some form of non-state authority in providing safety, security and access to justice. This includes a range of traditional, customary, religious and informal mechanisms that deal with disputes and / or security matters'. The term 'non-state' in this context has now been largely dropped by academics (see lessons) – other more popular terms include 'local providers', 'customary justice' (World Bank) or 'informal' (expert comments). These terms are used to cover a diverse group of actors including: citizens organised on a voluntary basis; private security groups; informal local

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[1] See related query: Herbert, S. (2014). *Donor policy approaches to security and justice.* (GSDRC Helpdesk Research Report 1189). Birmingham, UK: GSDRC, University of Birmingham. http://www.gsdrc.org/go/display&type=Helpdesk&id=1189

government security structures; customary chiefs; religious police; anti-crime groups; restorative justice community-based organisations; militias; secret societies; religious leaders; gangs; paralegals; trade associations; etc (Baker, 2011, p.27; Denney, 2012).

At least 80 per cent of justice services in sub-Saharan Africa are thought to be delivered by non-state providers (OECD, 2007, p.11). Over the past decade, donors have increasingly recognised the central role played by non-state actors. However, working with non-state providers is still 'relatively overlooked'; donors are still 'primarily concerned with building state provision' and are wary of the (real and/or perceived) risks of working with non-state actors (Baker, 2011, p.27, 9; Denney, 2012; expert comment).

There is **very little donor-produced literature** detailing policy approaches to working with non-state actors in security and justice. While almost every donor policy document highlights its importance, and includes a few lines about it (generally defining the terms), this is often the only information that is provided. It is likely that some donor evaluations are not publically available. Much of the most relevant publically available donor literature is relatively old (e.g. Wojkowska, 2006; DFID, 2004; UNDP, 2006). As per the request, the main part of this rapid review focusses only on donor literature (policy papers, briefings, donor evaluations, etc). It therefore does not include the significant and growing body of literature analysing donor approaches to (non-state) security and justice produced by academics.[2] This rapid mapping did not find literature that synthesises donor policy approaches, nor comparable information about donor presence in this area. Therefore, the selection of donors is indicative, not conclusive, and the examples are anecdotal.

### Findings

- **DFID** has a rule of law policy approach. Programming decisions are made by a context-based, problem solving approach and therefore the policy does not identify overarching actors or themes for engagement. Is one of few donors to have published a briefing (DFID, 2004) entirely focussed on engaging with non-state security and justice actors. Engaging with non-state actors is also emphasised in the most recent policy document (DFID, 2013) and on the website.[3]

- **UNDP** takes a human-rights based justice sector reform approach focuses on strengthening formal and informal justice system, especially for the poor and marginalised. It has published guidelines with a section focussing on non-state actors (UNDP, 2006), and a report analysing lessons (Wojkowska, 2006).

- **USAID's** rule of law programmes work with non-state justice institutions to improve access to justice, and seek to strengthen legitimacy by harmonising non-state customary or religious law with state-based body of law. A summary of an unpublished USAID guidance note focussing on non-state actors is available online (Pavlovich in Mcloughlin, 2009).

Supporting non-state justice and security is widely acknowledged to be a highly complex and controversial area which donors have historically tended to avoid. **Lessons** include:

- **The limits of the state-focussed capacity building model:** There has been continued recognition by donors that purely focussing on state institutions limits the effectiveness, reach, relevance and sustainability of security and justice programming.

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[2] E.g. by academics Jackson, Baker, Scheye, Denney, Price, Warren, etc.
[3] See - https://www.gov.uk/government/policies/helping-developing-countries-to-be-better-run-and-more-accountable

- **A multi-layered approach?** Many donors identify the OECD principles as guiding their policy. The key OECD recommendation is for international actors to take a multi-layered approach targeting assistance at state and non-state actors simultaneously.

- **Difficulties determining 'state' and 'non-state' actors:** The very use of the term non-state actor is contested as the category includes a vast number of highly diverse actors and the definition is not consistent across donors.

- **Understanding the context:** Donors can misunderstand the legal context in a country with difficulty distinguishing between non-state and state actors. This can lead to damaging programmatic consequences, hindering the ability of donors and programmes accurately to assess the political context, and constraining the ability of programmes to determine risk and risk mitigation strategies.

- **Using a problem-solving approach:** Thinking about justice and security development through the lens of 'non-state actors' – or any other 'institution' – hinders undertaking a problem-specific analysis, for its default assumption is that an effective programme lies within the realm of an 'institution,' 'agency,' and/or 'non-state actor'.

- **A bottom up rather than a top down model:** Non-state justice systems can often be the closest justice system, addressing issues most relevant to poor people, more physically and financially accessible, and more familiar to individuals speaking local languages.

- **Equality of access and human rights:** Equality of access and human rights can be a concern as non-state institutions may discriminate against women or marginalised groups.

- **Strengthening dialogue:** Support to non-state actors may worsen conflicts between state and non-state actors. Dialogue is key to ensure all are consulted.

## 2. Donor policy approaches to working with non-state actors

### DFID (UK) [4]

The DFID (2013) rule of law policy paper identifies that DFID work takes a context-based, problem solving approach and therefore does not identify overarching actors or themes for engagement. It highlights that the rule of law needs 'organisations (state and non-state) able to make, administer and enforce the rules' (p.5). It notes that 'a case-by-case approach is needed' when engaging with non-state actors (p.6). The importance of non-state actors is also highlighted on the website.[5] The DFID (2004) briefing note suggests ways of working with non-state security and justice systems and outlines the following policy options (p.12):

- for the national state in engaging with non-state actors: incorporation into the formal judicial system; codification of customary laws; require human rights compliance; minority rights recognition; regulation/self-regulation; innovation; and collaboration.

- for civil society organisations in engaging with non-state actors: direct provision; capacity building; human right s monitoring; awareness raising.

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[4] This subsection is intentionally short as this query is for DFID.
[5] See - https://www.gov.uk/government/policies/helping-developing-countries-to-be-better-run-and-more-accountable

## UN agencies

### *UNDP*

UNDP's (2004, p.4) justice sector reform approach takes a human-rights based approach and focuses on 'strengthening the independence and integrity of both formal and informal justice systems, making both more responsive and more effective in meeting the needs of justice for all—especially the poor and marginalised'. A UNDP (2005, pp.97-105) practitioners guide has a chapter on informal justice systems and outlines strategies for development actors to enhance access to justice:

- For **state sanctioned Alternative Dispute Resolution (ADR)** processes, possible strategies include: (i) increasing public awareness and confidence in community mediation; (ii) obtaining political and financial support from government; (iii) improving referral mechanisms and increasing caseloads at mediation boards; (iv) training in community mediation; (v) helping ADR to ensure balanced community involvement; and (vi) using ADR to complement the formal justice system.
- For **traditional and indigenous justice systems (TIJS)**, possible strategies include: (i) engagement to ensure that people who are not able or not willing to go through formal processes have access to some form of justice; (ii) combine rather than choose between formal justice and TIJS, and build linkages; (iii) start with thorough research and knowledge development; (iv) codification of traditional law; (v) establish regulatory mechanisms; (vi) establish clear accountability lines; (vii) include popular TIJS methods in the state system; (viii) conduct training on human rights standards; and (ix) include disadvantaged groups.

### *UN-Habitat*

UN-Habitat has established a collaborative research and action network to foster local engagement of non-state security providers in urban areas and to enable stakeholders to engage productively around plural security provision and the challenge it poses to effective urban governance (Warren, n.d.).

## USAID (US)

A USAID (2008, p.33) guidance note on rules of law programmes states that programmes can support fairness by working with non-state justice institutions to improve access to justice, among other ways. It also identifies that it can strengthen legitimacy by harmonising non-state customary or religious law with the state-based body of law (p.27). Practically this could be done by (USAID, 2008):

- Bringing aspects of non-state justice institutions under the realm of democratic accountability;
- Expanding access to justice and human rights protections for vulnerable populations;
- Introducing international rights standards into the non-state bodies of law;
- Providing for appeal rights from the non-state customary or religious systems to the state justice system.

While the USAID's Central America Regional Security Initiative (CARSI) is largely state focussed, it does include non-state actors through its community-based prevention aspects – e.g. community policing (Berk-Seligson, et al. 2014, p.12). The community-based prevention is led by neighbourhood associations or organisations that foster partnerships (including with local government and police). They undertake common prevention activities, diminish risk factors, and increase protection. An example is the *juntas locales de seguridad* in El Salvador. USAID (2011) notes that if these groups adopt vigilante-style approaches they will no longer be considered community-based prevention groups, but private security or paramilitary groups.

The USAID (2008) guidance note states that USAID is developing technical guidance on engaging with non-state justice institutions, however this doesn't appear to be publically available. A summary of this unpublished document (Pavlovich, 2009 unpublished) is provided by Mcloughlin (2009).[6] The guidance helps USAID staff design, implement and monitor rule of law programs that include non-state justice institutions. It suggests a framework for assessment, and discusses programming options, which should be decided on a case-by-case basis (see below). The assessment looks at the nature of the non-state justice system and institutions, and also at the justice system as a whole to see where there are gaps in services, where the state and non-state justice systems are in conflict, and the overall potential for reform.

## World Bank

Although not a donor, the World Bank provides policy advice, research and analysis, and technical assistance on security and justice issues. Policy and implementation of World Bank engagement in the criminal justice are guided by a legal note (Leroy, 2012) and a staff guidance note (World Bank, 2012a). The World Bank engages with non-state actors in criminal justice work in the following ways (expert comment):

- Through civil society (local and international where relevant) in the consultation process for the development of projects.

- Through a few trust funds that provide support to civil society organisations (such as legal aid providers and human rights and victim assistance groups).

- Through service providers (in regards to work focusing on violence prevention) including some non-state actors, such as health clinics, community groups engaged in prevention activities.

## EU

A booklet explains how the EU's justice approach has moved from an 'institutional support' approach to a 'service delivery' approach (European Commission, 2012, p.31). The former focussed on building institutional capacity within state institutions, concentrating on 'technical solutions to justice problems, delivered through training, advice, provision of capital equipment, and infrastructure development'. The newer approach focusses on ensuring support is responsive to the needs of different stakeholder groups, and involving them in addressing obstacles to effective justice and security systems (including supporting pro-reform groups). The 10th European Development Fund (2008 – 2013) focused on access to justice, including the greater involvement of non-state actors and civil society, among other areas.

## DANIDA (Denmark)

In a 'how to note' on justice reform, non-state actors (excluding civil society) do not have a central role; however two areas of work which relate to them are identified (DANIDA, n.d.):
- **Building public awareness and engagement:** Supporting state and non-state actors to engage with the public (the users) in the reform process, and to develop and implement communication strategies, can help build consensus for reform and strengthen public confidence in the sector and in the rule of law.
- Improved regulation of non-state justice or security providers and of the legal profession.

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[6] USAID was contacted via email and phone during the course of this enquiry to try and locate this document.

# 3. Lessons

Supporting non-state justice and security is widely acknowledged to be a highly complex and controversial area which donors have historically tended to avoid. There is, consequently, very little in the way of systematic lessons-learned in this area in policy documents (although there is one comprehensive paper that collates lessons – Wojkowska, 2006). Much of the available policy literature recommends that donors take a pragmatic approach to working with both state and non-state providers, and to increasing communication and transparency between these different sources of authority (GSDRC, 2009). It is recommended that reform strategies 'take advantage of the informal structures and at the same time encourage appropriate reforms' (Wojkowska, 2006).

## *Limits of the state-focussed capacity building model*

There has been continued recognition by donors that purely focussing on state institutions limits the effectiveness, reach, relevance and sustainability of security and justice programming. And that programmes that focus just on state or non-state institutions 'are unlikely to be effective' (OECD, 2007, p.11) A European Commission (2011, p.101) evaluation of its support to justice and security system reform finds that the programmes 'were silent on or placed little emphasis on the role of non-state security and justice providers…This omission reflects both a lacuna in the analysis and guidelines which inform programme design and an emphasis on a universal best practice approach to security and justice provision that is heavily influenced by European models'.

## *A multi-layered approach?*

Many donors note that their security and justice policy approaches follow OECD principles established in the 2007 handbook on supporting security and justice. The handbook's key recommendation related to non-state actors is that international actors should take a 'multi-layered or multi-stakeholder approach' targeting assistance at 'those providers, state and non-state actors simultaneously, at the multiple points at which actual day-to-day service delivery occurs'. This would help respond to the 'short-term needs of enhanced security and justice service delivery, while also building the medium-term needs of state capacity' (ibid, p.1). A UNDP paper recommends UNDP increase its engagement with informal justice systems to better strengthen access to justice for poor and disadvantaged people, as per the UNDP's policy commitment (Wojkowska, 2006).

## *Whether, when and how to engage*

In the unpublished USAID guidance report, the following factors are identified to determine *whether*, *when* and *how* to engage directly with non-state justice institutions (Pavlovich in Mcloughlin, 2009, p.4):

- **'Prevalence of non-state justice institutions:** If non-state systems are not commonly used throughout the country, focus activities on supporting government or civil society access to justice initiatives.
- **The potential for conflict:** In a divided society, support for non-state justice institutions that serve only certain social groups could reinforce rather than resolve conflict.
- **Fairness concerns:** Where non-state justice institutions are fundamentally unfair, addressing incentives for corruption, or supporting community-based monitoring of the non-state justice system in lieu of working directly with non-state justice institutions are options.
- **Legitimacy of non-state justice institutions:** Where the legitimacy and effectiveness of non-state justice institutions could be negatively affected by engagement with donors, initially work with these institutions to address issues that are of interest in the community (e.g. community development or natural resource management) in order to build trust. It is also important to

consider the role donor assistance programs can potentially play in formalising non-state justice institutions, which may reduce the effectiveness and appeal of these institutions.

- **The underlying political and social context:** If power imbalances are common and operate to the detriment of women or marginalised groups, these imbalances will also affect the non-state justice sector. It is unlikely that the provision of training alone will address such deeply-rooted issues; it may be necessary to also develop strategies to indirectly alter the existing imbalances through other programme activities.
- **Other donor programs:** Where there have already been successful interventions, consider how these gains can be leveraged through co-funded or follow-on activities.
- **Time horizons:** Engaging with non-state justice institutions over a short time frame may be harmful; institutional and policy reform are long-term initiatives that must be pursued steadily over an extended period. Programs should be designed flexibly to adjust to changing social contexts and national politics.'

## *Principles for engagement*

Wojkowska (2006, p.31) identifies the following principles for UNDP and other donor engagement based on interviews, project documents, and publications:
- Identify those who are most vulnerable, people's perceptions of justice, the obstacles they face and the ways they address them;
- Identify those accountable for addressing the issues (institutions, groups, community leaders, etc);
- Assess and analyse capacity gaps between need and provision and use analysis to focus capacity development strategies;
- Capacity development for access to justice requires building on existing strengths and solutions - promote the positive aspects of the informal systems and reform the negative aspects;
- Find solutions for problems instead of imitating models;
- Work with a representative section of the national community;
- Recognise it is impossible to remedy all shortcomings of informal justice systems.

## *Difficulties determining 'state' and 'non-state' actors*

The very use of the term non-state actor as a counterpoint to a state actor is contested for various reasons. First, the non-state category includes a vast number of highly diverse actors, and the definition is not consistent across donors (e.g. sometimes the term is used to include civil society actors, such as the media, rather than just non-state service providers).

## *Understanding the context*

It is widely identified that understanding the context is crucial to policy and programming. This can be particularly complex in a multi-layered legally pluralistic context – when it may be difficult to determine who is and isn't a state actor (e.g. Nigeria) (expert comment; Hancock, 2015 forthcoming). Misunderstanding the legal context has damaging programmatic consequences; hinders the ability of donors and programmes accurately to assess the political context; and constrains the ability of programmes to determine risk and risk mitigation strategies.

A review of 78 World Bank assessments of legal and justice systems since 1994 found that 'many mention the prevalence of traditional justice in the countries looked at, but none explore the systems in detail or examine links between local level systems and state regimes' (Chirayath et al. 2005, p.3). DFID, the FCO and the MoD (2011) highlight the importance of understanding why citizens use certain justice providers to ensure equitable justice is accessible.

### Using a problem-solving approach

An increasing number of actors are advocating for a problem-solving approach (e.g. OECD, 2007; DFID, 2013; World Bank, 2012). This approach would mean focussing on specific problems in specific contexts, and designing responses accordingly. However, the current over focus on the lens of non-state actors or institutions can impede a problem-focussed approach as it often assumes that an effective response would target an institution, agency, or non-state actor (expert comments).

### Interventions in supporting the harmonisation of state and non-state justice systems

Analysis of USAID options for, and experience of, interventions in supporting the harmonisation of state and non-state justice systems found it can involve creating a pluralist system through either a constitutional or court-based model. State regulation of any kind could undermine the legitimacy of non-state justice institutions. Any sort of recognition of non-state justice institutions could provide non-state actors and institutions with legitimacy that they might not otherwise have at the community level, regardless of whether these actors and institutions abuse their power or are responsive to local concerns. 'Harmonisation initiatives involve highly sensitive political choices regarding the primacy of values, and so must be entered into in as thoughtful and participatory a manner as possible' (Pavlovich in Mcloughlin, 2009, p.12)

### Interventions in public access to justice

Analysis of USAID options for, and experience of, interventions in improving public access to justice found it can involve supporting legal empowerment programmes, developing the capacity of non-state justice institutions and actors to provide information to their communities, or building a knowledge base to bridge state and non-state justice legal institutions. Incorporating non-state norms into alternative dispute resolution systems can help not only to make these new structures more culturally relevant, but can also build cooperation between the state justice sector and local communities in areas where this may not always have been the case (Pavlovich in Mcloughlin, 2009, p.12).

### Interventions in institutional capacity building

Analysis of USAID options for, and experience of, interventions in institutional capacity building found that providing joint training and supporting dialogue between state and non-state actors as well as the police can improve understanding of respective roles and responsibilities while also supporting improved coordination. Donors have also empowered and supported networks or associations of non-state justice institutions on a regional or national basis, that can share—and standardise—best practices (Pavlovich in Mcloughlin, 2009, p.12).

### A bottom up rather than a top down model

The community-based nature of many non-state justice institutions makes them more physically and often more financially accessible to local populations (especially in rural areas). They also tend to address issues that are most relevant to poor people (e.g. land, family disputes). Non-state justices systems may be more familiar to individuals, as they may be conducted in local languages according to familiar norms, and they may be more efficient as resolving disputes (USAID, 2008).

### Equality of access and human rights

It is widely identified (although not universally) that non-state institutions may be more discriminatory and exclusionary than formal legal systems to minorities, marginalised groups, women, etc (e.g. Wojkowska,

2006; USAID, 2012). Systems captured by elites may exacerbate issues of fairness. USAID (2008) identifies that access to justice programmes can minimise the potential for unfairness and abuse (e.g. by providing information about human rights and justice issues; supporting paralegals and NGOs to bridge state and non-state justice institutions; establishing linkages between state and non-state institutions; and improving oversight of non-state justice institutions).

Analysis of USAID options for, and experience of, interventions in equality and human rights found that in some countries non-state justice institutions were so discriminatory that it was not worthwhile for USAID to engage with these institutions unless there were internal demand for reform. In this context, access to justice issues may be more effectively addressed through work supporting alternative dispute resolution structures, including civil society access to justice initiatives' (Pavlovich in Mcloughlin, 2009, p.12).

### *Strengthening dialogue*

Support for non-state institutions may give rise to—or worsen—conflicts between state and non-state actors as well as between customary and state law. 'Thus, open dialogue is key to ensure that actors in and users of the justice system are consulted and that solutions are developed that are responsive to and accepted by citizens and that improve the operations of the justice system as a whole' (Pavlovich, 2009, p.10 In Mcloughlin, 2009).

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