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Customary Justice Systems Play an Important Role in Postconflict Justice Strategies

For Immediate Release
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(Washington)— In a new volume, “Customary Justice and the Rule of Law in War-Torn Societies” from the United States Institute of Peace, editor Deborah Isser argues that measuring customary justice systems against Western rule-of-law templates leads to strategies that fail to address the concerns of the population and impedes access to justice.

“Customary justice systems are generally seen as either a side issue on the margins of the justice sector or a troublesome obstacle to the rule of law. The chapters in this volume serve as a sober rebuttal to this view,” said Isser. “The case studies demonstrate that customary justice systems must be treated as an enduring and influential component of the justice landscape as a whole and that policymakers and practitioners who ignore or seek to undermine them are doomed to fail.”

Moving beyond the narrow lens of legal analysis, the seven cases in the volume— Mozambique, Guatemala, East Timor, Afghanistan, Liberia, Iraq, Sudan—incorporate a nuanced analysis of the social, cultural, historical, and institutional context of the justice system as a whole.

Written by experts, the case studies provide advice on how to engage with customary law and suggest concrete ways policymakers can bridge the divide between formal and customary systems in both the short and long term. The recommendations stress the importance of focusing on practical solutions to real and current problems as determined by the population, rather than on pushing for a predetermined end state. The contributors suggest ways to support a constructive and inclusive process through which constituents can create a form of legal pluralism that will best reflect the needs and aspirations of society as a whole.

In conflict-affected communities scarred by legacies of violence, customary justice systems often offer locally legitimate processes for dispute resolution that have a proven capacity to peacefully resolve grievances within the community and prevent the escalation of acute political violence. The book offers valuable insights for practitioners and policymakers approaching justice and the rule of law in countries like Yemen and Libya that are experiencing political upheaval. The book provides tools so that future engagements do not repeat the mistakes of the past.

About the Editor

Deborah Isser was senior rule of law adviser (2004–10) at the United States Institute of Peace, where she directed the project on customary justice and legal pluralism. She is senior counsel at the World Bank, where she manages the Justice for the Poor project and focuses on justice in conflict-affected societies.

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About the United States Institute of Peace

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“Customary Justice and the Rule of Law in War-Torn Societies” *Questions and Answers*

What dilemma does customary justice present to international justice actors and how does this volume address it?

From its outset, this volume has recognized the primary dilemma cited by many international justice actors. On the one hand, customary justice systems are far more accessible than formal institutions to the local population. On the other hand, customary systems tend to be inaccessible—both practically and culturally—to outsiders, who generally lack the skills as well as the legitimacy to engage with them.

This volume seeks to deepen knowledge of how customary justice systems might further—or obstruct—the goals of stability and rule of law in the immediate postconflict period. It tackles the difficulties that arise from clashing conceptions of justice and how these play out in the fragile and devastated terrain of societies emerging from mass violence. It lays out concrete guidance to national and international policymakers and practitioners on how to address these complexities in justice reform initiatives.

Perhaps the most important message of this volume is that efforts to promote the rule of law in legally pluralistic societies must begin with a deep and broad understanding of the entire justice landscape: deep because it must look beyond laws and institutions on paper to include socioeconomic and political dynamics that shape the justice environment; broad because it must consider the full range of justice mechanisms, including formal, customary, and those that are in between.

What challenges or constraints do rule-of-law practitioners face when engaging customary justice systems?

Three fundamental constraints continue to hinder a shift in practice.

1. The first is the widely held tendency to see justice reform as a technical exercise of drafting laws and building institutions and therefore as something to be done by international legal professionals. But lawyers schooled in Western formal law rarely have the background, skills, or access needed to account for the contextual complexities of customary justice systems. This attitude is symptomatic of the broader flaws of the rule-of-law enterprise in postconflict societies.
2. The second constraint is a normative one. As the rule-of-law enterprise has grown into a core element of peacebuilding operations over the past fifteen years, its normative basis has also become firmly established. The United Nations’ definition of the “rule of law” explicitly calls for consistency with international human rights norms and standards. A primary and generally unquestioned goal of most postconflict rule-of-law interventions is often stated as nothing less than full compliance with these standards. This built-in normative bias poses an obvious challenge facing customary systems that are not based on the international ideal of rule of law (based on Western liberal democracy) and include practices that fall short of international norms.
3. The third constraint concerns the nature of the postconflict peacebuilding enterprise. The objective of state building calls for the (re)establishment or

expansion of state sovereignty, which is generally seen as entailing a state monopoly on delivery of justice and regulation of crime. Rule-of-law practitioners thus tend to regard customary systems as a distraction from their main task.

What are the arguments against engaging with customary justice systems?

Arguments against engaging usually come from two camps. One posits that customary systems are so far from the goals of rule of law—especially international human rights standards—that justice reform strategies should seek to replace them rather than engage them. According to this argument, any official recognition of customary systems is tantamount to sanctioning human rights violations.

The other camp is more cognizant of the positive role customary systems can play but argues that since it is so difficult for outsiders to understand and since the risks of engagement are so high, efforts and resources should be focused exclusively on the formal justice system. After all, the argument goes, while the international community may not know how to engage customary systems, it does know how to write laws and reform state institutions.

Why is it so important for international justice practitioners to take customary justice systems into account?

First of all, customary justice systems are and will likely remain far more accessible and effective than the broken and mostly distrusted formal systems. Second, the customary systems offer a paradigm of justice preferred by much of the population and can often resolve problems that the formal system cannot, including dealing with root causes of conflict, ending cycles of blood vengeance, resolving sociospiritual problems, and promoting social reconciliation. Third, constructively engaging customary justice systems can improve the legitimacy of the state and its formal institutions, whereas repressing them can exacerbate tensions. These conclusions call for a fundamental shift in how justice reform is pursued, to take into account the sociocultural and political context that shapes local perceptions of justice and the dynamics of change.

What principles does the volume set forth to guide policy and programming in environments of legal pluralism?

The volume outlines four principles to guide policy and programming:

1. Justice reform policies and programs must be based on a deeply contextual understanding of the entire justice landscape.
2. Policies and programs concerning customary justice should be aimed at developing practical solutions to real problems.
3. Reform strategies need to be grounded in current—and realistic—expectations of institutional capacities and social realities.
4. Justice reform strategies should provide space for developing a justice system that uniquely reflects the values and identity of the population as a whole.

How can the rule-of-law community mainstream the approach described in the book?

Mainstreaming this approach will require the rule-of-law community to fill several remaining knowledge gaps as well as adjust institutional support structures. A growing number of researchers, practitioners, and donors are dedicating time and resources to this topic, adding much-needed evidence, experience, and analysis. Key priorities for deepening the existing knowledge base include the following:

- **Document and evaluate interventions related to customary justice.**
- **Strengthen the body of comparative data and analysis.** There is an understandable tendency for justice reformers to look for models from other countries regarding the legal status of customary justice and other policy issues. But comparative data can be misleading, especially when they are limited to describing the structures used elsewhere. For comparative information to be truly useful, it needs to be deeply contextual so that it may account for the political, social, and economic variables that underlie the policies and determine their impact.
- **Deepen the theoretical basis of justice reform work.** The mainstream rule-of-law community needs a stronger intellectual underpinning that connects justice reform with theories of change management and understands the relationship between justice reform and other peacebuilding goals.
- **Set an agenda for focused research.** Along with the wider research agenda on legal pluralism laid out above, a number of narrower topics—women’s rights, religious and ethnic minorities, and youth—merit focused research attention.
- **Embrace cross-sectoral and interdisciplinary approaches.** In most field missions, rule-of-law departments staffed with professional lawyers live a separate existence from civil affairs, governance, or economic departments. This artificial isolation of the justice sector from the broader context discourages much-needed interdisciplinary problem-solving. Both groups—researchers and practitioners—should explore collaborative efforts toward strategies of reform that are both nuanced and practical.

Praise for “Customary Justice and the Rule of Law in War-Torn Societies”

“Brilliantly structured, this important book provides a realistic, honest, and original analysis of the tension between universal human rights and customary justice in post-conflict societies. It argues, persuasively, that customary justice systems should not be rejected simply because they do not conform to idealistic visions of the rule of law. Each of its seven case studies offers an outstanding contextual analysis that elucidates the critical roles that informal justice can play in strengthening legal institutions.”

—**Julio Faundez**, professor of law, Warwick University

“This volume features an incredible amount of historical and descriptive detail. Indeed, each chapter reads like a mini-treatise on the topic of law in each country or region.”

—**Mark Goodale**, author of *Surrendering to Utopia: An Anthropology of Human Rights*

“Inspired by the theory of legal pluralism, the seven case studies in *Customary Justice* examine empirical research material collected from societies in Africa, Asia, and Latin America to grasp local justice, its perception, and its contribution to achieve accepted solutions to conflicts. The book addresses the complex legal realities that are not included in conventional law books, case law, and statutes. *Customary Justice* contributes to a better intercultural anthropological jurisprudence, and offers action-oriented recommendations in its concluding chapter.”

—**Manfred Hinz**, professor, faculty of law, University of Namibia

“This work represents possibly the most important contribution of the past decade for practitioners and policymakers seeking to leverage international rule of law assistance into long term institutional and societal strength. These case studies provide a wealth of insight and applicability in other contexts where billions will be spent and blood spilt in the hopes of reinvigorating accessible and legitimate systems of justice and accountability. Beginning with the truism that communities define justice through their own prism of cultural norms, social experience, and historical reality, these essays provide pragmatic details for those seeking to attain authentic justice that serves affected populations and supports the ends of societal stability. This volume might well be seen as the *raison d’être* for the U.S. Institute of Peace. It is a source of guidance for future efforts to navigate the recurring tension between traditional approaches with deeply rooted legitimacy and more formalized systems designed to advance an entrenched rule of law compliance needed to sustain lasting peace.”

—**Michael A. Newton**, professor of the practice of law, Vanderbilt University Law School

“Efforts at law and development have proven extremely difficult under favorable circumstances, and all but impossible in postconflict situations. Yet development organizations have continued to apply the same tried and failed formulas that focus exclusively on building state legal institutions. *Customary Justice and the Rule of Law in War-Torn Societies* takes a different approach. The contributions to this collection recognize that customary forms of law often function quite effectively to serve local

needs. Each chapter provides a detailed and comprehensive case study that examines customary systems, state legal systems, and their interaction, noting the strengths and weaknesses of each, and closes with a set of practical recommendations. This fascinating book exhibits a great deal of insight and offers sound advice from scholars and practitioners with years of experience in the field. It is a must read for anyone interested in legal development.”

—**Brian Tamanaha**, Washington University Law School