

Indigenous and other Traditional or Customary Justice Systems in the Asia-Pacific Region

Report of the 2018 Geneva Forum of Judges and Lawyers



Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

® Indigenous and other Traditional or Customary Justice Systems in the Asia-Pacific Region: Report of the 2018 Geneva Forum of Judges and Lawyers

© Copyright International Commission of Jurists

Published in June 2019

The International Commission of Jurists (ICJ) permits free reproduction of extracts from any of its publications provided that due acknowledgment is given and a copy of the publication carrying the extract is sent to its headquarters at the following address:

International Commission of Jurists
P.O. Box 91
Rue des Bains 33
Geneva
Switzerland

The 2018 Geneva Forum of Judges & Lawyers, and this and accompanying publications, were made possible by the support of the Republic and Canton of Geneva, Switzerland.



Indigenous and other Traditional or Customary Justice Systems in the Asia-Pacific Region

Report of the 2018 Geneva Forum of Judges and Lawyers

The 2018 Geneva Forum of Judges & Lawyers, and this and accompanying publications, were made possible by the support of the Republic and Canton of Geneva, Switzerland.



Preface

The ninth annual Geneva Forum of Judges and Lawyers was convened by the International Commission of Jurists (ICJ), 13-14 December 2018 in Bangkok, Thailand.

The Geneva Forum is an annual global meeting of senior judges, lawyers, prosecutors and other legal and United Nations experts, convened by the ICJ through its Geneva-based Centre for the Independence of Judges and Lawyers, with the support of the Canton and Republic of Geneva (Switzerland) and other partners. Each year, participants and the ICJ discuss an issue relevant to the independence and role of judges, lawyers and prosecutors, with a view to developing and disseminating practical guidance for practitioners. Before 2018, the Forum had always been convened in Geneva.

The 2017 Forum focused on traditional and customary justice systems. The deep and complex discussions that emerged there led the ICJ to decide that the Forum should maintain its focus on traditional and customary justice systems for the following three years. To better engage with local contexts, the Geneva Forum is “on the road” in Southeast Asia in 2018, and in Africa and potentially Latin America in 2019-2020. The Forum will return to Geneva for an enlarged session in 2020 to adopt final conclusions and global guidance.

The 2018 Forum in Bangkok brought together judges, lawyers, and other legal experts from around the Asia-Pacific region, from both formal State justice systems and indigenous and other traditional or customary systems, to exchange experience and expertise on the relationship between indigenous and other traditional or customary justice systems and official State justice systems, international human rights, access to justice and the rule of law, bearing in mind Sustainable Development Goal 16 on providing access to justice for all and building effective, accountable and inclusive institutions at all levels.

This report summarizes the discussions at the 2018 Forum; it should be read in conjunction with the separately published and periodically updated *Traditional and Customary Justice Systems: Selected International Sources*, which compiles relevant treaty provisions, standards, conclusions and recommendations of UN and other expert bodies, as well as the Report of the 2017 Forum.

Contact, additional information and acknowledgement

For more information about the annual ICJ Geneva Forum, or ICJ’s work on indigenous and other traditional or customary justice systems, please contact Matt Pollard, Director of the ICJ Centre for the Independence of Judges and Lawyers, e-mail: matt.pollard@icj.org

The *Selected International Sources* compilation, Report of the 2017 Forum, and other relevant information are available at <https://www.icj.org/gf2018/>

The ICJ thanks legal intern Mr Dominic Farchione for his assistance with the preparation of the report.

Introduction

In many countries the vast majority of legal disputes, especially in rural areas, are resolved by indigenous or other traditional and customary justice systems and not the official justice system of the State. Often such systems are either simply ignored by the official laws and courts of the State, or the State seeks actively to suppress them without regard to the impacts on access to justice and other rights of the local people. Globally, there is increasing interest in the potential role of indigenous and other traditional and customary justice systems in efforts to achieve “access to justice for all” and “effective, accountable and inclusive institutions” under UN Sustainable Development Goal 16.

The role of some traditional and customary justice systems was recognized in the 2007 UN Declaration on the Rights of Indigenous Peoples, which provides that, “Indigenous peoples have the right to promote, develop and maintain their institutional structures and ... juridical systems or customs, in accordance with international human rights standards.”¹ In 2018 the UN General Assembly further urged States to implement the Declaration in consultation with indigenous peoples and others, including through “legislative, policy and administrative measures”; it also urged States “to promote awareness of it among all sectors of society, including members of legislatures, the judiciary and the civil service, as well as among indigenous peoples”.² However, practical guidance specifically addressing implementation of the right to develop and maintain indigenous juridical systems or customs, including with respect to the relationship between such indigenous systems and non-indigenous justice systems, remains limited.

Indigenous and other traditional or customary justice systems vary widely around the world in their composition, their aims and approaches, the practices and processes they follow, and the norms they apply. There is often a multiplicity of different such systems within a single country. The degree to which the relationship between such systems and the State system is explicitly addressed in the national Constitution or other legislation, and the degree to which actors within different systems recognize in practice one another’s role or authority and seek coordination or confrontation, also varies widely.

The very diversity of such systems in the world demands considerable sensitivity to the risk of over-generalization and to implicit biases. Common distinctions such as “formal” versus “informal, for instance, may themselves embody certain cultural assumptions and biases. Furthermore, official State justice systems themselves incorporate a range of traditions and customs, and there is always a risk of confusion between a process that aims at upholding universal human rights norms, and one that arbitrarily or unjustly privileges some traditions and customs over others. Nor can it be assumed that such systems will necessarily operate outside the framework of State institutions and the State’s

¹ UN Declaration on the Rights of Indigenous Peoples, UN General Assembly Resolution 61/295 (2007), Article 34. Among numerous other relevant articles, see also article 5 (“Indigenous peoples have the right to maintain and strengthen their distinct ... legal ... institutions”) and article 40 (“Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”) The Declaration was preceded by the legally-binding Indigenous and Tribal Peoples Convention, 1989 (Number 169), of the International Labour Organization (ILO), with articles 8 and 9 particularly addressing indigenous justice systems. While the Declaration now enjoys essentially universal support by States (see General Assembly resolution 73/156, 2018), the number of countries having ratified the Convention remains limited (23 as of April 2019), and largely concentrated in Latin America.

² General Assembly Resolution 73/156 (2018), “Rights of Indigenous Peoples”, paragraph 2.

international obligations: sometimes indigenous or other traditional or customary justice systems are explicitly or implicitly integrated into the national legal order, or fall within areas of State responsibility as a result of the State acquiescing in their operation. Nevertheless, some patterns do emerge in terms of recurring practices and characteristics of many if not most such systems, and ultimately there is value in discussing the issues at a global level, even if the terminology available does not necessarily always fully capture reality in a comprehensive and entirely objective manner.

Indigenous and other traditional or customary justice systems are often geographically, culturally and financially more accessible to local populations than is the official court system. Indeed, for marginalized and disadvantaged rural populations in developing countries, traditional and customary courts may in practical terms be the only form of access they have to any kind of justice.

Regardless of questions of accessibility relative to the State justice system, indigenous or other traditional or customary justice systems may also be seen by local people as having greater legitimacy, particularly where there is a history of use of State institutions to destroy, suppress or otherwise violate the rights of the indigenous or other relevant communities, or where discrimination of any kind systematically excludes members of such communities from serving in the State justice system. In addition to the specifically recognized right of indigenous peoples to their juridical systems, official recognition of traditional or customary courts in a country can more generally be a positive reflection of the cultural and other human rights of ethnic, religious or linguistic minorities.

For all these reasons, in principle indigenous and other traditional or customary justice systems have an important potential to contribute to realization of rights to fair trial, to effective remedy for rights violations, and to holding individuals and potentially other entities accountable for wrongful damage to others or to the community, and more generally to resolving disputes peacefully.

At the same time, the composition, procedures, and outcomes of traditional and customary justice system mechanisms and processes can conflict with the human rights protections set out in international law and standards on human rights and the rule of law.

The rights of women and children are of key concern. Some traditional and customary justice systems are rooted in patriarchal systems and, as such, can reinforce harmful gender stereotypes and cultural assumptions that are inherently likely to discriminate against women and children and therefore negatively impact upon their rights. Other concerns include consistency with the right to a competent, independent and impartial tribunal established by law; respect for fundamental guarantees of fairness comprising the right to fair trial; accountability of judicial decision-makers in relation to corruption and other misconduct; and non-discrimination and equality before the law more generally. Of course, such concerns may apply equally, or even with more force, to the official State justice system in a given country.

Moreover, equal and effective access to justice for persons in relevant communities may be further impeded by, among other things: a lack of coordination and collaboration between the different kinds of justice systems, both in terms of practical matters and in relation to legal clarity over their respective jurisdictions; a lack of awareness of or respect for international human rights standards by actors in both

kinds of systems; a lack of awareness or regard for traditional and customary practices among actors in State institutions; or the co-opting or corruption of traditional or customary justice institutions and processes by State authorities or private parties for improper ends.

As part of its ongoing four-year project on this issue, the 9th Annual Geneva Forum of Judges & Lawyers convened 13-14 December 2018 in Bangkok, Thailand, for a consultation on the role of indigenous and other traditional or customary justice systems in the Asia-Pacific region.

The Forum brought together judges, lawyers, and other legal experts from around the region, from both formal State justice systems and indigenous and other traditional or customary systems. It also featured participants from the United Nations, including Ms Victoria Tauli Corpuz (UN Special Rapporteur on the Rights of Indigenous Peoples), as well as representatives of civil society organisations.

Participants exchanged experience and expertise with a view to developing conclusions and recommendations on the relationship between indigenous and other traditional or customary justice systems and international human rights, access to justice and the rule of law, and how to engage with them. Thirty-three participants attended the event, coming from, among other countries, Thailand, Myanmar, Philippines, Pakistan, Indonesia, Malaysia, Cambodia, Timor Leste, and Sri Lanka. In addition to the Special Rapporteur on the Rights of Indigenous Peoples and her staff, officials from the mandate of the Special Rapporteur on the Independence of Judges and Lawyers, as well as OHCHR's Bangkok Regional Office for South-East Asia, participated. Bringing together experts from such different backgrounds allowed a fruitful discussion and debate among peers that benefitted from comparative experiences.

This report sets out the many key points of agreement amongst participants, illustrated by national examples mentioned in the discussions – as well as several issues on which there was a divergence of opinion among participants. The report follows the practice whereby, to encourage open discussion, participants were assured that any statements they made would not be attributed to them by name.

While this report seeks to reflect the range of opinions shared during the Forum, it does not necessarily include every point expressed by every individual participant, nor should the inclusion of anything in this report be taken to indicate the unanimous agreement of participants or the particular agreement of any specific participant. Equally, although the report was prepared by and its content remains the sole responsibility of the ICJ, the views of participants reported here do not necessarily represent the views of the ICJ.

The Potential for Equal and Effective Access to Justice

The Forum discussed the potential for indigenous and other traditional or customary justice systems in the Asia-Pacific region to contribute to the realization of equal and effective access to justice.

Several participants noted that many in traditional communities take matters to traditional and customary justice systems far more often than to the formal system. Participants cited a variety of

reasons for this preference, including: greater costs of seeking to resolve disputes through formal systems (both in terms of financial costs and time required); greater complexity of formal systems' rules and procedures; an emphasis in informal systems on cultural context and norms, which many indigenous persons see as integral to their cases, and which formal systems tend either not to recognize at all, or at least not to emphasize; familiarity of community elders, who typically adjudicate cases in traditional or customary systems, with the local people and community-specific issues that arise in their cases; and greater trust that community members place in elders in informal systems than in official judges in formal systems. Moreover, according to some participants, traditional systems produced more efficient or effective outcomes than the formal system, and have proven to be successful in meeting Sustainable Development Goals (SDGs).

Many participants emphasized that while indigenous and other traditional and customary systems are able in many cases to provide effective forms of redress, access to justice overall remains a major issue for indigenous and other relevant communities.

Adequate resources are rarely allocated to indigenous and other traditional or customary systems, sometimes making it difficult for them to properly serve the people who utilize them. It was observed by some participants that formal systems in relevant countries or regions are themselves frequently under-resourced (although perhaps not so severely under-resourced as the indigenous or other traditional system), which in turn would tend to further undermine lack of choice of justice systems for relevant communities. Lack of presence or visibility of the formal system for relevant communities may be another factor. In areas such as Myanmar, for example, it was reported that many locals do not understand how the formal system operates, or that it even exists as a resource for obtaining justice.

The reluctance of such communities to bring disputes to the formal system may be further reinforced by their experience of being targeted deliberately, or otherwise impacted disproportionately, by the formal system. Several participants noted, for example, the highly disproportionate rate of conviction and/or incarceration of indigenous persons by formal systems, relative to non-indigenous persons.

However, it did not follow that informal systems would necessarily always operate to the benefit of all community members or act consistently with universal norms of equality and human rights. Some participants noted for instance that women who seek justice in male-dominated informal systems face various obstacles, including the inability to obtain an inheritance, bias in rape cases, and a general lack of access to the decision-making process. (At the same time, participants recognized that similar forms of discrimination and bias also frequently exist within formal systems). Participants highlighted the leading role of women from within relevant communities in efforts to counteract bias and to increase female participation in the decision-making process in both informal and formal justice systems.

It was noted that international standards specifically provide for the right of indigenous peoples to maintain their legal systems and institutions, within an overall framework of respect and protection of human rights. States had corresponding duties, and consequently even where there might be human rights concerns internal to certain indigenous systems, States could not simply seek to abolish them; rather, it was incumbent on State institutions and others to find other means of engagement with a view to better respecting, protecting and fulfilling relevant human rights within the specific context.

With respect to other traditional and customary justice systems that are not of an indigenous character, careful evaluation of the context is if anything even more important in assessing whether and how to engage. In some cases, constructive engagement, cooperation and coordination could lead to positive results from a human rights perspective. In others, engaging with those in leadership positions in a particular traditional or customary justice system could inadvertently reinforce discrimination or other abuses, carrying risks similar to those involved in engaging with compromised formal judiciaries in repressive States.

Indeed, it was argued, in certain circumstances international law and standards could in principle allow or possibly even require States to seek to abolish certain non-indigenous traditional or customary justice systems on the basis that they are not operating in a manner consistent with human rights. In such situations States would still need to consider possible impacts on other human rights (including for instance minority rights), as well as the practical needs of individuals and communities for access to justice. In particular, in contexts where such traditional or customary justice systems are presently the only means for people to obtain justice due to the effective absence or inaccessibility of official State courts, simply abolishing the traditional or customary system without simultaneously taking measures to ensure that people have effective access to a properly functioning State system, would itself not be consistent with human rights.

All actors – both those embedded within the national context and those who engage with the country from the regional and international level – should consider whether and how, in the particular context, better coordination between the official State justice systems and indigenous or other traditional and customary justice systems could help to ensure the equal provision of justice for all and respect for human rights. Efforts towards coordination appear to be particularly incumbent on actors within official State systems with respect to how they interact with indigenous justice systems.

The scope of matters over which indigenous or other traditional or customary justice systems should potentially be able to exercise authority remained a matter of considerable discussion and differences of opinion.

Some participants saw the potential for indigenous justice systems to, in principle, have exclusive jurisdiction over all matters within their traditional territories, including civil or criminal matters involving non-indigenous persons, as well as at least some other issues relating to indigenous peoples outside of such territories. Such an approach could find support in Article 34 of the UN Declaration on the Rights of Indigenous Peoples, they argued, even when considering the provisions of article 46 of the Declaration.³ Others noted that such an approach would, unless the composition and procedures of such systems fully complied with the requirements of independence, impartiality and fair trial safeguards reflected in for instance article 14 of the ICCPR, appear to contradict the more restrictive position adopted by the UN Human Rights Committee under the International Covenant on Civil and Political Rights. The Committee,

³ See also Expert Mechanism on the Rights of Indigenous Peoples, Study on access to justice and Advice No. 6, UN Doc A/HRC/27/65 (2014) paras 6 to 30 and Annex paras 5 and 6. See also Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and the Administration of Justice, UN Doc E/CN.4/2004/80/Add.4 (2004), paras 9, 17, 23 to 25, 30.

referring to the situation “where a State, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrusts them with judicial tasks”, has held that, “It must be ensured that such courts cannot hand down binding judgments recognized by the State, unless the following requirements are met: proceedings before such courts 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 of the Covenant.”⁴

Some participants supported these or other limits to the scope of matters to be addressed by traditional systems, emphasizing oversight in order to ensure compliance with international human rights, while others considered that, at least when it comes to indigenous justice systems, allowing States to impose such limitations to indigenous jurisdiction risked perpetuating the injustices of colonial subjugation. The potential challenges in distinguishing between “minor” and “non-minor” matters in particular cases were also discussed. For instance, traditional and customary justice systems often have a recognized role in relation to matters of family law and inheritance, yet the impacts of such decisions can in many societies be among the most significant particularly for women and children. Given that much of the argumentation against limiting the possible scope of jurisdiction along the lines set out by the Human Rights Committee was based in instruments that specifically address the special rights and context of indigenous peoples, the extension of similar reasoning to allow broad jurisdiction to other, non-indigenous, traditional or customary mechanisms was even more controversial.

The General Comment in which the Committee set out this position, which was adopted a few months before adoption of the UN Declaration on the Rights of Indigenous Peoples by the General Assembly, makes no reference to article 34 of the Declaration. The Committee’s position also does not appear to have been directly addressed by the UN Expert Mechanism of the Rights of Indigenous Peoples in the discussion of indigenous juridical systems in its 2014 Study on access to justice and its associated Advice No. 6.⁵ One suggestion was that it would be helpful to those working in this area if the Human Rights Committee were to revisit and further explain, refine or elaborate upon its position, particularly in relation to indigenous justice systems, in consultation with other UN bodies (including the Expert Mechanism), relevant indigenous representatives, civil society organisations and other relevant stakeholders.⁶

The additional question was raised as to how best to seek to have indigenous and other traditional or customary justice systems operate in a manner consistent with international human rights standards. For example, in what circumstances should criteria of independence and impartiality within the meaning of international law and standards be applied in relation to such systems, and how should the criteria be

⁴ General Comment no 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (2007), para 24. See also Concluding Observations on Bolivia (2013), UN Doc CCPR/C/BOL/CO/3 (2003), para 22. It may be noted that in responding to questions from the Committee, the representative of Bolivia sought to distinguish between indigenous justice mechanisms and “traditional or customary justice” systems within the usage of the Committee: see UN Doc CCPR/C/SR.3011 (2013), para 23.

⁵ UN Doc A/HRC/27/65 (2014).

⁶ For a previous example of the Human Rights Committee holding a thematic and institutional exchange of views with a representative of the Expert Mechanism on the Rights of Indigenous Peoples, see UN Doc CCPR/C/SR.2903 (2012).

interpreted in such circumstances, given that traditional judges are part of the small communities over which they adjudicate and many traditional systems positively value and emphasize the decision-maker's personal relationships with disputants?

Numerous participants challenged the notion that informal systems should necessarily be incorporated into the formal system, or should be made in some way to become more like the formal system.

It was noted that formal systems often have many of the same shortcomings that informal systems are criticized for having – for example, a lack of fairness and independence, as well as a discriminatory impacts on women, or failure to give the best interests of the child pre-eminence in relevant matters. Where the formal system has many of the same problems as the informal system, but its legitimacy is not questioned as frequently or in the same way as is the legitimacy of the informal system, this could often be seen as reinforcing other kinds of discrimination and exclusion in society.

At the same time, it was suggested that one of the challenges for State actors, UN and other international organisations and agencies, and civil society, is that effective techniques and strategies for engaging with and addressing problems in formal State systems, as well as entry points and lines of control and authority for reform, have been further developed and are clearer; similar techniques and strategies have not yet been developed to the same extent in relation to indigenous and other traditional or customary justice systems. Furthermore, deciding whether and how to engage with such systems may need to be much more context-specific and complex, given their virtually limitless diversity across the world.

Hostility of some traditional and customary justice systems to intervention by outsiders was noted as a further factor to take into account; however, it may also be observed that many formal judiciaries tend similarly to resist outside intervention. The success of strategies involving peer-to-peer engagement between judges from different countries, to improve practices within formal judiciaries, was noted as potentially pointing a way forward towards constructive and effective engagement with decision-makers in traditional and customary systems. This could involve both bringing together decision-makers and other actors from within traditional systems in different countries or localities, but also bringing together formal justice actors with informal justice actors from within one country.

Many participants emphasized the importance of recognizing that indigenous and many other traditional or customary justice systems have a great capacity to change from within. Relevant decision-makers and communities can and frequently do choose of their own volition, or responding to pressures from within their own communities, to develop practices that are more in harmony with international human rights norms, once they are aware of the norms and the possibilities for change. Indigenous and other communities, it was stressed, are usually neither homogenous nor static, and a commitment to carry on certain traditions and beliefs need not preclude more general dynamism and openness to change in areas of importance to human rights and the rule of law. In this regard, the common assumption that written codification of traditional or customary law will necessarily promote the rule of law and human rights was challenged, as pushing in all cases for written codification could in some circumstances inadvertently impede progressive developments.

Legal Status of Traditional Justice Systems at the National Level

Participants also discussed how national laws of various Asia-Pacific countries recognize (or do not recognize) indigenous and other traditional or customary justice systems, as well as how formal and informal systems interact with one another in practice, such as on the issue of jurisdiction. Furthermore, it was emphasized that formal acknowledgment of traditional justice systems, in itself, does not necessarily translate into effective coordination in practice between the formal and informal systems.

Participants provided examples of State justice system interaction with, and recognition of, traditional justice systems:

In Timor Leste, for example, traditional justice systems are recognized through constitutional articles that assert and value the cultural heritage of indigenous groups, and which provide that all people not only have a right to cultural enjoyment and creativity, but also a duty to preserve and protect cultural heritage. Certain cases can be legally resolved through a traditional system's mechanism for mediation. While the traditional system is usually only employed to resolve small-scale cases, such as theft, both the formal and informal systems can be utilized in more "serious" cases: for example, while a murder case passes through the formal system, the families involved in the dispute may participate in traditional mediation in order to restore community harmony and prevent similar events from occurring in the future. "Tara bandu" (a customary process through which local communities reach agreement on how to define and secure community social norms and practices) is also utilized alongside formal regulation, in order to bolster a formal system that often lacks resources, and to provide more practical, effective solutions for communities.

In the Philippines, the rights of indigenous persons are constitutionally recognized, and legislative acts such as the Indigenous Peoples' Rights Act provide for the right of indigenous persons to traditional justice systems and laws.

In Indonesia, customary laws are recognised by the State justice system so long as they are in accordance with the national Constitution. In addition to other informal mechanisms, judges in the formal system are required to understand local customary law in addition to formal-system jurisprudence, so that justice may be better achieved in local communities.

In Cambodia, indigenous rights are not specifically recognized in the Constitution – rather, the Constitution provides that all Cambodians, regardless of race, color, and belief, have the same rights. However, other Cambodian national policies specifically recognize indigenous issues relating to land, health, and education, and therefore provide guidance in such circumstances.

In Myanmar, ethnic groups, regardless of their particular traditional beliefs, are required to follow national law; however, customary law is frequently used in local cases involving marriage or inheritance, and communities may turn to local authorities in order to facilitate mediation in smaller, local disputes. More "serious" cases, such as those concerning criminal issues, however, must be resolved through the

formal court system. In this way, it was said, formal law is more influential than customary law in Myanmar.

Many participants noted that, even in countries where the Constitution or other laws recognize indigenous or other traditional or customary justice systems, there is often in actual practice a lack of coordination between the formal and informal systems, leading to negative consequences for equal and effective access to justice. Some participants reported that in cases where formal and informal jurisdictions have concurrent overlapping jurisdiction, the formal system often has precedence and is effectively imposed despite the wishes of local people.

Participants described examples from the Philippines, Thailand, Myanmar, and Cambodia, of situations where State regulation of land ownership, access and use has given rise to tension between the justice systems. Indigenous peoples' cultural practices involving traditional uses of land are often not taken into consideration by formal courts in determining whether such uses violate State land regulations, and this has often lead to the criminalization of indigenous persons and their cultural practices. On the other hand, participants noted that in some countries traditional laws and customs concerning land, such as those concerning inheritance, were incompatible with constitutional protections for women's rights of equality and non-discrimination; in such situations the formal systems had faced difficulty in resolving conflicting the conflicting rights and values at stake.

The discussion prompted a series of questions, on which a variety of views were expressed, including:

- What measures and mechanisms can State and non-State institutions appropriately use to ensure that human rights guarantees are upheld?
- How can the accountability of customary justice actors for abuse or misconduct be ensured, when a particular customary justice system does not have any formal mechanism for accountability, and given that simply empowering formal State mechanisms to exercise relevant powers over the traditional or customary justice system actors raises a risk of the abuse of those powers for improper motives?
- Is any degree of "oversight" of the operation of indigenous justice systems by non-indigenous systems compatible with the rights of indigenous peoples and if so, to what degree and in what manner should it be exercised?
- How should formal systems scrutinize and regulate the operation of other non-indigenous kinds of traditional or customary justice systems?

The need for formal systems to better recognize traditional histories and customs in order to better provide justice for community members that appear before formal courts, as well as to for instance prevent over-incarceration of indigenous and other communities, and to prevent overbroad application of criminal offences to such persons, was recognized. However, a wide variety of views were expressed on the question of how best to secure these aims in practice, as well as the question of the extent to which standards and approaches developed specifically in relation to indigenous justice systems should be applied to other non-indigenous traditional or customary justice systems.

The need for greater mutual recognition and coordination between State and indigenous and other traditional leaders, between informal and informal justice systems, and with law enforcement officials,

was a recurring theme in the discussions. Many participants felt this was essential in order to provide equal access to justice for all. It was argued that, where there are no clear rules or understanding at the national level on how traditional or customary systems and official State systems should co-exist, greater coordination is the first step towards formulating clearer rules and standards, and defining relative roles. Moreover, it was argued, if integrating different justice systems is desirable, those involved in the process must have a common understanding of the terms, concepts, histories, and customs at issue. Participants generally agreed that formal and informal justice systems had much to learn from one another.

However, whether as a matter of principle or in specific national contexts, there were some divergences of opinion regarding whether, as regards indigenous justice systems' relationship with formal State systems in particular, it was better to have equal parallel and separate systems, each with full authority and autonomy within their own sphere, or to seek to integrate the systems through for instance an appeals process that leads to some form of unified body at the highest level of court (or other solutions sitting somewhere between total separation and ultimate unification).

As regards non-indigenous traditional or customary justice systems, some participants felt that in certain specific national contexts with which they were familiar, with Pakistan as a key example, the structure and practices of a particular system were so profoundly infused with norms and practices of a discriminatory nature or otherwise diametrically opposed to universal human rights norms, and had demonstrated a total lack of openness to outside engagement or internal dissent, that there was no conceivable role for that particular traditional system compatible with human rights and the rule of law. Rather than constructive engagement or coordination, they argued, in their specific context the State should instead be seeking to abolish and supplant the traditional system, while ensuring improved access to the formal State system (even while acknowledging that the State system itself required significant further development to implement international human rights standards).

Human Rights of Women and Gender Equality

Participants also discussed the ways that various indigenous and other traditional or customary justice systems, as well as formal systems, positively or negatively affect gender equality and the realization of the human rights of women, as well as how potential inconsistencies between international human rights law, and the practices of certain justice systems, could be best addressed.

Describing the situation in Indonesia, beginning with the formal justice system, it was explained that Indonesia's laws support women's rights and address issues of gender discrimination. Indonesia's Constitution, it was said, provides that women are to be free from all forms of discrimination. Moreover, domestic legislation, such as a 2004 law aimed at eliminating domestic violence, as well as laws seeking to eradicate human trafficking, have been adopted by the Indonesian government. Indonesia has ratified both the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Covenant on Civil and Political Rights (ICCPR). Furthermore, it was reported, the Bangkok

General Guidance⁷ has been integrated into Indonesian law, in order to effectively incorporate a gender perspective into judges' work. As such, judges in the formal system are now required to consider the international conventions relating to gender equality that have been adopted by Indonesia, and to participate in trainings on CEDAW and other similar legal instruments. The customary law system in Indonesia, it was explained, does not currently have similar mechanisms and regulations for reducing gender inequality and discrimination. Thus, while national rules and policies require formal judges to follow rules that promote gender equality and address bias and discrimination, no similar measures have to date been adopted by or in relation to customary judges, and consequently a gap exists between the formal and informal systems as regards the effective promotion and protection of women's human rights. Moreover, given the frequency with which communities utilize traditional and customary systems, this gap illustrates how formal recognition of equal rights between men and women does not necessarily guarantee substantive equality on the ground.

Participants also discussed situations where the combined effect of discrimination in both formal and informal systems results in a joint failure to effectively promote and protect women's rights. For example, it was suggested that formal and informal systems in Pakistan effectively converge into one patriarchal system that facilitates the exclusion and discrimination of women. In many Pakistani rural communities, it was explained, so-called "honour killings" are seen as an accepted means for men to obtain justice informally (at the expense of women's lives) with the acquiescence of the formal justice system.

Another participant noted how certain traditional and customary legal systems effectively tie social harmony to the silencing of women, as demonstrated by the practice of giving women away in marriage in order to end community feuding. Furthermore, as several participants described, women often simultaneously face an ultimatum from both justice systems – if they appeal to the community for justice, the State will not intervene to help them, and if they choose to appeal to the State, the community will similarly withdraw its support. It was noted how this ultimatum clearly conflicts with the common notion that individuals' rights should be upheld and protected wherever and whenever they are violated, regardless of where one turns to for support.

Based on this discussion, the question arose: is there a way to bridge the justice gap between formal and informal systems, as relating to women's rights and gender equality? As some participants noted, some international experts and civil society actors have recommended that certain informal systems be banned completely because of the extent and depth of their lack of regard for women's rights and gender equality, with those involved in such systems prosecuted. On the other hand, others argued that in some or all situations it may be possible to envision a more holistic system, in which formal and informal mechanisms coordinate with one another to more effectively provide justice to all persons, untainted by discrimination and violence against women, or at least, without seeing deeper or more prevalent discrimination in the informal system than exists in the formal system.

Indeed some participants took the approach that in most if not all situations, neither the formal nor the informal system is without fault in relation to gender discrimination and violence, and moreover, that

⁷ *The Bangkok General Guidance for Judges in Applying a Gender Perspective* was adopted by judges from Philippines, Thailand, Timor Leste, and Indonesia, at a meeting in Bangkok in June 2016, hosted by the ICJ and UN Women. <https://www.icj.org/wp-content/uploads/2018/06/Southeast-Asia-Bangkok-Guidance-Advocacy-2016-ENG.pdf>

each has positive aspects that can be used to inform and reform the other. In this respect, participants noted several mechanisms utilized by some customary justice systems to promote women's rights. For example, a participant explained how in Myanmar, village committees that address informal disputes are often accompanied by a woman's organization that seeks to provide support to women involved in those cases, and to assist more women in becoming involved in the informal justice system – thus providing a kind of support which is lacking in the formal system. Such informal system mechanisms may be used to inspire the creation of similar tools within the formal system, and in this way the systems can improve one another.

Ultimately, participants generally called for greater awareness by formal actors of local legal traditions and customs (especially those in remote areas), capacity building and other measures to persuade or pressure judges within traditional and customary systems to better promote and protect women's rights in their justice processes, and greater efforts by formal government officials to determine how the formal and informal systems can better coordinate with, and support, one another.

At the same time, several participants maintained that other actors needed to recognize and avoid undermining the efforts of women's rights campaigners and other national actors in some countries, to abolish certain traditional or customary systems that perpetrate deep discrimination and violence against women and that do not respond to internal or external efforts towards changing their practices.

Fairness, Impartiality, and Use of Coercive Powers

Participants next discussed the procedures and composition of traditional justice systems – including the processes by which decision-makers are chosen, decisions are made, punishments imposed, and efforts are coordinated (or not coordinated) with formal systems – and whether and how such aspects relate to efforts to promote and ensure fairness and impartiality for those seeking and receiving justice.

Several participants noted the implications of even having such a discussion about fairness in connection with informal justice systems. Many persons are inherently biased against informal systems in this context, it was argued, believing that formal systems are necessarily more independent and impartial than other systems; however, the participant emphasized, the formal system has its own flaws, and in many contexts itself fails in practice to ensure independence and impartiality for those seeking justice. Moreover, some participants questioned whether it was appropriate to try to apply standards of fairness that were originally developed for formal courts, to radically different justice traditions, or if some other minimum standards should be applied in the context of customary systems.

With these considerations in mind, participants discussed the types of punishments utilized by informal systems. One participant described the practices of a particular traditional community where justice can be enforced through the imposition of a fine or judicial order, or through a "spiritual component", or both. The spiritual component can have greater deterrent value, it was suggested, than other forms of punishment, as it threatens the perpetrator and his or her loved ones with punishment from the perpetrators' ancestors (a kind of psychological punishment). According to the participant, many individuals are more afraid of the informal system for this reason, as the formal system does not impose

this type of spiritual punishment. Because there are no clear guidelines as to which system should hear certain types of cases, forum shopping then occurs, with individuals choosing to try cases in systems they believe will impose a lighter penalty.

Another participant pushed back on the notion that there is or should always be a choice between systems, arguing that in some cases, perpetrators who have been punished in the formal system must allegedly still go through the customary system within their communities. Therefore, there is concern that some individuals are actually tried and punished twice for the same act, due to the lack of coordination between systems.

It was affirmed more generally that the primary aim of indigenous and other traditional or customary systems is typically to restore community peace and cohesion, rather than necessarily to address the rights or obligations of individual victims and perpetrators; as such, it was argued, the concept of fairness was somewhat extraneous to the process.

Here it was suggested that it may be important, and help resolve potential controversies and conflicts, to take care to distinguish between indigenous or other traditional or customary processes that are truly "juridical" or "judicial" in their character and consequences – i.e. analogous to the functions performed by official State courts "in the determination of any criminal charge against him, or of his rights and obligations in a suit at law" (to use the language of article 14 of the International Covenant on Civil and Political Rights) – and those that are closer in their character and consequences to mediation or other forms of "Alternative Dispute Resolution". Even in relation to official State justice systems, some fair trial safeguards apply only to criminal trials, or to trials of civil matters; along with questions of judicial independence and impartiality, these standards would not normally be invoked (or at least not to the same degree of stringency) in relation to mediation or other forms of Alternative Dispute Resolution that do not involve exercises of the judicial powers of the State. Formal fair trial guarantees, or requirements of judicial independence or impartiality, may simply not be the appropriate standards to apply, including from a human rights perspective, to certain indigenous or other traditional or customary processes that, although they are aimed at dispute resolution, are not really analogous to the judicial functions of a formal court to which article 14 of the ICCPR would apply. This would not mean however that human rights had no role to play in relation to the processes: the substantive outcomes of such processes could still give rise to concerns in relation to non-discrimination, equality before the law, or other unjustified infringements of human rights.

Several participants noted how some communities look to local religious leaders to act as decision-makers in disputes, since many people tend to trust those community leaders. However, some religious leaders are not fair or impartial, particularly in cases dealing with religious issues, and community members may fear speaking out against such leaders for their lack of fairness. In other systems, it is the perpetrators who decide which justice system will be used to resolve a dispute, and this can potentially result in a lack of fairness for victims. Therefore, some participants suggested it can be important to establish specific criteria for determining who will act as decision-maker on any given matter, considering its character, the parties and where it occurred.

Some participants highlighted that the absence of guarantees or practices to ensure fairness and impartiality in certain traditional or customary systems can have a particularly negatively impact on the rights of women. For example, in some traditional systems, only men can be decision-makers (and sometimes only men can speak – whether as witness or advocate – even if the victim is a woman). Such exclusion of women, whether enforced formally or informally, results in bias and lack of fairness, particularly (but not exclusively) in cases involving sexual violence or family matters. Moreover, some women may not feel comfortable discussing issues like rape with a male decision-maker. Even where other matters may be dealt with in traditional institutions where women can participate, when it comes specifically to cases dealing with issues that touch on religion, including divorce or marriage, some traditional communities mandate that people turn to the church for guidance, in circumstances where the religious decision-makers are all men. In sum, the kinds of involvement that women have (and do not have) at the decision-making level, and how this involvement impacts the fairness and impartiality of decision-making, should be an essential consideration for anyone considering how to engage with traditional or customary justice systems.

In terms of fairness, impartiality, and consistency more generally, one participant noted how, in his village, there is no standardized process or procedure for decision-making within the traditional justice system – rather, the way a case will be resolved depends on a variety of factors, including which parties are involved, the severity of the case, and whether or not the case involves multiple communities. Both parties must agree on who will sit on the panel of judges overseeing the case. Nevertheless, it is often difficult to avoid conflicts of interest, given that panelists come from the same community as the parties, and it is likely that community members will know one another or even be related. When such a conflict exists, the parties have a right to reject the panel, and in some circumstances would invite someone from another village to preside over the case. In cases where there is a conflict between communities, a third community will need to resolve the dispute. The conflicting communities must then take an oath to accept whatever decision the third community reaches.

Several speakers pointed to a particular challenge for fairness generated by the uncertainty that commonly arises over which justice system has jurisdiction over a particular case. There is a risk that parties will seek perceived advantages by “forum-shopping” between the traditional and formal systems, or by otherwise exploiting any uncertainty. Several participants emphasized that it may be important to clearly predefine, by law, which issues are to be dealt with by formal and informal systems. This does not mean that the same line should be drawn between all formal and informal systems – instead, the line may depend on the actual systems at play in a given context. Several participants also emphasized the need for greater collaboration between formal and informal leaders on how cases should be allocated between systems. Where potentially overlapping jurisdictions is inevitable, in principle there should be some pre-defined process, if not criteria, in place to decide which should act.

With this in mind, participants offered proposals as to how the two kinds of system may better coordinate over jurisdiction.

Some participants argued that criminal proceedings should be left to the formal justice system, in light of the significant consequences for both accused and victims of serious criminal acts, arguing that informal systems with which they were familiar did not provide the same guarantees of impartiality, independence

and fairness that the formal system provided. Some participants similarly argued that serious non-criminal issues should also be dealt with by the formal system, on the basis that formal systems are better suited to ensure rights protections and guarantees.

Other participants argued that indigenous jurisdiction should not necessarily be limited to certain issues, that indigenous justice mechanisms could be recognized to have jurisdiction over all things that take place within a certain recognized traditional territory and potentially over matters affecting indigenous people or interests even if they took place outside such territory. International human rights norms, they argued, should be seen as providing a basis for both informal and formal justice systems. Moreover, they argued, in some cases even of a serious criminal character, adjudication by customary systems may be appropriate, as victims may prefer for certain matters to be dealt with by the community rather than by outsiders. Indeed, it was suggested, given the past or present role of some State justice systems in the colonial or other subjugation, or even attempted destruction, of indigenous communities, it was unjust and unrealistic to expect those communities and their members to view State justice systems as necessarily more "independent", "impartial" or "fair" than their own systems.

Other participants noted possibilities for different forms of hybrid system. Several participants explained specific procedures for appeal and review of informal justice mechanisms by formal mechanisms: traditional issues could be brought initially to an informal court, and if individuals were not satisfied with that court's decision, the decision could be appealed to the formal system, but the formal system would be bound to take into account both the legal norms of the Constitution and legislation, and other norms and communal principles that traditional communities value. Another arrangement was that cases initially within the exclusive jurisdiction of indigenous justice mechanisms could be subject to challenge or review before a joint judicial body whose members were drawn from both indigenous and non-indigenous judicial authorities.

There was general agreement that States must ensure that formal systems are improved and fulfill their obligations to all people, rather than depend exclusively on informal systems to deliver justice to traditional communities. Support was also expressed for the proposition that national legislators should, together with indigenous peoples and, where appropriate, other similar communities, review national laws with a view to recognizing the role of indigenous, and potentially other traditional or customary, justice systems in a manner consistent with the rights of indigenous peoples and other international human rights law and standards.

At minimum, coordination and collaboration between State justice systems and indigenous justice systems should be increased, including through means to resolve jurisdictional ambiguities. Deeper integration of the two kinds of systems through hybrid structures should also be jointly considered.

States should also consider whether similar measures would be appropriate in relation to non-indigenous traditional or customary justice systems, subject however to the possibility mentioned earlier that the structure and practices of certain such systems may be so profoundly infused with norms and practices of a discriminatory nature or otherwise diametrically opposed to universal human rights norms, with a total lack of openness to outside engagement or internal dissent, that there is no conceivable role for that particular traditional system compatible with human rights and the rule of law.

Human Rights of Children, and Juvenile Justice

Participants discussed a range of impacts that indigenous and other traditional or customary justice systems may have on the human rights and welfare of children. Indeed, it was emphasized, the interaction (or lack thereof) between formal and informal systems can itself have implications on children's rights.

Some participants asserted that while a central guiding obligation embodied in the UN Convention on the Rights of the Child is that all judicial decisions taken in respect of a child must uphold the best interest of that child, many traditional and customary justice systems instead view their overarching duty to be to maintain or re-establish the peace, balance and well-being of the overall community. Participants therefore discussed how best to address potential inconsistencies between international human rights law and standards, and traditional practices.

Several participants provided examples of how formal and informal justice systems can coordinate effectively in order to ensure justice and fairness for children. One participant described a dual-track criminal justice system for juveniles in Indonesia, utilizing both formal and informal systems and taking a restorative (rather than retributive) approach to justice. Within the informal system, police, social services, parents, religious leaders, school leaders, and customary leaders all play a role in finding a solution in a child's case. If not resolved at the preliminary investigative stage, a case may ultimately reach a court, but one with judges who are knowledgeable about children's issues, and who must choose the appropriate sanctions (if any) according to the best interest of the child. If the child comes from an indigenous community, the judge will also consider the views of the representative of the indigenous community on what might be the best solution for the people involved, so as to provide restorative justice for the community as a whole. No matter whether the informal or formal route is utilized, however, a restorative justice approach, which draws from local wisdom and traditional and customary law, must be taken. According to the participant, implementation of this restorative justice approach within the juvenile criminal justice system in Indonesia required extensive sensitization of Indonesian society and law enforcement, integrated training of officials such as prosecutors, judges, social workers, and corrections officers, and the combined efforts and involvement of a number of governmental ministries, so as to ensure proper coordination and integration of the system. According to the participant, the number of children imprisoned in Indonesia has markedly decreased following implementation of the system. While obstacles remain – including full implementation of the system by the government and the need for increased capacity building – it was emphasized that the system presents an example of how formal and informal systems can work together to provide justice for victims, perpetrators, and communities as a whole.

Participants noted other ways in which formal and informal systems work together to address particular issues, such as the disproportionate representation of indigenous children in detention systems. In some cases, according to participants, community elders will recommend that indigenous children be brought back to their communities, so that the communities themselves can take on the responsibility of

rehabilitating the children. And in New Zealand, one participant noted, the ordinary State courts will sometimes transfer indigenous children to indigenous courts, where the common approach is to send indigenous children back to their communities, so as to learn more about their culture and to strengthen community bonds.

However, while several participants noted successful stories of informal and formal systems working together so as to promote children's rights, other participants emphasized that much more needs to be done. In one country, a participant explained, the comprehensive protection of children was provided for in the State's Constitution, but not reflected in actual practice on the ground. According to that participant, there is no juvenile justice system in place in the formal courts, where children are treated no differently from adults. Similarly, in the traditional justice system, there is no differentiation between children and adults – the system simply considers those who come into conflict with the law as "persons." Another participant reported that in Myanmar, many children live on the streets, where they become involved in crime. These children then find themselves in the ordinary courts, where they are sentenced, or else waiting for their cases to be heard in adult detention centers. In Pakistan, according to one participant, formal and informal systems clash over the age at which someone should still be considered a "child" – a conflict that often plays out in child marriage contexts. And generally, although participants noted that evidence suggests there is a strong correlation between removing children from their communities and children becoming involved with crime, there is a lack of effort by many States to ensure that children are kept with their families.

Participants agreed, therefore, that while many reforms are being done in certain regions, there is still much work to be done to ensure that children are able to obtain justice and protection in both the formal and informal systems. Some participants therefore called for increased capacity building, in order to ensure that both systems are compliant with international standards and both systems can effectively protect children's rights.

Towards more Effective Engagement by and with Informal Systems

The Forum concluded with a discussion of how formal and informal systems could better engage with one another, and with international human rights, in order to improve equal and effective access to justice, protection of human rights, and the rule of law in the Asia-Pacific region.

Participants largely concurred with views expressed during the 2017 Forum: that indigenous and other traditional or customary systems are as a matter of fact, the primary means for seeking justice for large parts of the world's population, whether out of necessity or preference; that many such systems do or could make positive contributions to access to justice; that strategies should be sought and implemented towards seeing the practices of such systems become more consistent with international human rights norms; and that certainly with respect to indigenous justice systems, and potentially with respect to other kinds of traditional or customary justice systems, States should give consideration to recognition of their role within the domestic legal order.

Many participants emphasized that education has an important role to in ensuring indigenous and other traditional or customary justice systems can make a positive contribution to access to justice and human

rights. Learning opportunities and opportunities to exchange knowledge about international and national protections for human rights, as well as the national legal system, should be offered to decision-makers and other actors within indigenous and other traditional or customary justice systems. Judges, prosecutors, lawyers and other actors active within the official State justice system should be offered similar opportunities concerning international and national protections for human rights of indigenous peoples and other relevant communities, as well as about any indigenous or other traditional or customary justice systems operating in the country. Whether in the framework of these capacity-building exercises or otherwise, opportunities should be created for actors from both kinds of systems to come together to become familiar with one another, to exchange expertise, and where appropriate to eventually discuss coordination or other issues.

In the Philippines, according to one participant, traditional forms of justice are now included in continuing education programs for lawyers. Other participants argued that other actors, such as local authorities, the military, and the police, should also be involved in the education process. One participant noted that in the Latin American region, cultural experts – such as anthropologists or indigenous authorities – are sometimes utilized in cases before the formal justice system, to explain local culture and community norms to formal judges, and suggested this practice may be of interest to lawyers, prosecutors and judges in the Asia-Pacific region.

Measures should also be undertaken to make all members of indigenous and other communities aware of their rights, in relation to both kinds of justice systems, and how to seek remedies when they feel their rights are not being respected. One participant emphasized the importance of educating entire communities on human rights, arguing that by informing communities about international human rights standards, human rights may be better promoted on the ground. For example, the participant noted, in Indonesia, increased awareness of women's rights and CEDAW among the population more generally, has contributed to the acknowledgement of women's land ownership rights.

Capacity-building and coordination efforts have taken place in Myanmar, according to one participant. Organizations working on justice-related issues have engaged with local officials, in order to talk to them about a rights-based justice approach, their own notions of fairness and equality, and how to then incorporate a rights-based approach into local officials' existing practices. At the same time, organizations are collecting records of how local disputes are decided, so as to better understand the functioning of traditional justice systems. Organizations have pursued this work through collaboration with government offices, as there is a recognized need for further research on traditional systems.

Participants noted that it is also important to understand the ways in which traditional communities conceive of justice, in order to have an effective dialogue with traditional communities on such issues. One participant argued that in many rural, traditional communities, everything is framed in terms of the community, and that persons (whether from within or without the community) seeking better respect and protection for human rights within the justice systems that operate in the community, may find that avoiding speaking about rights exclusively from an individual perspective, and instead finding ways to relate international human rights norms to concepts already well-known to individuals from the particular community, will increase the impact of their engagement. Moreover, speaking with traditional actors on their understandings of the law – for example, of what constitutes a criminal offense – can help

traditional justice actors avoid unnecessary, unintended conflicts with the formal system. Participants also recommended that persons and institutions seeking to engage constructively with decision-makers in indigenous or other traditional or customary justice systems ensure they do not approach leaders or other community members in ways that may be perceived as condescending. Rather, capacity building should be presented, and designed in substance, as an exchange of perspectives between persons whose expertise and experience may differ but is equally deserving of respect.

Several participants emphasized the need for further research and documentation on indigenous and other traditional or customary justice systems, especially given the wide variety of practices that exist. Effective engagement with such systems should be informed not only by knowledge about how the specific system operates, but also comparative knowledge about the outcomes of engagement with similar systems elsewhere. It was repeatedly emphasized that a one-size-fits-all approach for engaging with such justice systems not only is unlikely to be effective, it in fact carries risk of having negative outcomes.

Many participants felt that increased engagement and understanding between indigenous and other traditional or customary justice systems and official State justice systems is needed in order to improve respect and protection for human rights by all systems. Rather than focus on differences, some argued, formal and informal actors may wish to begin with areas of agreement between the two systems, in order to establish trust as a basis for determining how best to move forward. Some argued that, rather than necessarily seeking to incorporate informal systems into the formal system, actors may look to strengthen both systems, so as to best promote effective and equal access to justice for all.

On the other hand, several participants highlighted that a specific set of international norms has been developed in relation to rights of indigenous peoples, including particularly the UN Declaration on the Rights of Indigenous Peoples, with specific provisions on indigenous justice systems. They emphasized that what may be appropriate to the specific situation of indigenous justice systems may not be appropriate to other kinds of traditional or customary justice systems. Furthermore, while State recognition or other forms of constructive engagement with traditional or customary justice systems may be seen as "optional" in other contexts, in the specific context of indigenous justice systems, such recognition and constructive engagement is a matter of obligation.

At the same time, speaking of non-indigenous traditional or customary justice systems with Pakistan as a specific example, some other participants reiterated that in their experience, the structure and practices of certain such systems may be so profoundly infused with norms and practices of a discriminatory nature or otherwise diametrically opposed to universal human rights norms, with a total lack of openness to outside engagement or internal dissent, such that recognition or constructive engagement by State institutions should be rejected as incompatible with the State's international human rights obligations. In such specific circumstances, they argued, actors from outside of the national context should be careful to ensure that they do not undermine the work of local civil society and local authorities to see such systems limited or abolished, by seeking to constructively engage with the systems or their leaders in ways that could inadvertently and unjustifiably increase perceptions of their legitimacy.

Conclusion

The 2018 ICJ Geneva Forum on indigenous and other traditional or customary justice systems in the Asia-Pacific region was both in itself an important exchange of experience and expertise by judges, lawyers and other practitioners from formal and informal systems from around the region, and generated important insights that will contribute significantly to the global guidance to be published by the ICJ in 2020.

Forum participants reaffirmed the potential for indigenous and other traditional or customary justice mechanisms to contribute to the realization of equal and effective access to justice, particularly for indigenous, rural, poor and other marginalised populations. Participants stressed the importance of sustained consultations and engagement directly with indigenous justice systems, to encourage their development in harmony with international human rights standards and in coordination with more official or formal national legal institutions. Participants also highlighted the opportunities and risks associated with similar forms of constructive engagement with other, non-indigenous, traditional or customary justice systems.

Participants further agreed that States must at the same time ensure that formal systems are also made more accessible, both in practical and in cultural terms, to relevant communities.

In line with articles 5, 34, 40, and 46 of the UN Declaration on the Rights of Indigenous Peoples, constitutional or other legal provisions should recognize the role of indigenous justice systems, within an overall framework for protection and promotion of international human rights standards. Indigenous peoples and States should jointly consider means for improved coordination and collaboration between indigenous and non-indigenous justice systems, with a view to seeing the different systems work in harmony to provide effective access to justice and protection of human rights for all people.

A similar approach may be appropriate in relation to certain other non-indigenous traditional and customary justice systems. However, some participants argued that certain traditional and customary justice systems not of an indigenous character are based on conceptual foundations and practices so deeply in conflict with international human rights and the rule of law, and so closed to change or dialogue, that recognition or other constructive engagement was either not possible or would be counter-productive; in such circumstances, they argued, State authorities could be justified in seeking to abolish such systems (but at the same time, authorities would be under an obligation to ensure the accessibility of official courts that themselves comply with international human rights and rule of law standards).

Among the possibilities for constructive engagement highlighted at the Forum, in addition to increased recognition and support from State institutions to indigenous and, where appropriate, other traditional or customary justice systems, participants emphasized the need for increased opportunities for exchange of expertise and experience, education, awareness-raising and other capacity-building efforts, in order to break down biases and stereotypes and to improve all actors' knowledge of international human rights standards and indigenous and other traditional or customary practices. The overarching aim of all such activities should be to improve equal and effective access to justice and protection of human rights for all.

Among the existing obstacles to access to justice identified by various participants, within both indigenous and other traditional or customary justice systems and official State justice systems, were the following:

- Lack of understanding, recognition and resources for indigenous or other traditional or customary justice systems, on the part of the State authorities and other actors;
- Insufficient coordination and collaboration between judicial and other actors within the two kinds of systems;
- The influence of stereotypes and implicit discrimination in considering how different justice systems operate, as well as their values and aims, impeding efforts to build common understandings across the systems, including as regards notions of fairness, justice, and human rights;
- Failure of State institutions and other actors to recognize and respond to a pervasive lack of trust in official State justice systems on the part of indigenous peoples and other subjugated communities, in situations where the State justice system itself participated in or perpetuated historical violence and discrimination against those communities (particularly where the State justice system's role has never been fully acknowledged and addressed), or where other State institutions continue in the present to perpetrate such violence or discrimination with impunity;
- On the one hand, lack of a real choice of justice system for individuals seeking justice due to the practical inaccessibility of the official State justice system, or else due to pressure on individuals to exclusively use one or the other of the State or traditional system and completely forsake the other system's assistance; and on the other hand, failure to adequately define the distinct jurisdictions of different systems and to provide an appropriate means of resolving jurisdictional conflicts when they arise.

The scope of matters over which indigenous or other traditional or customary justice systems may exercise authority remained a matter of discussion and some differences of opinion. Although no consensus was reached by participants at the Forum, one suggestion was that it would be helpful to those working in this area if the Human Rights Committee were to revisit and elaborate upon its position, particularly in relation to indigenous justice systems, in consultation with other experts and relevant stakeholders.

Participants also highlighted how failures to ensure fairness, impartiality, and independence in some aspects of both systems further impede access to justice. Among the key concerns were

- Official State justice systems' lack of awareness or consideration of the culture and practices of indigenous or other traditional actors, leading to over-criminalization by the formal system;

- Exclusion or other discrimination against women as decision-makers or participants in the traditional system (keeping in mind however that often the official State justice system may similarly exclude or discriminate against women), leading in turn to discriminatory impacts on women in the substantive outcomes of justice processes;
- Lack of guidance on whether and how established notions of fair trial safeguards, and judicial independence, impartiality, integrity and accountability, apply to decision-makers and decision-making processes in indigenous or other traditional or customary justice systems.

On this last point, while there are many complex and potentially contradictory issues from a human rights perspective in deciding whether or how international fair trial standards should apply to an indigenous or other traditional or customary justice mechanism, it may be helpful to narrow the focus by assessing the extent to which the mechanism is, in the relevant matter or matters, in fact exercising coercive and adjudicative powers akin to a court or tribunal adjudicating a criminal charge or civil lawsuit (in relation to which human rights law would insist upon formal fair trial protections), or is instead fulfilling a more consensual and mediating role more akin to alternative dispute resolution (in relation to which human rights law might not apply fair trial requirements, even in the formal system).

While the focus of the Forum was mainly on the composition and procedures of indigenous and other traditional or customary justice systems, and their relationship with official State justice systems, a range of other observations regarding the substantive legal norms applied by such systems arose. Some of a more positive nature were about the potential for indigenous or other justice systems to have greater impact in terms of rehabilitation and reintegration of offenders, ensuring justice for victims from groups that are typically marginalized by the official State system, and restoration of community well-being. However others were of a more negative character, in terms of potential for arbitrary or unjust punishment of individuals, families or other groups in the name of the best interests of the community, discriminatory impacts on women of substantive outcomes, and failure to make the best interests of the child the overriding concern in matters relating to children.

While there was a sense that the limited research and experience to date may suggest certain patterns globally and regionally in the approaches and practices of indigenous and other traditional or customary justice systems, the essential importance of understanding and responding to very local and specific contexts in light of the diversity of situations was repeatedly stressed. To take one example, in one locale women who have been subjected to sexual violence may find their cases are systematically marginalized or ignored by the police, prosecutors and judges in the formal justice system, and may see the indigenous or other traditional or customary system as being far more effective in actually holding the perpetrator to account and addressing the situation and needs of the victim; whereas in another locale women may experience the opposite: sexual violence is systematically ignored or downplayed in the traditional or customary justice system, and their only realistic hope for addressing impunity and meeting their needs lies in the official State system. Key, then, is that strategies and approaches for engaging with justice systems need to be highly sensitive to and based on a sound assessment of the local situation, and should be developed in conjunction with not only the leadership of, but also other members of, affected communities.

Forum participants were supportive of the ICJ's own plans to continue its work on indigenous and other traditional or customary justice systems. The ICJ will continue to periodically update its *Compilation of International Sources on Indigenous and other Traditional or Customary Justice Systems*, setting out relevant treaty provisions, standards, conclusions and recommendations of UN and other expert bodies. In 2019-2020, the ICJ plans to convene further regional consultations in Africa and potentially in Latin America, as well as a final global forum in Geneva in 2020.

The UN Special Rapporteur on the Rights of Indigenous Peoples has announced that her report to the Human Rights Council in September 2019 will focus on indigenous justice systems. The interactive dialogue on her report will be an important opportunity for States and civil society to further exchange views on the best means of implementing the relevant provisions of the UN Declaration on the Rights of Indigenous Peoples in the diversity of contexts around the world.

The Geneva Forum global and regional consultations, the Special Rapporteur's report and associated dialogue, and the ICJ's own research, global experience and expertise, will provide a foundation for the development by the ICJ of further legal, policy and practical guidance, including conclusions and recommendations on the role of indigenous and other traditional or customary justice systems in relation to access to justice, human rights and the rule of law. To be published in 2020, it will be aimed at assisting actors within indigenous and other traditional or customary systems, actors within State institutions, civil society and international development and other agencies, to better secure equal access to justice for all, legal protection of human rights, and the rule of law.



Participants list

9th annual Geneva Forum of Judges & Lawyers

13-14 December 2018
Bangkok, Thailand

1. **Ms. Rujapa AMPAIRAT** Human Rights Officer, Office of the National Human Rights Commission, Thailand
2. **Daw Aye Myaing** Senior Advocate; Former district judge; Chairperson, District Legal Aid Board of Mawlamyine; Member, Rahomonnya lawyer network. Mon State, Myanmar
3. **Ms. Manja BAYANG** Lawyer, Philippines; Researcher for the UN Special Rapporteur on the Rights of Indigenous Peoples
4. **Ms. Nazish BROHI** Independent Researcher, Karachi, Pakistan
5. **Mr. Sattawut CHANKAN** Human Rights Officer, Office of the National Human Rights Commission, Thailand
6. **Hon. Dr. Diah Sulastri DEWI S.H., M.H** High Court Judge of the High Court of Tanjungkarang, Member of the Working Group on Mediation and Working Group on the Women and Children in the Supreme Court of the Republic of Indonesia
7. **Ms. Christine EVANS** Human Rights Officer, Mandate of the UN Special Rapporteur on the Rights of Indigenous Peoples, Office of the UN High Commissioner for Human Rights (OHCHR), Geneva
8. **Ms Swati MEHTA** Justice and Legal Empowerment Specialist, MyJustice, Myanmar
9. **Daw Moe Moe Thet Aung** Lawyer, Law Home Organization, Kayah State, Myanmar
10. **Dr. Colin NICHOLAS** Co-ordinator, Centre for Orang Asli Concerns, Malaysia
11. **Ms. Rukmini PAATA-TOHEKE** Customary Law Judge, Adat Ngata Toro (Tina Ngata) Indigenous People and Customary Law Judicial Forum of Central Sulawesi; Board of AMAN in the Central Sulawesi, Aliansi Masyarakat Adat Nusantara (AMAN)/the Indigenous Peoples' Alliance of the Archipelago, Indonesia

12. **Mr. PHEAP Sochea** Cambodia Indigenous Youth Association, Phnom Penh, Cambodia
13. **Mr. Ekachai PINKAEW** Human Rights Officer, Office of the National Human Rights Commission, Thailand
14. **U Pyae Phyong Aung** Consultation Committee for Customary Law Draft Policy (State level); Kayah Earth rights Action Network; Kayah State Peace Monitoring Network; Refugee and Returnee Rehabilitation Committee (Kayah State); Karen Literacy and Culture Committee (Kayah State); Myanmar
15. **Mr. Sakda SAENMI** Coordinator, Thai Indigenous People Association; Director, Inter-Mountain Peoples' Education and Culture in Thailand Association (IMPECT)
16. **Mr. Stefano SENSI** Human Rights Officer, Mandate of the UN Special Rapporteur on the Independence of judges and lawyers, OHCHR Geneva, Switzerland
17. **Ms. Victoria TAULI CORPUZ** UN Special Rapporteur on the Rights of Indigenous Peoples, Philippines
18. **Daw Than Than Htay** Village Administrator, Mon State, Myanmar
19. **Mr. Josh TRINDADE** Advisor on Socio-Cultural Issues for Legislative Reform, Ministry of Legislative Reform and Parliamentary Affairs, Timor Leste
20. **Ms. Shivani VERMA** Human Rights Officer, OHCHR Bangkok Regional Office for South-East Asia

ICJ Staff

21. **Mr. Sean BAIN** Legal Adviser, Asia-Pacific Programme, Yangon, Myanmar
22. **Mr. Ross CLARKE** Team Leader, Denmark-Myanmar Program on Rule of Law and Human Rights, Asia-Pacific Programme, Yangon, Myanmar
23. **Ms. Emerlynne GIL** Senior Legal Adviser, Asia-Pacific Programme, Thailand Office
24. **Ms. Hnin Win Aung** National Legal Adviser, Asia-Pacific Programme, Yangon, Myanmar
25. **Ms. Watchalawalee KUMBOONREUNG** Thailand Programme Fellow
26. **Ms. Ruth PANJAITAN** National Legal Adviser, Asia-Pacific Programme, Indonesia
27. **Ms. Nawawan PETCHWATTANA** Administrative Officer, Asia-Pacific Programme, Thailand Office
28. **Dr. Matt POLLARD** Senior Legal Adviser (Centre for Independence of Judges & Lawyers, and UN Representative), Law & Policy Office, Geneva Office
29. **Mr. Frederick RAWSKI** Director, Asia-Pacific Programme, Thailand Office
30. **Ms. Joanne ROSALDES** ASEAN/Southeast Asia Programme Fellow
31. **Ms. Dhevy SIVAPRAKASAM** International Associate Legal Adviser, Asia Pacific Programme
32. **Ms. Sanhawan SRISOD** National Legal Adviser, Asia Pacific Programme, Thailand
33. **Ms. Sushmitha THAYANAMDAN** National Legal Adviser, Asia Pacific Programme, Sri Lanka

Programme

9th annual Geneva Forum of Judges & Lawyers

Bangkok, Thailand

Thursday, 13 December 2018

9:30 – 11:00

Opening Session & Introduction of the Forum

- Explanation by ICJ of background, scope and intended focus of Forum.
- Participants briefly introduce themselves and their experience with traditional and customary justice systems.

11:15 – 12:30

Equal and Effective Access to Justice

- What is the potential for traditional and customary justice systems to contribute to the realisation of equal and effective access to justice, particularly for rural, poor and other marginalised populations in the Asia-Pacific region, including in connection with Sustainable Development Goal 16?
- How do international human rights of ethnic, religious or linguistic minorities, the particular rights of indigenous peoples, and cultural rights more generally relate to traditional and customary justice systems in the Asia-Pacific region?
- What challenges and risks need to be overcome in seeing traditional and customary justice systems contribute to equal and effective access to justice in the Asia-Pacific region, and how to address them?

13:30 – 15:15

Legal Status of Traditional Justice Systems at the National Level

- Are traditional and customary justice systems recognised by the Constitution or other national laws in different countries in the region?
- Do the Constitution or other national laws set out the relationship between the traditional or customary justice system, and the ordinary courts of the country?
- What kinds of matters can traditional and customary justice systems decide in different countries in the region?
- Where there is overlapping jurisdiction between traditional systems and the ordinary justice system, who can determine which system will address a particular case, what is such a determination based on, and what can people do if they disagree with that decision?

15:30 – 18:00

Human Rights of Women, Gender Equality

- What impacts – negative or positive, actual or potential – do the mechanisms and processes of traditional and customary justice systems have on the human rights of women?⁸ For instance as regards:
 - effective participation by women (as decision-makers, parties, witnesses);
 - the right of women to non-discrimination, including in relation to access, process and outcomes;
 - practices relevant to the right to remedy and reparation, with particular impact on women; and
 - treatment of cases of alleged violence against women.
- What other impacts – positive or negative – do traditional and customary justice systems have from the perspective of gender analysis?
- How best to address any potential inconsistencies with international human rights law and standards?

Friday, 14 December

9:30 – 12:30

Fairness and Impartiality, Use of Coercive Powers

- What are the processes and criteria by which decision-makers within traditional justice systems are chosen?
- How do the decision-makers in informal justice systems ensure their decisions are independent and impartial, free from bias, corruption and discrimination?
- How do traditional justice systems guarantee the fairness of the proceedings (considering elements such as: the right to a fair and public hearing, the right to be heard by an independent and impartial decision maker, the right to legal representation and assistance, the right to interpretation if necessary, the right to legal aid, the right to non-discrimination in access to public office)
- What coercive powers do traditional justice systems use during the process (deprivation of liberty of persons accused, witnesses; getting information from people who resist providing it; etc.)? (considering elements such as: the right not to be subject to torture or other cruel, inhuman or degrading treatment; the right not to be subject to arbitrary arrest or detention).
- What kinds of punishments or other coercive measures can traditional justice systems impose to resolve the case? (considering elements such as: the prohibition against torture or other cruel, inhuman or degrading punishment; the right to life; the right to effective remedy).
- Can the decision of a traditional justice system be appealed or reviewed by another body? If so, by what bodies and on what grounds?

⁸ Please note that the inclusion of a specific session on the rights of women in the schedule is not intended to restrict discussion of the situation and rights of women to that session. To the contrary, participants are encouraged to consider and discuss gender perspectives and other intersecting aspects of discrimination on multiple grounds, whether in relation to ordinary courts or traditional or customary systems, throughout all parts of the programme.

14:00 – 15:30

Human Rights of Children, Juvenile Justice

- What impacts – negative or positive, actual or potential – do the mechanisms and processes of traditional and customary justice systems have on the human rights of children? For instance, as regards:
 - effective participation by children (as complainants, defendants, or witnesses); and
 - the rights of children, including the principle of primary consideration of the best interests of the child and standards for the administration of juvenile justice, in relation to access, processes and outcomes.
- How best to address any potential inconsistencies with international human rights law and standards?

15:45 – 17:30

Towards more Effective Engagement by and with Traditional Justice Systems

- With a view to improving equal and effective access to justice, protection of human rights, and the rule of law in the Asia-Pacific region:
 - How can decision-makers and other actors in traditional and customary justice systems better engage with international human rights?
 - How can judges, prosecutors and other actors from ordinary justice systems engage with decision-makers and participants in traditional and customary justice systems, with a view to improving equal and effective access to justice, protection of human rights, and the rule of law?
 - What approach should international non-governmental organisations, national and international development agencies, and inter-governmental organisations take with traditional and customary justice systems?

Commission Members

March 2019 (for an updated list, please visit www.icj.org/commission)

President:

Prof. Robert Goldman, United States

Vice-Presidents:

Prof. Carlos Ayala, Venezuela

Justice Radmila Dragicevic-Dicic, Serbia

Executive Committee:

Justice Sir Nicolas Bratza, UK

Dame Silvia Cartwright, New Zealand

(Chair) Ms Roberta Clarke, Barbados-Canada

Mr. Shawan Jabarin, Palestine

Ms Hina Jilani, Pakistan

Justice Sanji Monageng, Botswana

Mr Belisário dos Santos Júnior, Brazil

Other Commission Members:

Professor Kyong-Wahn Ahn, Republic of Korea

Justice Chinara Aidarbekova, Kyrgyzstan

Justice Adolfo Azcuna, Philippines

Ms Hadeel Abdel Aziz, Jordan

Mr Reed Brody, United States

Justice Azhar Cachalia, South Africa

Prof. Miguel Carbonell, Mexico

Justice Moses Chinhengo, Zimbabwe

Prof. Sarah Cleveland, United States

Justice Martine Comte, France

Mr Marzen Darwish, Syria

Mr Gamal Eid, Egypt

Mr Roberto Garretón, Chile

Ms Nahla Haidar El Addal, Lebanon

Prof. Michelo Hansungule, Zambia

Ms Gulnora Ishankanova, Uzbekistan

Ms Imrana Jalal, Fiji

Justice Kalthoum Kennou, Tunisia

Ms Jamesina Essie L. King, Sierra Leone

Prof. César Landa, Peru

Justice Ketil Lund, Norway

Justice Qinisile Mabuza, Swaziland

Justice José Antonio Martín Pallín, Spain

Prof. Juan Méndez, Argentina

Justice Charles Mkandawire, Malawi

Justice Yvonne Mokgoro, South Africa

Justice Tamara Morschakova, Russia

Justice Willly Mutunga, Kenya

Justice Egbert Myjer, Netherlands

Justice John Lawrence O'Meally, Australia

Ms Mikiko Otani, Japan

Justice Fatsah Ouguergouz, Algeria

Dr Jarna Petman, Finland

Prof. Mónica Pinto, Argentina

Prof. Victor Rodriguez Rescia, Costa Rica

Mr Alejandro Salinas Rivera, Chile

Mr Michael Sfard, Israel

Prof. Marco Sassoli, Italy-Switzerland

Justice Ajit Prakash Shah, India

Justice Kalyan Shrestha, Nepal

Ms Ambiga Sreenevasan, Malaysia

Justice Marwan Tashani, Libya

Mr Wilder Tayler, Uruguay

Justice Philippe Texier, France

Justice Lillian Tibatemwa-Ekirikubinza, Uganda

Justice Stefan Trechsel, Switzerland

Prof. Rodrigo Uprimny Yepes, Colombia



**International
Commission
of Jurists**

P.O. Box 91
Rue des Bains 33
CH 1211 Geneva 8
Switzerland

t +41 22 979 38 00

f +41 22 979 38 01

www.icj.org