

Traditional and Customary Justice Systems: Asia-Pacific Regional Consultation

9th annual Geneva Forum of Judges & Lawyers

**13-14 December 2018
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 International Commission of Jurists (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.

The 2017 Forum focused on traditional and customary justice systems. Participants discussed the potential contributions of such systems to access to justice for rural and other marginalized populations (including in relation to Sustainable Development Goal 16), the relationship of such systems to international fair trial and rule of law standards, and impacts on human rights including particularly those of women and children.¹ Following on these discussions, the ICJ has decided that the Forum will maintain its focus on traditional and customary justice systems for the next three years. In order to better engage with participants in customary justice systems, the Geneva Forum will be “on the road” in 2018 and 2019, convened in Southeast Asia in 2018 and Southern Africa in 2019. The Forum will return to Geneva for an enlarged session in 2020 to adopt final conclusions and global guidance.

The ninth annual Geneva Forum will take place in Bangkok, Thailand on 13 and 14 December 2018. It will bring together judges, lawyers others engaged with traditional justice systems in the Asia-Pacific region, as well as practitioners from ordinary justice systems in the region, together with ICJ and UN experts from Geneva, to discuss these issues and develop practical recommendations, in a private and small-group setting that emphasizes active and dynamic conversation engaging everyone, rather than pre-prepared presentations by selected speakers.

The potential and the risks for equal and effective access to justice and human rights

Many participants in the 2017 Geneva Forum affirmed that traditional and customary justice systems can make an important contribution to improving access to justice for rural or other marginalized populations, as a result of such factors as geographic proximity, lower cost, lesser cultural or linguistic barriers, and greater trust by local communities, relative to the official justice system. Indeed, for these and other reasons, for some marginalized and disadvantaged rural populations, traditional and customary courts may in practical terms be the only form of access they have to any kind of justice.

Furthermore, article 34 of the UN Declaration on the Rights of Indigenous Peoples affirms the right of indigenous peoples “have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”. Indeed, 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 other ethnic, religious or linguistic minorities.

¹ For more details see the ICJ publications: *Traditional and Customary Justice Systems: Report of the 2017 Geneva Forum of Judges and Lawyers* and *Traditional and Customary Justice Systems: Selected International Sources*, both available at www.icj.org/gf2017.

At the same time, the Forum discussions confirmed that certain characteristics and processes of some traditional and customary justice systems conflict with international standards on fair trial and the administration of justice, and human rights, particularly of women and children. Among the examples of concerns raised from different regions were: women being forced to present their grievances through a male representative and sometimes not even allowed to give testimony as a victim or witness; unequal representation of women as decision makers; subordination of the best interests of a child to family, inter-family, or communal interests; use of children as form of compensation in settling legal disputes; bias or partiality of decision-makers, or unfair procedures, or lack of consistency, leading to discriminatory or unjust outcomes.

As such, participants in the 2017 Forum generally agreed that government authorities, development agencies, and civil society should engage with such systems with a view to seeing them operate more consistently with international standards. There was a range of views on which forms of engagement or intervention were most appropriate or effective. It was also emphasized that work should continue to build the accessibility and capacity of official justice systems to ensure that individuals seeking justice have a real choice.

The above conclusions were subject to the acknowledgement that traditional and customary justice systems take many different forms around the world, and that they exist in many different contexts.

Format for Forum Discussions

The format of the Forum is designed to make the maximum space available for interactive discussion between participants. For this reason the ICJ does not encourage participants to prepare formal presentations, although one or two participants will open each session with a brief verbal introduction, intended to provoke discussion. To facilitate open discussion, the Forum is conducted on the basis of that no statement or other information shared at the Forum may be publicly attributed to an individual, whether by name or affiliation, without their prior consent. The list of participants is, however, public. The working language of the meetings will be English, with interpretation into Burmese; we regret that we are unable to commit otherwise to provide interpretation at this event, although the ICJ will consider informal arrangements in specific cases.

Development of Guidance by the International Commission of Jurists

Composed of some sixty distinguished judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) works to promote the rule of law and the legal protection of human rights, 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.

The ICJ's global experience and expertise, together with research and global consultations with judges, lawyers and other relevant experts, including the 2017 Geneva Forum, the 2018 session in Bangkok, and subsequent regional consultations in Africa and the Americas, will provide a foundation for the publication by ICJ in 2020 of legal, policy and practical guidance on the role of traditional and customary justice systems in relation to access to justice, human rights and the rule of law. The ICJ guidance will focus on the mechanisms and procedures of traditional and customary justice systems, as opposed to tackling all aspects of the substantive law.

While the ICJ will seek for the guidance to reflect the broadest possible level of concurrence among those consulted, the guidance will remain the sole responsibility of the ICJ and will not necessarily reflect the views of every individual participant in the consultations.

The ICJ guidance will take into account the many variations and differences between different traditional and customary justice systems that exist in different countries, while seeking to articulate conclusions and recommendations sufficiently universal to be applicable across the widest possible range of contexts. At the same time, the ICJ does not intend for its guidance directly to address official religious courts or the application of customary law by official courts that do not incorporate mechanisms or processes of a traditional or customary character, as these may potentially raise somewhat distinct issues.

The guidance will seek to assist all actors involved in implementation and assessment of relevant targets

of Sustainable Development Goal 16 on access to justice for all and effective, accountable and inclusive institutions, as well as Goal 5 on gender equality, including: decision-makers and other participants in traditional and customary justice systems; judges, lawyers and prosecutors operating in official justice systems; other government officials; development agencies; United Nations and other inter-governmental organisations; and civil society.

The guidance will be published and disseminated through activities with ICJ's regional programmes, and its national sections and affiliates, through a series of regional launch events and workshops, as well as at the global level at the United Nations and in other settings. The guidance will provide the basis for ICJ strategic advocacy at the national level in the years following the conclusion of this initial phase of this work.

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