

# **Customary and Informal Justice and Alternative Dispute Resolution in the East, Southern and Horn of Africa**

Report of the 10th "Geneva" Forum of Judges and  
Lawyers, Nairobi, Kenya, 2-3 March 2020



**EAST, HORN AND SOUTHERN AFRICAN REGIONAL FORUM ON  
ALTERNATIVE DISPUTE RESOLUTION & CUSTOMARY AND INFORMAL JUSTICE**



Forum Theme:

*“Advancing SDG 16 and Pathways to Justice”*

March 2<sup>nd</sup> – 3<sup>rd</sup> 2020

Safari Park Hotel

Nairobi, Kenya



While this report seeks to reflect the range of views 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. The views of participants reported here are their own and do not necessarily represent the views of the International Development Law Organization (IDLO), its Members Parties or the International Commission of Jurists (ICJ).



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## LIST OF ACRONYMS

ACHPR	African Commission on Human and People's Rights
ADR	Alternative Dispute Resolution
AG	Attorney General
AJS	Alternative Justice System(s)
AU	African Union
CAM	Court Annexed Mediation
CIJ	Customary and Informal Justice
COVID-19	Coronavirus Disease 2019
CSO	Civil Society Organization
FIDA	Federation of Women Lawyers
ICJ	International Commission of Jurists
ICCPR	International Covenant on Civil and Political Rights
IDLO	International Development Law Organization
JLOS	Justice, Law and Order Sector
MOJ	Ministry of Justice
NGO	Non-Governmental Organization
SDGs	Sustainable Development Goals
SGBV	Sexual and Gender-Based Violence
TAWLA	Tanzania Women Lawyers Association
TOT	Training of Trainers
ULS	Uganda Law Society
UN	United Nations
UNDP	United Nations Development Programme

# 1. INTRODUCTION

## 1.1. BACKGROUND TO THE FORUM

The ability to access justice is a crucial component of securing peaceful, just, and inclusive societies where effective and accountable institutions govern at all levels, as recognized by Sustainable Development Goal (SDG) 16 of the 2030 Sustainable Development Agenda. As noted in the recent report of the Task Force on Justice, a global justice gap affects 5.1 billion people globally and 4.5 billion are excluded from the social, economic, and political opportunities that the law provides, while 1.5 billion have a criminal, civil, or administrative justice problem that they cannot solve. Another 253 million people live in extreme conditions of injustice, without any meaningful legal protections.<sup>1</sup>

Countries in the East, Southern, and Horn of Africa are confronted by this justice gap and a key challenge for countries in achieving the 2030 Agenda as well as the African Union's Agenda 2063, is to adopt and implement legal and policy frameworks that ensure equal access to justice for all. In September 2019, the Secretary General at the United Nations SDG Summit called for accelerated implementation of SDG 16. Key declarations such as the Declaration on Equal Access to Justice for All by 2030<sup>2</sup>, the G7 Access to Justice for All in Conflict-Affected Countries Declaration and Joint Action Plan<sup>3</sup> aim to help advance a Decade of Action for SDG 16. The Task Force on Justice made three key recommendations for accelerated action: (i) place justice at the heart of sustainable development; (ii) put people at the center of justice systems; and (iii) move from justice for the few to justice for all.

While the demand for justice is great, pathways to justice are diverse and there are many complex challenges in the architecture, supply, and financing of justice. As efforts advance to prioritize and accelerate action, governments and other stakeholders must pay regard to the potential contributions of the full range of justice providers, in each local context, to meet international standards and goals. There is need for greater awareness and exchange by those working to strengthen the justice sector of how to improve the quality, scale, and scope of a variety of justice actors through legitimate and inclusive means. While keeping in focus the essential role of courts and judiciaries for advancement of the rule of law, it is important to consider the variety of justice actors and mechanisms that exist and are used by individuals and the various normative and legal frameworks of plural environments, at the local, regional and international levels.

In many countries, the use of Alternative Justice Systems (AJS) or Alternative Dispute Resolution (ADR) mechanisms are important justice options. Many people effectively access justice mainly or exclusively through indigenous and other customary or traditional justice systems.<sup>4</sup> Such alternatives

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<sup>1</sup> Task Force on Justice, Justice for All – Final Report. (New York: Center on International Cooperation, 2019), available at: <https://www.justice.sdg16.plus/>. The World Justice Project (WJP) notes that people in countries in Africa often fall into the justice gap mainly because they are unreported victims of violent or non-violent crime, because they are employed in the informal economy, or because they lack legal identify and land our housing tenure. See: WJP, "Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the Word", 2019, p. 28.

<sup>2</sup> See: Declaration on Equal Access to justice for All by 2030, February 7, 2019, The Hague, available at: [https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/6c192f\\_6dce6db9c17c472594ecaeb69f936cf5.pdf](https://bf889554-6857-4cfe-8d55-8770007b8841.filesusr.com/ugd/6c192f_6dce6db9c17c472594ecaeb69f936cf5.pdf).

<sup>3</sup> See: Access to Justice for All in Conflict-affected Countries Declaration and Joint Action Plan, 19-20 June, 2019, available at: <http://g7plus.org/wp-content/uploads/2019/07/Declaration-and-Joint-Action-Plan-SIGNED.pdf>.

<sup>4</sup> Terminology to describe these systems is diverse, as reflected in discussions at the Forum and in a number of international policy and legal documents. See further: UN Declaration on the Rights of Indigenous Peoples (page 2-3). The UNs terminology approach uses 'informal justice' as a broad term to encompass different justice systems in contexts of legal pluralism <<https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/informal-justice/>>. IDLOs Policy and Issue

can provide critical pathways to justice but, come with distinct challenges and often receive insufficient attention from policy makers, justice sector professionals, practitioners and the international community.

ADR encompasses a variety of dispute resolution techniques and mechanisms that are alternative to full-scale court processes. In many instances in the African context, ADR reflects or continues traditional practices such as negotiation, mediation or other decision-making processes aimed at maintaining community harmony, including those typically associated with customary and informal systems of justice. ADR can be an efficient means to deliver cost-effective and timely justice services in appropriate circumstances, utilizing restorative or other non-adversarial techniques as an alternative to litigation or prosecution. Similarly, indigenous and other customary or traditional justice systems can function as alternatives or as complementary forums to formal courts. In considering the role of such systems, as in the formal system, attention to human rights, quality, effectiveness and accountability is fundamental.

Countries in the East, Southern, and Horn of Africa are making important strides to strengthen the policy and legal framework on ADR and Customary and Informal Justice (CIJ) systems, which can exist through choice, convenience, or at times due to a lack of a fully functioning state system. Importantly, there is a history and tradition of ADR and CIJ mechanisms that pre-date modern instruments. The focus of SDG 16 and engagement within the justice sector is evolving from an institutional focus to both an institutional and individual focus, with successful justice strategies rooted in the needs of justice seekers and service delivery. The individual experience of justice is characterized by the resolution of conflict, realization of rights and redress for violation of rights, regardless of justice mechanism. The value of different systems and approaches must be recognized, while finding ways to align with international, regional and national justice standards.

It is against this background that the International Development Law Organization (IDLO) and the global secretariat of the International Commission of Jurists (ICJ) convened, under the auspices of the Judiciary of Kenya,<sup>5</sup> a Regional Forum themed “Advancing SDG 16 and Pathways to Justice”, in cooperation with the ICJ national section ICJ Kenya, in Nairobi from 2-3 March 2020.

## 1.2. RATIONALE AND OBJECTIVES OF THE FORUM

The Forum provided a platform to allow for a deeper reflection on access to justice through ADR and indigenous and other traditional or customary justice systems, providing greater insight into local realities, concerns and approaches and exploring existing lessons, illustrations, and good practices.

Invited justice champions from national governments, the formal and informal justice sectors, civil society and academic community shared insights on ongoing justice sector reforms and policy developments that aim to provide alternatives to or complement formal courts, curb rights-abrogating practices, and contribute to inclusive and peaceful societies.

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Brief on engagement with Customary and Informal Justice Systems also explores terminology and concepts (at pages 8-9) <<https://www.idlo.int/publications/policy-and-issue-brief-engagement-customary-and-informal-justice-systems>>

<sup>5</sup> In 2016, the Kenyan Judiciary established an Alternative Justice System (AJS) Taskforce to advance policy and mainstreaming into the formal justice system of traditional and other informal mechanisms used to access justice in Kenya. This includes the constitutionally recognized promotion of alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms, provided there is not contravention of the Bill of Rights, repugnancy to justice or morality in results or outcomes, or inconsistency with the Constitution or any written law.



The Forum organizers understood that both the 2030 Agenda (SDGs) and the African Union's Agenda 2063 call for expanding avenues and opportunities for sustainable development. They identify access to justice, peace building and conflict resolution as key pillars to realizing global and regional development. The need for continuous engagement among stakeholders to deliberate on opportunities, bottlenecks and modalities regarding the realization of these ideals has been widely acknowledged and called upon. Consequently, this Forum, themed "*Advancing SDG 16 and Pathways to Justice*" was a response to that call. It provided a platform for information sharing and learning among justice seekers, ADR specialists and formal justice practitioners on utilizing existing avenues for delivering justice and peace within the continent in the context of SDG 16.

The Forum focused on unpacking the meaning of access to justice, successes and opportunities in achieving access to justice, and challenges facing ADR and indigenous and other customary or informal justice (CIJ) systems in Africa. In doing so, it facilitated peer learning among delegates, and enhanced appreciation among the Forum attendees of the important role of ADR and CIJ interventions in Africa. The Forum also served as a platform for stakeholders to affirm an increased commitment to acknowledging and enhancing the employment of ADR and CIJ in addressing justice gaps within the continent so as to help Africa achieve the 2030 Agenda, and the African Union's '*The Africa We Want*' Agenda 2063.

#### **Forum objectives:**

- To share experiences and discuss effective means to reduce justice gaps in the East, Southern and Horn of Africa.
- To reflect on justice seeker experiences and barriers to access justice, with emphasis on the most marginalized and their unmet justice needs.
- To assess the potential role of formal and informal ADR and CIJ mechanisms as alternative or complementary justice paths.
- To identify ongoing risks, challenges and necessary safeguards to develop appropriate legal, policy, and implementation frameworks, considering international and regional<sup>6</sup> standards on human rights and the rule of law.
- To detail emerging opportunities to advance access to justice in the context of SDG 16.

### **1.3. OUTCOMES OF THE FORUM**

The main outcomes of the Forum were:

- Enhanced understanding of how ADR and CIJ mechanisms support the realization of rights and access to justice for the poor and most marginalized.

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<sup>6</sup> E.g. the African Commission on Human and Peoples' Rights 2003 *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, "Part Q: Traditional Courts"  
[https://www.achpr.org/public/Document/file/English/achpr33\\_guide\\_fair\\_trial\\_legal\\_assistance\\_2003\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf)

- Strengthened appreciation for relevant normative and institutional frameworks under international and regional rule of law and human rights instruments.
- Conceptualization of a framework at the regional level to monitor the use of CIJ and ADR towards the attainment of SDG 16.

## 2.0. FORUM PROCEEDINGS

### 2.1 THEMATIC AREAS OF DISCUSSION

The Forum focused on advancing SDG 16 and pathways to justice, through focused discussions on, among other things:

- The role of ADR and CIJ systems to help realize SDG 16 and international human rights and rule of law standards.
- Equal access to justice for all, especially for the poor and most marginalized.
- Challenges within ADR and CIJ systems, including in fragile and post conflict contexts.
- How challenges affect access to justice for the poor and most marginalized.
- Good practices that ensure that justice seekers can access justice, while navigating parallel or overlapping legal systems.

### 2.2 METHODOLOGY

The Forum was coordinated through:

- Panel discussions with plenary sessions
- Guided discussions facilitated by experts to help identify and expose different views and varying levels of appreciation of thematic issues
- Breakaway sessions to allow for in-depth interrogation of issues
- Panel interview of an ADR expert, a justice seeker and a formal justice expert (judge).

### 3.0. FORUM PROCEEDINGS

The official opening of the Forum was held in Elgon Conference room at The Safari Park Hotel and included speeches by the Hon. Justice David Maraga, Chief Justice of the Republic of Kenya; H.E. Frans Makken, the Ambassador of the Netherlands to Kenya; Hon. Justice Prof. Joel Ngugi, Chairperson, Taskforce on Traditional, Informal and other means of Accessing Justice (AJS) Kenya; Justice Fred Ochieng, Chairperson, ADR Task Force, Judiciary of Kenya; H.E. Avv. Hassan Hussein-Minister of Justice, Somalia; overall Conference Moderator, Mr. Deprese Muchena, Regional Director for East and Southern Africa at Amnesty International; Mr. Romualdo Mavedzenge, IDLO's Regional Manager for Africa; and Mr. Kelvin Mogeni, Chairperson of the ICJ Kenya Council.

#### 3.1. DAY ONE, MONDAY 2ND MARCH 2020

##### 3.1.1. Opening remarks

Mr. Deprese Muchena, welcomed participants to the Forum and took them through the conference theme, objectives and expected outcomes. He commended the good turnout of participants, stating that this demonstrates Africa's commitment to promoting the role of ADR and CIJ systems to help realise SDG16 and international human rights and rule of law standards. Mr. Romualdo Mavedzenge acknowledged the distinguished guests who graced the occasion. These guests included:

- Hon. Justice David Maraga, Chief Justice of the Republic of Kenya,
- Hon. Justice Prof. Joel Ngugi, Chairperson, Taskforce on Traditional, Informal and other means of Accessing Justice (Alternative Justice Systems (AJS) Taskforce), Judiciary of Kenya,
- H.E. Avv. Hassan Hussein, Minister of Justice, Somalia,
- Justice Fred Ochieng, Chairperson, ADR Task Force, Judiciary of Kenya,
- Mr. Kevin Mogeni, ICJ Kenya Council Representative, and
- H.E. Frans Makken, Ambassador of the Netherlands to Kenya.

Mr. Romualdo Mavedzenge continued to state that Africa was taking stock of its progress on the implementation of SDGs, whose realization requires that citizens be placed at the center of governance. He also noted that to meet the other SDGs, Africa must pursue the realization of SDG 16 which is integral to the achievement of the other SDGs. While progress has been made in other SDG areas such as health and education, Mr. Mavedzenge cautioned that SDG 16 faced many challenges in implementation, in part because over 5 billion people still have unmet justice needs globally today. He expressed that the Forum had a responsibility to look for ways of addressing these justice needs.

Mr. Mavedzenge emphasized the need to come up with a framework that allows marginalized groups access to justice through innovative ways that bridge the justice gap. This, in his view, was tied to the justified need to have justice at the core of sustainable development in Africa and beyond. He also stated that people in the continent do not feel protected by existing laws and institutions due to their prevailing social conditions including gender, age, literacy and economic factors.

Mr. Mavedzenge ended his remarks by thanking all participants and partners, and on behalf of IDLO, appreciated the Kingdom of Netherlands for supporting the Forum, the International Commission of Jurists, and the Judiciary of Kenya, for collaborating with the IDLO on this initiative.

Mr. Kelvin Mogeni, Chairperson of the ICJ Kenya Council, speaking on behalf of ICJ Kenya and the global secretariat of the ICJ, acknowledged the special role of the delegates, distinguished guests and the partner organizations in reinforcing the walk towards realizing SDG 16. He appreciated the special role of the Kenyan Judiciary for hosting the Forum, and praised the good collaboration between the ICJ and IDLO, with support of the Embassy of Netherlands and the Republic and Canton of Geneva, Switzerland, through which the Forum was made possible. Wondering whether the alternative justice system will be able to supplement the judiciary, Mr. Mogeni remarked that ADR and CIJ systems' interventions are fundamental because formal justice systems are only available to 1-2% of Africa's population. ADR and CIJ is expected to serve the justice needs of the remaining 98% of the continent's population. He considered it a worrisome reality that this percentage of justice seekers on the continent is accessing ADR and CIJ systems that have not been perfected.

Mr. Mogeni informed the delegates that *Access to Justice* is one of ICJ's key thematic areas. He noted that, there cannot be sustainable access to justice if justice is not available to all who need to embrace it. He called on the need to ensure that judicial systems are effective in delivering justice to all if they are to be trusted and relied upon by communities which they serve. Mr. Mogeni concluded his remarks by calling on ADR and CIJ practitioners and institutions, including religious institutions, to work towards ensuring that justice is served to all.



*From Left: Mr. Romualdo Mavedzenge, Regional Manager for Africa, IDLO; Hon. David K. Maraga, Chief Justice and President of the Supreme Court of Kenya; H.E. Avv. Hassan Hussein, Minister of Justice,*

*Somalia; Dr. Justice Flavian Zeija, Chief Judge from the Judiciary, Uganda; and Ms. Teresa Mugadza, Country Manager, IDLO Kenya.*

H.E. Frans Makken, the Ambassador of the Netherlands to Kenya appreciated the recognition accorded to the Embassy of Netherlands. He noted that the partnership between the Netherlands Embassy and IDLO has recorded tremendous success in ensuring ADR and CIJ bridge the gap between informal and formal justice systems in order to ensure justice is accessible to all. He also lauded the partnership between the Embassy through IDLO in rolling out ADR for not only commercial disputes but also civil matters especially in family matters in Kenya as well as Somalia.

He recognized the need to further meet the aim of achieving inclusive access to justice and respect for human rights including those of women, children, youth and vulnerable groups who face unique barriers in their effort to access justice. According to him, this called for implementation of ADR and CIJ interventions that do not add to injustices but that are rather enshrined in human rights standards and principles.

H.E. Frans Makken acknowledged the special role played by non-governmental organizations (NGOs) in furthering this endeavor. NGOs are aware of local customs and systems and their knowledge and experiences can be used in building linkages between formal and informal justice systems. He noted that ADR and CIJ interventions are important for Kenya, especially following statistics in the State of the Judiciary report 2018/2019 which indicated that over seven billion Kenyan Shillings is tied up in courts through unresolved civil cases.<sup>7</sup> These cases take several years to be conclusively determined, restricting financial resources that can be pumped into the economy.

Hon. Justice Prof. Joel Ngugi, the Chairperson of Kenya's Taskforce on Alternative Justice Systems acknowledged the role played by the Judiciary in Kenya in the recognition of ADR. He expressed his confidence in the Honourable Chief Justice (CJ) of the Republic of Kenya, Hon. David Maraga, to steer the Country – and by extension the region – towards furthering access to justice. Hon. Ngugi stated that the Chief Justice had demonstrated that he is a true champion of ADR and CIJ mechanisms, and an esteemed elder. In this regard, he stated that the Forum was honoured to invite the Chief Justice to give a keynote address.

### **3.1.2. Keynote address by H.E. Chief Justice and President of the Supreme Court of Kenya, Hon. David K. Maraga**

The Chief Justice began his speech by acknowledging the presence of dignitaries from governments, judiciaries, NGOs and partner institutions, and those from the ADR and CIJ sector. He further welcomed the delegates to the Forum and by extension to Kenya. He noted that it was an honour for the country to host such an important Forum. The Chief Justice also expressed the judiciary's delight in partnering with IDLO and ICJ to co-host the Forum.

He remarked that Kenya's judiciary had undertaken a lot of initiatives to deepen access to justice including using ADR and AJS. This was in line with a global acknowledgement that access to justice is a prerequisite for sustainable and inclusive development through the entrenchment of justice into the SDGs – through SDG 16 – which has resulted in an important shift in global discourse on this front. Noting that abstract rule of law without contextualization to local realities does not allow inclusive access to justice, the Chief Justice also stated that independence of the judiciary alone does not necessarily guarantee inclusive access to justice due to other bottlenecks that must be

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<sup>7</sup> State of the Judiciary Annual Report 2018/2019, page 9 <<https://www.judiciary.go.ke/resources/reports/>>

acknowledged and addressed to ensure sharing of the benefits of development by all. For instance, he pointed out that it is unfortunate that the elite in society think that people in villages have nothing to contribute to justice discourse. He noted that disputes in the village require instant resolution since delays in dispensing justice make life unbearable for most Kenyans who live in these villages.

Similarly, he noted, national prosperity cannot be shared when majority of the population do not have access to justice. There is need for forums through which individuals from villages and the marginalized can share their understanding of access to justice, which should then be incorporated into mainstream thinking and practices. This goes with institutionalization and streamlining of alternatives which will holistically deliver justice.

In order to ensure effective and efficient justice service delivery, the Chief Justice posed three questions that need to be addressed:

- how do the majority of people in society access justice?
- are these existing means optimal for access to everyday justice?
- what are state institutions doing to promote or impede access to justice?

The Chief Justice stated that he looks forward to reading the deliberations on these questions and others. He said that he was open to suggestions from other jurisdictions based on successful interventions/ experiences that Kenya can learn from.

The Chief Justice cited Article 159 of the Constitution of Kenya, 2010, which establishes guiding principles for the judiciary. He discussed how the Article makes the judiciary accountable to the people of Kenya. He noted that it mandates the judiciary with ensuring that justice is served to all without prejudice or delay, and through promotion of ADR mechanisms that do not undermine the values of the constitution. This, he stated, calls for the establishment of practical, affordable alternatives which deliver justice in a timely fashion noting that other approaches to dispute resolution may be more appropriate to some disputes and to some people without dependence on mainstream court systems. Consequently, justice and dispute resolution systems should be appropriate and proportionate in resources and time in addressing justice needs.

He spoke of the Kenyan Judiciary's recognition of the need for two taskforces on ADR and AJS. The two, he explained, were established to help develop policies and institutional frameworks for realizing the ambitions of article 159 of the Constitution and SDG 16 with regard to mainstreaming ADR and AJS into justice service provision. He stated that he hopes that members of these taskforces will benefit from experiences from other jurisdictions within the region to come up with well-informed frameworks for Kenya. The Chief Justice declared the Forum formally open, expressing his trust that the Forum would be successful in enhancing understanding of how ADR and CIJ mechanisms would support the realization of access to justice for all in Africa.



*Hon. David K. Maraga, Chief Justice and President of the Supreme Court of Kenya, giving the keynote address at the opening of the Forum.*

Responding to the speeches, Mr. Deprose Muchena appreciated the speakers for giving very insightful remarks. He congratulated the Chief Justice's tremendous efforts, recognized within Africa and beyond, towards widening access to justice in Kenya.

### **3.1.3. High level panel discussion to set the context in relation to national legal and policy frameworks on CIJ and ADR mechanisms to advance SDG 16**

This session featured three distinguished panelists who gave their perspectives on National legal and policy frameworks on CIJ and ADR Mechanisms to Advance SDG 16 based on their experiences in the judiciary, governance and in academia.

Judge President Cagney Musi from South Africa made the initial remarks, stating that the relationship between the formal judiciary and the traditional courts in South Africa has not been close.

He noted that the South African constitution does not directly make provision for traditional courts, although chapter 12 of the Constitution deals with how to ensure people at the village level access justice. He stated that unlike Kenya, the country missed the opportunity to make compulsory the mediation of disputes as an alternative form for resolving disputes. He urged that ADR in South Africa has much improved. With the advent of democracy, he said, a traditional courts bill was drafted in 2008 but has to date not been assented into law. The bill was introduced in the National Assembly (proposed section 76) and published in Government Gazette No. 40487 of 9 December 2016. It sought to infuse the formal system with the customary system while retaining constitutional values.

Emphasis was placed on reconciliation and a restorative approach, and on co-existence in peace between communities. He noted that often the formal system is more retributive. The fate of the bill is however yet to be determined. The Black Administration Act 38 of 1927 therefore continues to govern traditional courts due to lack of more up-to-date legislation.

Additionally, he said, small claims courts were established in South Africa through Act 61 of 1984, as a cost-effective alternative to the higher-level courts, with rules and procedure that are not as strict. The presiding officer who is invariably a lawyer and called a Commissioner, largely determines the procedure to resolve the dispute. However, he noted that due to resource constraints, the small claims courts usually sit at night which can pose dangers for litigants as well as transportation complications.

To address the justice gap, he mentioned that South Africa has managed to establish mediation through formal rules of courts, which encourages practitioners, before a case is handled through formal courts, to establish whether there have been attempts to resolve a dispute through mediation. However, this is dependent on the practitioner's initiative. The judge suggested that it should be made compulsory for cases to be addressed through mediation before they can be taken through the mainstream court system. According to him, ADR can provide increased access to justice for rural communities. This, he said, can work through community-administered courts where community members handle matters locally.

Judge President Musi informed the Forum that although the use of community-administered courts has been tried in South Africa, the approach was challenging. Urban areas with high crime rates operated community courts. However, communities revolted against the system due to its nature of sentencing that lacked respect for human rights. Still, with increase in crime, there is agitation among communities for community courts to be restored. He stated that customary law endeavors to restore balance in society while common law concentrates on damages, retribution and punishment.

In conclusion, the Judge President posited that whereas traditional systems are restorative, formal legal regimes are punitive, posing a challenge in merging the two. He also noted that less formal resolution of disputes is less expensive. Judge President Musi said there is also need to create uniform institutional frameworks for traditional justice.

H. E Avv Hassan Hussein, the Minister of Justice from the Republic of Somalia, started his presentation by reiterating the need to increase access to justice, through strengthening both formal and informal justice systems. In this regard he told delegates that Somalia had adopted legal pluralism where customary, secular and sharia law operate concurrently. He stated that customary law is prominent for political reasons because it persisted through civil war in the country. According to the Minister, Somali society believes in the use of arbitration to settle disputes. When persons come forward with problems, the court has authority to refer cases back to customary resolution mechanisms where the court considers that doing so will better deliver justice for the parties.

H.E. Avv Hassan Hussein further told delegates that the Ministry of Justice in Somalia recognizes the role of traditional and informal justice systems in addressing disputes. Somalia's ADR and CIJ endeavor is supported by partners such as IDLO coupled with backing and commitment from the government through the Ministry of Justice. The country has seen a rapid development of ADR centers with adjudicators and clerks engaged to offer ADR services in ADR centers across the country. The centers provide direct dispute resolution assistance to citizens but also, where necessary, refer cases to the courts. The centers have since been supported with documentation capacity so that agreements and decisions are recorded and can be reviewed when handling these cases at subsequent levels.



ADR centers in Somalia have so far handled more than 5000 cases. Compared to formal justice systems, which is still struggling to operate at full capacity following the civil war, the benefits of ADR are visible and appreciated by the Somali people. Consequently, there is need to encourage linkages between formal and informal justice systems by strengthening ADR and CIJ mechanisms to be complementary instruments to formal courts as opposed to being in competition. In pursuit of this, and informed by governance gaps that have bedeviled the country arising from political instability in the past, he pointed out that Somalia is in the process of reforms and promoting access to justice and respect for human rights. This, he stated, is part of the country's priorities in ensuring restoration of the society. He shared his conviction in the role of ADR and CIJ in facilitating that process. The Minister thanked IDLO and other stakeholders for supporting this endeavor.

The third panel speaker was Professor Thandabantu Nhlapo, a renowned South African Professor of Customary Law. He made his remarks and presentation about customary law in Africa drawing from an article by Prof. Chuma Himonga titled "*The future of Living Customary Law in African Legal Systems in the Twenty-First Century and Beyond, with Special Reference to South Africa*". Castigating the alleged demise of customary law, Professor Nhlapo, stated the need to recognize and distinguish between living and official customary law. Official customary law, he said, can be coined (invented) to suit political interests and often distorted to suit circumstance, hence it should be avoided. Some principles of official customary law, he stated, are not issued from customary law but are colonial interventions. Living customary law on the other hand, he stated, is beneficial as it is changeable and remains relevant as it is already adapted and adapts to the local economic and social contexts. He noted that people obey living customary law because they know it works for them and guards their society.

Regarding the quality of living customary law, he stated that living customary law is more likely to adhere to human rights. He noted that this aspect of living customary law is appreciated in constitutions which protect rights to culture. Further, he pointed out that there are undertakings by the judiciary that seek to enhance the use of ADR and living traditional laws into conflict resolution. Customary law is very rapidly being mainstreamed into formal judicial decision making where its role is receiving more recognition.

Professor Nhlapo observed that there is a lot of referral to the common law in cases where decisions have been made using customary laws in the first instance, but parties are not satisfied with the outcomes. He noted that living customary law does not conflict with formal law but is instead the foundation of formal law. He emphasized the need to re-examine formal legal instruments and integrate customary law into them. He noted that that whereas there are concerns about adherence of customary law to human rights, these are largely misinterpretations of customary laws. He maintained that despite challenges about its application, living customary law in Africa is still in existence and likely to assume a prominent position in African legal systems and will continue to regulate the lives of the majority of Africans on the African continent in the twenty-first century and beyond. He regretted the fact that currently customary law is administered through courts by western trained legal practitioners. He called for the recognition of elders as dispensers of customary law, who would then need to be familiarized with international human rights standards to dispense customary justice.

### Question and Answer Session

During the question and answer session, Mr. *Arnold Tsunga* of ICJ expressed concern with the phraseology often employed on CIJ. He argued it is problematic that terms that are disparaging make CIJ appear inferior relative to what is being referred to as formal justice systems. He emphasized that the use of phrases that connote inferiority of ADR and CIJ should be discouraged. The use of concepts

such as “supplementary” to the formal system or “to decongest” or to “free up courts for big cases” does not augur well with the mainstreaming and growth of ADR and CIJ. Supporting this remark, *Professor Michelo Hansungule*, a Zambian leading scholar on human rights and access to justice, observed that the general characterization of African justice systems is a problem. That there is no formal and informal justice. He called on the need to avoid being slaves of terminology since justice is – just justice.

Regarding the use of CIJ in South Africa, Professor Hansungule observed that Section 39(2) of the Constitution of South Africa ties reliance on customary law to adherence to human rights. He questioned why customary law must be measured against international standards before its application. He emphasized the need to delink African legal regimes from westernized thinking, partly because traditional African Laws existed well before colonialization. He further stated that very many rural people rely on customary law without considering them complementary to courts to help decongest cases. To them, customary law is the system they believe in.

Delegates argued that the negative perception of customary law is based on social and often class- or western-based attitudes. In response, Prof. Nhlapo suggested that development of customary law should follow the principle that, ‘if there is nothing wrong, do not fix it’. He made reference to Section 89(2) of the Constitution of South Africa which applies to the development of customary law in the spirit and purpose of the bill of rights which, he stated, read along with Section 39(3), means that when it is not broken don’t fix it (if there is nothing wrong with customary law, keep it as is). In support of Professor Hansungule’s statement, he reiterated that in his view a majority of the population appreciates customary law without considering it as supplementary or a mere tool for decongesting formal courts which are overwhelmed with cases.

*Professor Chuma Himonga* added her voice to the discourse stating that appropriate customary law advances access to justice and access to human rights. She agreed that not every aspect of customary law is necessarily compatible with human rights. In this regard she said one needs to know how to deal with the incompatibilities. Citing the case of Somalia, she said that it is important for a study to interrogate how Somalia has dealt with the incompatibility in their ADR centers in relation to the legal system.

Addressing concerns about the need to distinguish between civil and criminal cases, which require different treatment, it was reported that Somalia had developed a policy and Standard Operations Procedures for ADR centers explaining which cases are relevant for ADR and which should be dealt with in formal courts, such as serious crimes. The country has a penal code and criminal procedure rules that are adhered to when prosecuting cases. Somalia is in the process of passing an Act that prosecutes cases of rape and other crimes. The Act is in parliament pending approval. Still, the Somali society emphasizes the need to uphold the rights and plight of vulnerable people such as the elderly, children and the disabled. The government works with paralegals to monitor adherence to these rights.

Finally, the session identified further challenges facing the mainstreaming of ADR and CIJ as avenues for justice service delivery. These include multiculturalism and multilingualism among communities within the national legal frameworks. ADR and CIJ are also often a voluntary means of resolving disputes, necessitating awareness-raising to ensure that ADR is embraced. Further, it was observed that reducing the cost of ADR and CIJ mechanisms makes it easier for them to be embraced as opposed to court-based justice systems which are very expensive. It was explained to the Forum that Article 159(2) of the Constitution of Kenya, 2010 is used to compel parties to attend mediation in certain circumstances. It was explained that pursuant to this Article one does not have to agree to a resolution, but they must participate. It was highlighted that outcomes have shown that even when

parties are initially reluctant to attend mediation, they often end up agreeing to a resolution and embracing its outcome. And because mediation is free, many people see the benefit.

### 3.1.4. Exchange of information and perspectives on national legal and policy frameworks on ADR and CIJ to advance SDG 16

The panel discussion in this session began with a presentation of the Kenyan experience by **Mr. John Ohaga**. *Mr. Ohaga*, the Chairperson of Kenya's ADR Steering Committee, stated that there has been a paradigm shift in the last decade in the way Kenya as a country has viewed ADR, and the mechanism no longer operates from the periphery of the justice spectrum. Traditionally, he said, ADR was perceived as inconsequential and treated with skepticism and a high level of suspicion, and was considered illegitimate. Today, he said, ADR is viewed as a key component of access to justice and sustainable development. He acknowledged that unlike the adversarial processes embedded in conventional systems which are not as responsive to change, ADR is agile and flexible and therefore adaptable to changing justice demands. Being flexible, ADR can adapt to diverse dispute situations making it possible to apply to various types of disputes.

Mr. Ohaga explained that, in its commitment to realizing the SDGs, Kenya strategically maps each of the 17 SDGs with Vision 2030 Medium Term Plans (MTPs) objectives to ensure the global development framework and its implementation is directly linked to achieving both the national goals, Vision 2030 and the Sustainable Development Goals including SDG 16.3, which commits the international community to promote the rule of law at the national and international levels and to ensure equal access to justice for all by 2030. To institutionalize and further this endeavor, he spoke about the judiciary's current strategy document titled, 'Sustaining Judicial Transformation' (SJT). He stated that this initiative commits to '*a people-focused delivery of justice*', with the specific objective, among others, to '*increase access to and expeditious delivery of justice*'. One key strategy towards this goal is '*promoting and facilitating Alternative Dispute Resolution (ADR)*' which is provided for under Article 159 of the Kenyan Constitution.

He further stated that Kenya has a National Steering Committee appointed by the Attorney General of Kenya to spearhead the formulation of the ADR policy. The functions of the Committee include: (a) providing guidance and overseeing the process for formulation of a national policy institutional framework on alternative dispute resolution; (b) proposing appropriate reforms to the legal and institutional framework for alternative dispute resolution; (c) proposing appropriate amendments to legal instruments with a view to harmonize the practices, standards for accreditation, training and provision of alternative dispute resolution services; and (d) ensuring that the national policy on alternative dispute resolution is linked to national and sectoral policies and international best practice.

He indicated that, through a widely representative approach, the national policy has been taken through various stages of draft approval up to the development of a Green Paper in 2019. The Green Paper version of the ADR policy is currently undergoing expert review by the steering committee and will be subjected to the formalization and adoption processes to produce the White Paper which shall be the formal national policy on ADR. The policy is anchored in the Constitution of Kenya 2010, international and regional human rights instruments, SDG 16.3 on the rule of law and access to justice, the political pillar of Vision 2030, and the Judiciary's 'Sustaining Judiciary Transformation Framework'. The National ADR endeavor is also anchored on other international legal instruments including the Universal Declaration on Rights of 1948, the New York Convention on February 10, 1989, the East African Community Treaty of 2000, the UNCITRAL Model Law of 1995, and Boosting Intra-African Trade (BIAT) Action Plan of 2012.

Finally, Mr. Ohaga noted that the perception that ADR cannot be dealt with correctly on the African continent is being remedied through a larger Africanization movement. He said that Kenya leads the way in the region having commenced the ADR policy-making process. Once complete, the policy will improve professional standards, define clear entry points for ADR, and ensure its seamless connectivity into formal arbitration and court dispute settlement structures. He expressed his hope of seeing the completion of the ADR mainstreaming exercise which will greatly impact on the administration of justice in Kenya and make it a model for the rest of Africa and the world at large.

Mr. Ohaga's presentation was followed by country-specific responses from Sierra Leone, South Sudan, Somalia, Tanzania, Uganda and Zambia respectively. Ms. Martina Kroma, Chair of the Law Reform Commission in Sierra Leone reported that in the country, customary law is administered by local courts where lawyers have no audience. The local courts, she explained, use local languages, but their reports are recorded in English. They derive their mandate from a law that recognizes mediation, although the local courts do not have adequate enforcement mechanisms, and this impedes access to justice.

She said parties aggrieved by local court decisions can appeal to formal magistrate courts, and the magistrate is not bound to adopt the decision of local courts. The local courts only operate in specific geographic locations and address issues pertaining to specific ethnic groups of people. Here, the court can only deal with civil matters pertaining to land disputes and debts, among such other cases, whose values do not exceed 100 USD. When a foreigner commits crimes within a local community, the case is dealt with based on the local customary laws of the host community. Foreigners are therefore required to familiarize themselves with laws and customs of the localities where they stay.

Ms. Kroma highlighted that customary laws that address needs of the underprivileged such as women and children regarding inheritance of property, abuses, adoption, among others exist. Customary laws are required to conform to the rules of justice, equity, and good judgement. However, unlike CIJ, she said, ADR is not strongly recognized in Sierra Leone. ADR interventions are still informal and do not operate within similar frameworks as the local courts. Whereas local court decisions can be appealed, that does not apply to outcomes of ADR.

Mr. Hillary Koma from South Sudan Law Society made a presentation on the current dynamics within South Sudan. He explained that South Sudan's Constitution of 2011 recognizes customs and traditions as well as the will of the people. The International Federation of Women Lawyers (FIDA)-South Sudan operates legal aid clinics, which support disadvantaged citizens in accessing justice. In partnership with FIDA, the South Sudan Law Society works with traditional elders and paralegals to ensure people in prisons are not tortured nor are detained for longer than legally required. They also ensure cases involving women and children are addressed quickly. However, she pointed out that access to justice in South Sudan still suffers from the multiplicity of languages used in mainstream courts due to the diverse legal backgrounds from which lawyers were trained during the conflict. This results in communication barriers among legal practitioners in South Sudan and is an impediment to efficient service delivery.

Reflecting on the Somalia experience, Mr. Ahmed Ali, Head of Unit and Coordinator of ADR in the Ministry of Justice, indicated that simple, familiar and transparent ADR mechanisms have been adopted, pointing out that this is very important in rural areas where the existence of mainstream political and legal institutions is weak. Here, he said, clan elders and intellectuals within the communities use a win-win approach to conflict resolution based on compromise. These mechanisms have been important in the country when there was no government in place to implement the rule of law.

He stated that the Somali population acknowledges the comparative advantage of relying on informal customary law. Religious (Sharia) principles are also used to resolve disputes. He spoke of Somali citizens' right to establish and go through CIJ mechanisms in resolving their disputes provided these systems adhere to constitutional dictates. These ADR and CIJ efforts are supported by UNDP and IDLO which run ADR programs in Somalia. There are efforts to align the ADR frameworks with exiting national and international laws.

*Mr. Ali* remarked that ADR and CIJ do not come without challenges. Customary courts are effective and do not have backlogs of cases. They: (a) do not rely on formal law; (b) do not differentiate between criminal and civil matters; (c) have no means of policing and ensuring compliance; (d) sometimes handle cases that are beyond their jurisdiction as provided for in law; and (e) make decisions that are not consistent all the time as they are not based on any written law.

Experience from Tanzania was shared by Ms. Christina Kamili, the CEO of Tanzania Network for Legal Aid Providers (TANLAP). She reported that Article 107A(2)(d) of the Tanzanian constitution mandates the judiciary to promote and enhance dispute resolution among persons involved in the dispute. In addition, the country has a compulsory requirement that lawsuits be referred to mediation before they can go to court. Further, Tanzania's Legal Aid Act of 2017 and its regulations of 2018 reinforce these demands.

Tanzania's law also acknowledges the use of paralegals in dispute resolution. More than 3000 paralegals are registered by the Ministry of Justice to provide legal awareness and information in communities. Other than providing ADR services and preparing clients for legal procedure, paralegals do not provide mainstream legal representation services. They instead refer matters requiring legal representation to advocates. Similarly, disputes relating to divorce which have social repercussions must first be dealt with by religious and community leaders who, only upon failing to resolve the disputes between parties, can recommend legal avenues for addressing them. The same applies to labor disputes.

Generally, according to Ms. Kamili, dispute settlement in Tanzania begins at the village level dispute resolution committees, especially for land- and family-related disputes, before formal legal redress can be sought. ADR and CIJ mechanisms in Tanzania have several benefits. They are closer to people, cheap, less time consuming and are restorative in nature thus facilitating peace and development consistent with observations by earlier presenters from other jurisdictions including Kenya, Somalia and South Africa.

Ms. Rachel Odoi, the Senior Technical Advisor for the Justice Law and Order Sector (JLOS) in Uganda reported that the country believes in and adheres to timely dispute resolution and people centered justice as enshrined in law. The Ugandan law prescribes timely delivery of justice for all. The law calls for the need to promote reconciliation. Courts have a mandate to ensure ADR is used in resolving disputes. As a result, all civil matters in Uganda must first be referred to mediation. However, advocates are very reluctant to participate in mediation, resulting in high rates of failure of mediations to resolve disputes due to the absence of parties. Consequently, most mediated disputes are still referred to litigation.

Uganda has an Arbitration and Conciliation Act. The country has established local council courts in village, parish and sub-county levels with specific dispute resolution mandates at their respective level. Today, around 65% of Ugandans seek justice through local council courts. It is evident, therefore, that in Uganda, formal, informal and customary structures for dispute resolution and access to justice all exist and are utilized. However, there are challenges, especially in creating linkages among the three levels of dispute resolution. This is coupled together with lack of legal

knowledge among people who use these services, as well as duplication and forum shopping where people have the same cases pending in several systems.

In conclusion, Ms. Odoi reported that Uganda has achieved 55% national coverage with access to legal aid. Work is ongoing to ensure every citizen can access legal aid. Uganda's traditional justice systems help with reconciliation and peacebuilding in the country, especially noting that Uganda is recovering from war. This is important because whereas the country's courts use English, most Ugandans do not understand it, limiting their participation. In contrast, informal courts are participatory and allow use of local languages which make them usable and preferred by the majority in Uganda.

The discussion was concluded with general remarks from *Professor Michelo Hansungule*, who called for the need to avoid categorizing ADR and CIJ into formalized and informalized. In his view, ADR should just be ADR. He also praised Kenya's intervention which augurs well with SDG 16, and expressed his reservation that existing civil and common law legislation in Africa today cannot adequately facilitate access to justice by all. He wondered whether it was possible to achieve justice for all and to what extent we are achieving the realization of SDG 16 in the present justice system in Africa. He stated that while achieving access to justice for everyone in totality is not possible, the realization of SDG 16 is possible with the administration of African justice. This is because African living customary law is efficient, affordable, flexible (not time bound), free of rigid rules (every idea is admissible), is participative for all community members, allows for the widest freedom of expression, does not depend on the existence of court rooms, does not require the use of judicial robes nor salaries for judges, among such other factors. Therefore, African justice systems are preferable for addressing the continent's justice needs. In his view, customary law practitioners do not need training. They are trained by the community based on lifelong experiences. They only need familiarization with the bill of rights to allow them to deliver justice effectively.

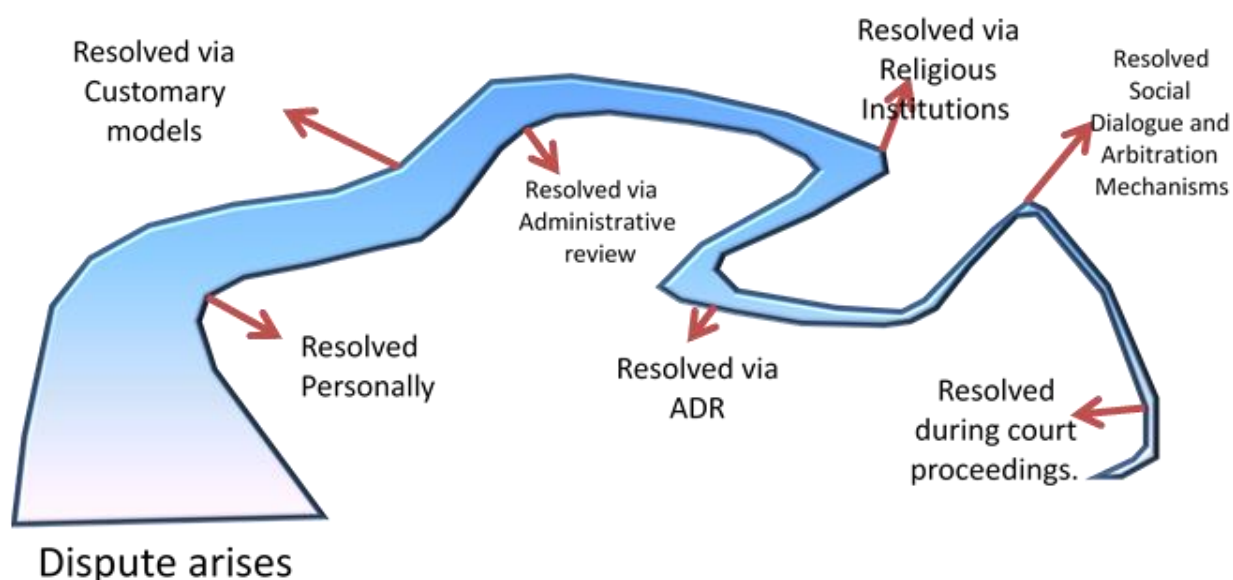
### **3.1.5. Practical challenges to accessing justice through alternative systems**

This session had a panel discussion which was preceded by a presentation by Hon. Justice Professor. Joel Ngugi, Chairperson, Taskforce on Traditional, Informal and other means of Accessing Justice (AJS)- Kenya. Session moderator was *Ms. Teresa Mugadza*, the Country Manager for IDLO Kenya.

Hon. Justice Professor Joel Ngugi reported that the AJS Taskforce struggled to find the appropriate title for the concepts of justice that are delivered through means other than the courts. He suggested the concept of African Justice as opposed to Alternative Justice System. He informed the Forum that the taskforce has developed an AJS policy in Kenya, to be launched in Nairobi on the 24<sup>th</sup> March 2020. He then pointed out that the policy tries to address jurisdictional questions such as the particular manner of addressing serious crimes. He said that the question is answered by understanding how justice is defined in the African context. The theory being propagated does not distinguish civil from criminal cases but only asks the question of whether it can be said in a true sense that parties have agreed to participate in AJS interventions.

Posing a question to the participants, Hon. Justice Professor Ngugi asked, "*where is justice found?*" He stated that the premise used is often wrong as justice is not always found in the court. He said that if this misleading lens is dropped, then we will start to resolve a lot of issues that impede access to justice as justice is not purely found in official justice dispensing institutions. AJS reflects the lived realities of Africans that shows how Africans, including Kenyans, resolve their disputes. The Professor remarked that in the African "river of justice", there are many disputes out of which only very few (2-3%) end up in court. Further, the few cases that end up in courts have painted a very bad image of

formal justice systems in Africa with wrong prescriptions and attitudes. Therefore, these aspects should be taken seriously to provide room for engagement because this is what happens in societies for most Africans. This, he said, also provides room for access to justice as from the data previously presented, statistics show that 5.1 billion people have no real access to justice. There is therefore need to detach the dependence on courts in order to accept AJS, which is superior and already dependable in addressing African disputes. He views AJS as a new means for social engagement enabling the state to reconstitute both the state and the citizen. He pointed out how in the judiciary, this will help reduce delays and backlogs.



*An illustration of the river of justice as presented by Hon. Justice Professor Joel Ngugi.*

Whereas state-backed systems have us believe that the only solution to criminal disputes is prisons, he said this is not factual and AJS also reduces reliance on incarceration. He listed categories of AJS to include:

- Autonomous pre-colonial: inbuilt and rarely known or recognized because of their efficiencies. The best way to deal with them is leave them alone since they aren't broken systems.
- third party annexed AJS mechanisms: comprising of state institutions like the chiefs, or the police or even other private institutions like FIDA. They convene AJS to help resolve dispute.
- court annexed AJS mechanisms: where courts sitting with court user committees welcome councils of elders to resolve disputes and their determinations registered in court.
- state regulated AJS mechanisms: which are fully recognized and backed by statute. However, he noted that the challenge with regulation is that it recreates state control in AJS which is ordinarily supposed to be independent of state control. He pointed out that while Uganda has local ordinance courts, Kenya's AJS stakeholders have recommended that the country does not move so fast to legislate to avoid returning to state led AJS.

Hon. Justice Professor Ngugi further observed that there are concerns about AJS including:

- Gender bias. There have been arguments that AJS is bad for gender justice. There is also a question on whether the state-backed system is good for gender justice. Both AJS and state-backed systems have their weaknesses and none should be viewed as superior or inferior to the other. He said they have both been infected by patriarchy leading to bad outcomes and processes. It therefore becomes a monolithic criticism and therefore biased to state that only AJS is bad for gender justice. Citing judgments from Canada and Italy, concerning alleged rapes of women, which excused and were apologetic for the action of the man, he stated that there is a whole book of misogynistic rulings by judges. He noted that both state-backed and AJS are infected by patriarchy that lead to biased outcomes. Therefore, it is fundamental that we engage with both systems to root out gender bias. There is need to contextualize gender challenges bedeviling the use of AJS in dispensing justice. Government institutions and judiciaries must interact with each other's systems as a means of promoting AJS only subject to constitutional values. There is need for didactic and pedagogical engagement to address the existing concerns in order to increase capacities of individuals and institutions to deliver justice for all. Organic training and sensitization on issues affecting AJS is important.
- Challenge of inclusion especially regarding marginalized and vulnerable groups. AJS should still address the plight of women, children and the elderly.
- Courts have a role to affirm public values through adjudication. There are no existing modalities for achieving this with AJS, therefore this area needs to be developed.
- For lawyers, ADR stands for "accelerating diminishing returns". Lawyers assume that with increased dependence on ADR, their clientele will diminish and hence take away their jobs. However, many cases are solved daily using ADR, therefore this doesn't pose any threat to them.

Professor Ngugi concluded by saying that government and judiciary must interact with other systems. They should protect the ADR systems that do adhere to the constitution and only control them when they do not. He stated that the AJS policy seeks to do this.





*Hon. Justice Prof. Joel Ngugi - Chairperson, Taskforce on Traditional, Informal and other means of Accessing Justice (AJS) during his presentation at the Forum. Justice Ngugi made a presentation on practical challenges to accessing justice through AJS.*

Professor Ngugi's presentation was followed by panel responses where Ms. Ann Ireri, the Executive Director of FIDA Kenya remarked that FIDA Kenya stumbled upon AJS through dealing with the justice plights of roughly 90 women daily. She stressed the need for lawyers to think beyond the litigation paradigm in order to settle disputes brought forward by these women. Therefore, ADR came out as a necessity to address their needs in a timely manner. FIDA Kenya prepares clients through counselling, emotional support and orientation to enable them understand the process. A pre-trial session looking at psycho social issues is a key component of their process. She reported that FIDA Kenya has established itself as a leader in family mediation in Kenya. However, she noted that the organization still lacks trained mediators with the special skills that they need to address justice needs of marginalized groups such as persons with disabilities. In addition to this, FIDA Kenya lacks support systems like safe houses. It therefore proposed the need to invest in safe houses for victims of abuse who, if not protected from their abusers, will suffer repeat cases.

Ms. Lilliane Adriko the CEO of FIDA Uganda observed that FIDA Uganda has developed handbooks for guiding justice service providers – including elders and cultural leaders – to ensure human rights are placed at the center of processes. Handbooks also guide justice seekers to know their rights and responsibilities but have faced challenges emanating from low literacy levels. She also highlighted the need to train and support groups in need (such as youth), which requires state financing that is not currently available. Similarly, she stated that cultural leaders require training and support such as monetary facilitation in light of prevailing economic conditions, which make it hard for them to offer pro-bono services. She proposed that the state should therefore be involved in mapping out AJS

service providers and finance their operations considering the prevailing socio-economic dynamics. She also highlighted the need to overcome overdependence on donor funds to champion AJS programs in societies. This should be through state allocation of financial resources for AJS.

According to the speaker, in post-conflict societies, the younger generations do not have the depth and breadth of institutional and historical knowledge to be able to carry out ADR processes. There is also no guarantee that the existing/cited institutional memory is precise and this can translate to wrong prescriptions being given to cases. She further stated that ADR and AJS interventions are not good for gender justice, as they tend to discriminate against women. There is need to support and train justice actors to ensure they work within specific frameworks. These frameworks must come first from the state and not from NGOs.

Speaking on South Sudan, *Ms. Adut* from FIDA South Sudan mentioned that South Sudan has ratified a number of instruments and conventions such as the Convention for the Elimination of Discrimination against Women (CEDAW), and these have become part of the national laws. They also have a national action plan. Advocating for women's right is being conducted by women's advocacy organizations like FIDA and other civil society organizations funded by international partners. South Sudan lacks national laws against sexual gender-based violence and the family law is still undergoing review by the Ministry of Justice. She said that they hope that once stability is attained, efforts will be geared towards having these laws in place. The challenge facing FIDA in the country is insecurity. It is not possible to go to villages due to high tensions. The delay in forming the transitional government has also posed a challenge. She said that FIDA South Sudan is documenting sexual violence cases that are tied to the conflict, in the hope that these cases will be heard by formal authorities once in place. It is expected that the Justice and Reparation Commission will bring perpetrators to face justice deliver justice to their victims. People largely depend on customary justice systems due to the high levels of illiteracy in the country, meaning it is difficult to access and understand formal justice processes. She further stated that there is ongoing SGBV research in both war and peace time situations.

In Zimbabwe, Mr. Abel Chikomo from the Transparency Responsiveness Accountability and Citizen Engagement (TRACE) Program- Zimbabwe reported that capacity gaps among justice providers exist which lead to miscarriages of justice in some instances. Here, local courts lack interpretation capacity for local rulings in some jurisdictions. There are also cultural practices and traditions that affect the rights of women. These include practices that prohibit women from sitting before councils of elders or chiefs presiding over cases outside their jurisdiction, such as rape. ADR and AJS institutions further lack independence as they are presided over by political leaders. Further, he said that clustering of society into the rich and the poor tilts the justice scale. Consequently, traditional authorities are likely to be prejudiced based on social status of victims vis-à-vis perpetrators in society for financial or other gains.

#### Question and answer session

During the questions and answers session, Chief Benson William David Mtuwa, a traditional Leader from Malawi called for the need to determine who should oversee AJS and justice delivery in general. As in previous sessions, delegates expressed concerns with westernized definitions of justice, affirming that African societies should be left alone to self-administer themselves without interference. Other delegates wanted to know to what extent courts should apply ADR to criminal and civil matters. They remarked that AJS and ADR opens a lacuna for erratic rulings as they are not founded on any law.

Dr. Flavian Zeija, a Principal Judge from Uganda, called on the need to codify customs since some generations of Africans have passed without being introduced to these customs. Similarly, he observed that some customs are repugnant and should be disregarded or set aside. These sentiments were opposed by Professor Himonga who warned against the temptation to assume an ideal notion of African traditional justice that has existed for a long time. According to her, customary practices evolve and adopt to local realities. Further, she stated that African local communities should not be treated as if they are homogenous. African communities and their cultures are unique and should be treated as such. Reiterating Professor Himonga's answer on codification of customary laws, Professor Ngugi stated that no one should attempt to codify customary law. Instead, the customary law of every society should be allowed to grow organically and resolve local problems as they arise.

Responding to some of the questions, Professor Ngugi stated that AJS should not discriminate between civil and criminal cases. It should however seek to know whether parties voluntarily agree to be engaged in an AJS forum. As a precondition to ADR, parties to such disputes should demonstrate credibility of agencies to participate in AJS. In addition, there should be deliberate effort by the western-educated African population to not interfere with existing customary laws.

Regarding what happens if no actions are taken towards the customary systems already existing, a member of the audience argued that what was already going on was satisfactory, and advised that the "educated" should resist the temptation of interfering with them.

Whereas Professor Ngugi acknowledged that accountability is a great challenge, he still expressed his conviction that AJS and ADR mechanisms address the needs of vulnerable and marginalized justice seekers who cannot afford litigation. Further, he stated that mediation is being adopted more by professional organizations and members of the business community.

Professor Ngugi talked of a range of challenges facing the use of ADR and AJS, as well as proposed remedies, as follows:

- community courts and traditional leaders sometimes charge sitting fees that are more than the ordinary mainstream court levies.
- banishment of perpetrators of crimes may be a challenge, as some tribes do not have policing capacity.
- customary law is evolutionary and in undergoing that change, needs to be developed and underpinned by the bill of rights.
- there is a need to continuously train community elders to expand their knowledge based on their own laws, including the bill of rights, and not in common law.
- unlike the current legal training regime in the continent, which is too western-oriented, there is need to train African lawyers to be experts in their own laws and jurisprudence. In his view, there is need to employ cultural relativism.

He pointed out that the information came from research which had been conducted for over four years entailing anthropological studies where they observed elders determining cases and adapting pilots of court user committees and a comprehensive justice needs survey. Lastly, he said, there was also reliance on studies carried out by secondary organizations such as FIDA and ICJ Kenya. The same was said of South Sudan and Zimbabwe who stated that they had conducted extensive research to derive their data to facilitate policy and decision making.

Ms. Lilliane Adriko from FIDA Uganda clarified that they recognize the role played by local leaders at the community level because that is where the cases are solved by dispensing justice – at the grassroots level. She recommended that the state supports what the informal justice system does through various ways such as facilitating trainings or tools, instead of relying on donor funds, in order to create a sense of ownership.

Ms. Ann Ireri, the Executive Director of FIDA Kenya stated that FIDA Kenya supports the vulnerable women in the society who cannot afford to use litigation. Therefore, mediation being a friendlier, more conducive process, helps them achieve stopgap measures in a faster way. Secondly, mediation assists women to avoid damage to relationships with their spouses. Mediation therefore has become a peaceful way of solving disputes and has slowly gained traction across the society.

### **3.1.6. Recommendation for a framework to monitor the use of ADR and CIJ in advancing SDG 16**

This session sought to gather recommendations aimed at developing a framework for monitoring the use of ADR and CIJ in advancing SDG 16 in a manner consistent with international and regional human rights and rule-of-law standards. It was kicked off by a presentation by Ms. Rose Foran who shared the experience from the UNDP Somalia Rule of Law Programme in a presentation titled '*Measuring People-Centered Approaches to Justice: Indicator SDG 16.3.3*'.

According to her report, in 2019, the UN Statistical Commission initiated a comprehensive review of the SDG indicator framework which identified clear shortcomings relating to SDG 16 Target 3, with specific regard to the coherence between its targets and indicators. It was observed that the existing targets 16.3.1 and 16.2.3, for instance, do not point out issues that people seek out justice services for (i.e. land disputes, to housing concerns, or labor disputes). In addition, it does not recognize the variety of different forums through which justice problems can be resolved.

Due to this intervention, and with regard to indicator 16.3.3, the Interagency Expert Group on SDG 16 met in Addis Ababa in October 2019 to review new indicators proposed for the framework and approved a new indicator to be presented to the UN Statistical Commission. The indicator would assess the proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism. The Expert Group also approved a survey methodology which factored in: (a) experience of dispute over past two years; (b) most recent dispute experienced, by type of dispute; (c) access to dispute resolution mechanism, by type of mechanism; and (d) reason why no dispute resolution mechanism was accessed. As a result, there is proposed joint custodianship by UNDP, OECD, UNODC to support data collection and reporting on the indicator, and, the proposed SDG indicator 16.3.3 will need to be approved by the UN Statistical Commission. The 51st Session is taking place on 3-6 March in New York.<sup>8</sup>

Various components including indicators of the survey model for SDG 16 are being tested in several nations including Cape Verde, El Salvador, Kazakhstan, Kenya, Tunisia, Uganda and Tanzania. The exercise will also entail the development of a refined final questionnaire for collecting data needed for measuring the achievement of SDG 16.3.3. The new survey methodology will collect data on a wide array of access to justice indicators which include:

- problems with land, or buying and selling property;

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<sup>8</sup> The proposed indicator 16.3.3 was adopted at the 51<sup>st</sup> session of the UN Statistical Commission on 6 March 2020.

- issues with housing;
- resolving family issues;
- seeking compensation for injuries or illness;
- problems with employment or labor;
- problems with goods and services;
- problems with government payments;
- government and public services other than payments;
- issue of money, debt, or financial services; and
- problem with environmental damage.

In addition, the tool lists out different options of third parties that can be involved in resolving the problem such as:

- court or tribunal;
- police (or other law enforcement);
- government or municipal office or other formal designated authority;
- religious leader or authority;
- community leader or authority (such as village elder, or local leader) or local non-governmental organization;
- lawyer, solicitor, paralegal;
- other formal complaints or appeal process;
- other external help, such as mediation, conciliation, arbitration; and
- other person or organization.

Once this intervention is adopted by UN member states, Ms. Foran said, it will be possible to identify major aspects of rights violation, most preferred methods of responding to such violations by victims, as well as the reasons behind such decisions. Availability of regularly collected data is intended to inform evidence-based policies and decisions on access to justice. In addition to the above, Ms. Foran reported that the Praia Group on Governance Statistics has produced a handbook for measuring SDG 16, which can be made available to participants.

Specifically referring to studies from Somalia, Ms. Foran mentioned the status of access to justice in Somalia where. She stated that according to their findings under the UNDP Rule of Law SDG 16 Programme, the formal justice system is still blossoming and therefore measuring progress/impact is challenging. She stated that there were efforts to go beyond reliance on perception surveys and 3<sup>rd</sup>

party data by enhancing government-based institutional capacity and infrastructure for data management. This, she said, is an underlying problem across states since prioritization and localization exercises have yet to be undertaken for SDG measurement.

So far, data emerging from Somalia, she said, has captured several cases disaggregated by gender of complainants in 16 ADR centers. There is a focus on building more robust administrative data through coordination between ADRs and the Federal Government of Somalia. Key priorities for monitoring in Somalia now include (a) disaggregation of data by dispute type (b) disaggregation of data by conflict resolution mechanism; and (c) interaction with formal systems. She emphasized the need to highlight the complementary nature of formal and traditional systems through referrals to ensure that no one is left behind across gender, age, and other vulnerability dimensions.

The presentation was followed by responses from the panel. First, Mr. Nicholas Joseph from IDLO stated that his organization is committed to accelerated realization of SDG 16. IDLO, he said, will implement programs on legal empowerment with a focus on women empowerment and public participation. He also acknowledged that SDG 16 will be important in the realization of Agenda 2030. This is in addition to fostering national and global partnerships for SDG 16. To bridge the gap in 2020, IDLO will focus on implementing legal and economic empowerment for women and girls, women's participation in the justice sector and combating gender-based violence.

Like Ms. Foran, Mr. Joseph concurred that SDG 16 is one of the most difficult SDGs to monitor. This, he noted, is caused by lack of data on access to justice which is rarely collected through national surveys. Still, despite this gap, IDLO has worked with stakeholders to strengthen CIJ since 2012. This has been done in several countries including Somalia and elsewhere where IDLO collects data that informs interventions on access to justice within its practice. He further stated that ADR and CIJ systems have benefits that are recognized by IDLO and their partners including the Judiciary of Kenya. Currently, the organization supports a five-year community justice program being implemented in Uganda. Through such efforts, the agency is working to ensure co-creation of ADR and CIJ policies and interventions across the nations noting that the role of CIJ actors cannot be overemphasized.

Dr. Justice Mavedzenge from ICJ was second to speak during this session. He stated that the Forum has been held at an opportune time seeing as ICJ is currently implementing an SDG 16 project in Zimbabwe. He indicated that he hopes to gain useful insights from colleagues during this Forum on how to measure and evaluate progress towards achieving SDG 16 targets. He however said he would share his views based on his experience thus far of working on the implementation of SDG 16. When designing a framework on measuring progress towards achieving SDG 16, Dr. Mavedzenge said there is need to engage with the following key questions:

- what are the conceptual grounds which should inform the development of the monitoring framework?
- what kind of methodologies should be used to assess/evaluate progress?
- what is the role of international human rights standards when measuring progress towards SDG 16?
- is it possible to develop a framework which can legitimately be applied across the African context?

Dr. Mavedzenge proceeded to suggest that there is need to take a value-based qualitative approach, which is complemented by a quantitative analysis. These values which should inform the design of the framework should include justice, accountability and inclusivity. He proposed that international human rights law and standards should permeate our understanding of the substantive meaning and benchmarks created by these values.

In response, various delegates raised questions and comments, including:

- that access to or violations of access to justice do not need to be measured using academic numbers. It was said that Justice speaks to itself and can be seen. Conditions on having measurements are donor-imposed and do not necessarily meet any just end for communities and victims. Measurements of access to justice, it was proposed, should be based on an understanding of communities' notions of justice and not on academically designed tools which do not speak to local realities.
- the need to avoid using elitist frameworks that impede the realization of African justice by examining and addressing the challenges that the western oriented frameworks have brought about access to justice in Africa.
- cultural relativism demands for participation from communities so that interventions address their needs. Elitist discussions on access to justice should cascade down to communities.
- that undertaking research on access to justice is expensive.
- that, due to lack of transparency by stakeholders, some stakeholders who undertake research do not provide access to their data to other stakeholders, including the government. This often results in duplicity and also impedes informed interventions.
- that due to duplicity of research, that are not followed up with any intervention, community members have developed lack of trust and cooperation in subsequent requests for data.
- that there should be deliberative national processes around indicators for realizing SDG 16 regarding access to justice.
- that measuring access to justice should not be made complex (technical) but rather, friendly and easily understood by communities. There is need to appreciate already existing justice systems and allow them to work.

### **1.3.7. End of day one remarks by the overall moderator**

Mr. Deprose Muchena made concluding remarks at the end of first day of the Forum, noting that the Forum had stated very clear objectives and realizable outcomes. He observed that the delegates had made great progress towards meeting the objectives of the Forum and in so doing, moving closer to achieving envisaged outcomes. The progress was reflected through the 28 individual presentations and 4 panel discussions that characterized the day's activities.

## 3.2. DAY TWO- TUESDAY 3RD MARCH 2020

### 3.2.1. Recap of day one activities

The day began with a summary of the previous day's activities by the Forum moderator, Deprose Muchena. He stated that:

- Delegates were exposed to the conceptual framework of the SDGs, ADR and CIJ; the context in which it is being implemented, the figures on the justice gap shared and the actors involved. This brought out that neither the concepts nor the context is homogenous. They are varied but the central aspiration is to deliver justice.
- It was generally agreed that each country whose justice related policy and practices were reviewed within the region already have some form of ADR and AJS being used in addressing justice gaps. These range from institutionalized and legally backed approaches, to those that are informal and not yet recognized in law.
- It was observed that there is still confusion regarding the interpretation of elements of culture, their alignment with human rights and needs of marginalized groups.
- It was acknowledged that challenges exist around how to harmonize the use of mainstream and ADR/CIJ systems on occasions where states have legal pluralism.
- It was noted that there is need to address constitutional/ legal and policy gaps that hinder the use of ADR/CIJ.
- Some took issue with efforts that endeavor to formalize the informal African justice systems, proposing that traditional/African/cultural justice systems should be liberated from formal processes.
- Advice was given against providing a blanket prescription of what justice should be, with one stating for instance that Africa should adopt the mantra 'if it is not broken don't fix it' which basically advises against manipulating African justice systems in any way.
- It was stated that judiciaries should protect ADR and CIJ when the systems work well and only seek to control them when they are working against the constitution.
- It was pointed out that there is need to enhance understanding of ADR as a concept and practice by avoiding western-based interpretations of the meaning and use of customary law. Following this view, it was said that, regarding it as either informal, alternative or African connotes its inferiority to westernized thoughts. Justice should be deemed as is without being either formal or informal/ traditional or modern.
- It was proposed that a curriculum for training of ADR and CIJ practitioners should be developed so that they are trained to become experts in their own jurisprudence as opposed to training them on civil/common law. It was stated that capacity building for realizing this endeavor should be enhanced and not destroyed. In addition, exceptions should be made so that capacity building is provided on human rights, and/or the bill of rights.



### 3.2.2. Relevant international and regional rule of law and human rights standards and mechanisms

Mr. Romualdo Mavedzenge introduced the first session of day two by informing delegates that the UN Special Rapporteur on the rights of indigenous peoples, *Ms Victoria Tauli-Corpuz* from the Philippines, who was to give an address in the session, was not able to join the conference due to circumstances related to the COVID-19 global situation. He noted that the session was highly relevant as it allows the Forum to have deep conversations about existing standards and practices, creating an avenue for delegates to deliberate on how to balance the standards with community aspirations and values.

The brief introduction was followed by a presentation on existing international instruments by Dr. Justice Mavedzenge, the Regional Legal Adviser for ICJ in Africa. Dr. Mavedzenge opened his presentation by acknowledging that his colleague Dr. Matt Pollard of the ICJ's Centre for the Independence of Judges and Lawyers in Geneva who was supposed to make the presentation could not travel to the Forum as scheduled due to intervening circumstances related to the COVID-19 global situation. Dr. Mavedzenge said his presentation is therefore adapted from what had originally been drafted by Dr. Pollard.

Making the presentation, Mr. Mavedzenge remarked that globally, the most comprehensive international legal instruments that directly deal with access to justice include but are not limited to:

- the 1948 Universal Declaration of Human Rights (UDHR)
- the 1966 International Covenant on Civil and Political Rights (ICCPR)
- the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the 1989 Convention on the Rights of the Child (CRC)

Dr. Mavedzenge further noted that, from the specific perspective of the rights of indigenous peoples, the most relevant treaty at the global level is ILO Convention no 169: The Indigenous and Tribal Peoples Convention, but it has a far lower rate of ratification than the global human rights treaties mentioned above. In Africa, only the Central African Republic has ratified it. However, in 2007, the UN General Assembly adopted the “United Nations Declaration on the Rights of Indigenous Peoples”. While not a treaty, the Declaration contains provisions that are relevant for the discussion we are having today, said Dr. Mavedzenge. The Declaration states that, “Indigenous people have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.” In addition, they “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.” These provisions point to the immense protection of indigenous legal regimes existing in indigenous societies that need protecting and developing.

Dr. Mavedzenge went on to identify rights that he considered “central” which CIJ systems and ADR must adhere to as a minimum requirement under international law. He identified these as including the right to fair trial before an independent and impartial tribunal, the right to an effective remedy for violations of rights, and the right to equality before the law.

Dr. Mavedzenge then highlighted certain key developments in the past decade in international law that, he suggested, point towards a growing consensus on the idea that indigenous and other traditional or customary justice systems can be an important element of the overall justice system. He ended his presentation by pointing out that the latest development, in this regard, is the set of recommendations made by the Special Rapporteur, in her 2019 report.<sup>9</sup> Dr. Mavedzenge drew the Forum's attention to the following recommendations of the Special Rapporteur report:

- States should give explicit recognition, in constitutional or other legal provisions, of the right of indigenous peoples to maintain and operate their own legal systems and institutions.
- States should ensure training on the status, concepts and methods of indigenous justice for judges, lawyers, prosecutors and law enforcement officials.
- States and indigenous authorities should establish means for exchanging information, understanding and mutual capacity-building between formal state systems and indigenous systems.
- Indigenous peoples, state authorities, international development actors, civil society and other interested parties should coordinate efforts to help strengthen and promote indigenous justice systems and provide them with the necessary funds and logistical support.
- The jurisdiction of indigenous systems should not be unduly restricted and indigenous justice systems should not be deemed inherently inferior to state systems.
- Joint mechanisms for cooperation and coordination between indigenous and state justice systems should be established.
- Ordinary judicial authorities that review decisions from indigenous systems should have an intercultural understanding of the context of indigenous peoples and their institutions and legal systems, which can be enabled, for example, through the participation of cultural experts.
- Since indigenous laws and juridical institutions change and develop over time, any codification of indigenous laws should be designed to avoid freezing those laws as they currently exist, with a particular concern not to entrench any norms or practices that could otherwise develop in a more harmonious direction in accordance with international human rights.
- When preparing legislation or other measures affecting indigenous peoples, states should consult indigenous peoples in good faith in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
- States and indigenous leaders share the responsibility for ensuring that processes and decisions by indigenous justice authorities accord with international human rights, particularly in the context of possible conflicts between the rights and interests of individual indigenous

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<sup>9</sup> UN Special Rapporteur on the rights of indigenous peoples, Report on access to justice for indigenous peoples, UN Doc A/HRC/42/37 (2 August 2019), <https://undocs.org/A/HRC/42/37>.

members and the collective rights and interest of an indigenous people or community. Dialogue, cooperation, consultation, and consent are crucial. No unilateral or coercive interventions should take place.

- Indigenous authorities should ensure safe and inclusive spaces for all in the community to discuss the appropriateness of norms and practices and their consistency with constitutional or international human rights, and to argue for their reform or modification. They should give due consideration to the arguments presented in such discussions. Other stakeholders may support such internal discussions, as well as offering relevant capacity-building or other awareness-building activities both to indigenous leaders and other members of indigenous communities. Any engagement by non-indigenous actors with indigenous communities and leadership on such issues should be sensitive to the social, cultural, political and historical context and cohesion of indigenous peoples and the risk that outside interventions may be perceived as perpetuating actions and attitudes reminiscent of colonialist eras and related historically oppressive connotations.
- States, indigenous peoples and others should cooperate to address the special needs and concerns of indigenous women, children, youth, persons with disabilities and others who frequently face discrimination or other barriers in the areas of access to justice within both the ordinary and indigenous justice systems.

Mr. Melakou Tegegn, an expert from the African Commission on Human and Peoples' Rights' Working Group on Rights of Indigenous People was invited to make his remarks on Africa-specific rule of law and human rights standards and mechanisms that are relevant to CIJ systems and ADR.

Mr. Melakou highlighted gains made in expanding access to justice by indigenous people in Africa citing examples of advocacy work by NGOs in Western and East Africa. This, he stated, resulted in recognition of the rights of African people, for instance, through the adoption of the International Working Group for Indigenous Affairs (IWGIA), Report by Nmehielle VO (2003)<sup>10</sup> and ACHPR and IWGIA (2005) African Commission Report on Human and People's<sup>11</sup>. The report he said, sets out indigenous people's rights.

Mr. Melakou informed delegates that the AU established a working group on indigenous people's rights in 2000 to monitor the protection of, and adherence to rights of indigenous peoples across the continent and compile periodic reports on their findings. The group, he pointed out, conducts seminars, including sensitization seminars on the rights of indigenous peoples. Its members convene at least once annually to take stock of trends and make interventions. During the meetings, they also interact with indigenous people's representatives who present their plights for consideration and resolution.

Whereas he acknowledged that African governments have been engaged in the championing of the rights of indigenous people, Mr. Melakou noted that some challenges still exist such as:

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<sup>10</sup> Nmehielle, V.O. (2003) "The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?" Singapore J. Int Comp Law 7:412-446.

<sup>11</sup> ACHPR and IWGIA (2005) Report of The African Commission's Working Group of Experts on Indigenous Populations/Communities. Copenhagen: Eks/Skolens Trykkeri.

- denial of existence of indigenous people in their territories by some African states.
- non-responsiveness of some African governments to African Commission activities, such as ignoring requests or invitations to file a report on indigenous people, or appeals by the working group regarding violations of the rights of indigenous people within their borders which need addressing; and
- Inadequate funding undermines the capacity of the working group to discharge its mandate.

Mr. Melakou recognized the special linkage that exists between indigenous and religious laws as instruments of conflict resolution and peacebuilding and therefore ADR and CIJ instruments. Despite their role, he expressed concern that modernity does not seem to recognize the force of traditions. Consequently, he called on the need to re-conceptualize modern states and their principles in order to build stronger relationship between the state, religion and cultural institutions.

He argued that there should not be a dichotomy between traditional and institutionalized modern laws. Whereas the modern laws are a recent development, he noted that, African communities had traditional justice systems that were already addressing their justice gaps. These, he said, should be preserved and allowed to work hand in hand with modern legal regimes. He further reported to delegates that the African Commission had received numerous reports about violation of human rights and particularly rights of indigenous peoples in Africa. These include the rights of Ogiek and Endorois communities in Kenya. These communities, he said, upon failing to get audience and assistance from the state, took the state to the African Court on Human and Peoples' Rights in Tanzania where, for instance, the court ruled in favor of the Ogiek People in 2017. However, conclusions and rulings of the court have not been accepted and acted upon by the Kenyan government as is common with other African governments.

Ms. Pamela Kovacs, IDLO's Manager of Research and Learning provided an overview of a framework, developed by the Danish Institute for Human Rights, that focuses on three dimensions of justice: structural, procedural, and normative. Within this framework, she pointed out that, standards are upheld through participation and accountability (structural), due process, adjudicative independence/impartiality, and verifiable evidence (procedural), as well as protections for the vulnerable (normative).

Ms. Kovacs further explained that the framework provides guidance for ADR and CIJ systems, outlining them as follows:

- Structural considerations: participation can be enhanced through well thought out selection and appointment procedures and accountability can be fostered through a range of options which might include establishing codes of conduct, review mechanisms and relationships to courts and paralegals.
- Procedural considerations: jurisdictional boundaries can support due process in determining the kinds and types of matters heard, the methods of ADR can guide the role of adjudicators and standards applied, and where appropriate, there can be flexibility in the kind and type of evidence presented.
- Normative considerations: protections for the vulnerable need to be supported to ensure that outcomes are just and do not perpetuate discrimination or bias. Importantly, since problems are not always solely legal, but tied to economic, social and security-related imperatives, it is

also important to identify underlying reasons for why outcomes may not comply with standards and address these issues.

Ms. Kovacs' presentation highlighted how relevant legal and policy frameworks can be applied and used to support the attainment of SDG 16. She noted the importance of these standards and their appropriate application to ensure access to justice and that no one is left behind.

The session was closed with a questions and answer session. Some speakers emphasized that efforts to strengthen African ADR and CIJ justice systems should not seek to transform them into formalized and complicated process as in the civil and criminal court system, Doing so, they said, would take away ADR and CIJ systems' essential characteristics and advantages. The need to define justice in the African context, as well as the need to differentiate between justice and remedies, was emphasized. The delegates further called on African States to fully meet their obligations under the African Charter on Human and Peoples' Rights; and to demonstrate a willingness to engage with and respect the guidance and calls of the African Commission on Human and Peoples Rights. The countries' commitment, it was pointed out, should not be any less than what they demand of their citizens with regards to national laws.

Whereas Mr. Melakou presented the challenges facing the African Commission on Human and Peoples' Rights' Working Group on Rights of Indigenous People, some delegates identified the Commission as a bottleneck to delivery of justice. It was claimed that the Commission postpones cases brought before it, sometimes as many as 15 times over several years, hence delaying justice for affected indigenous communities.

Regarding the controversy surrounding the definition of court justice mechanisms, Professor Hansungule suggested that the phrase African Justice should only be used for identity's purposes. He cautioned that the terms formal and informal should not be used to refer to and characterize justice systems. Further, other delegates agreed that one who fails to recognize a people's culture, indirectly fails to recognize the people themselves. It was emphasized that one cannot claim to recognize a culture without recognizing the people's way of resolving conflicts, hence highlighting the need to give African Justice Systems their rightful place within global justice discourses. At the same time, there is need to ensure that CIJ systems conform to the basic human rights which African states, along with the rest of the international community, have recognized.

Delegates also called on the need to sensitively participate in a contextualized examination and management of the gaps and challenges that exist within African justice systems to make them work better. It was cautioned that attempts to provide blanket descriptions or definition of justice could be misleading. In this regard, it was stated that, justice should be based on or take due account of the specific local culture it operates in.

In his concluding remarks, Mr. Melakou cautioned against a mentality among African administrators that considers indigenous people as savage. He noted that most Africans still depend on traditional laws to address their conflicts and since the status quo cannot change suddenly, there is need to establish mutual and harmonious cooperation and coexistence between traditional and formal legal regimes. Failure by African governments to listen to their peoples' needs has resulted in advocacy for recognition of indigenous/traditional people.

### **3.2.3. Review of ADR and CIJ experiences and contributions to access to justice in line with Agenda 2030 SDG 16 Targets**

This session began with the presentation of initial findings from a research study by IDLO Somalia on the operation of ADR centers. The presenter, Mr. Mahad Wasuge, who is the IDLO Lead National Researcher in Somalia began by stating that the study was conducted in six centers between 2019 and 2020 in Benadir and Puntland where mixed method research were used to examine key concerns and experiences of justice seekers as well as the perspectives of ADR actors on the operation of these centers.

The study established that such ADR and CIJ efforts in Somalia were relevant because they have a simplified documentation system, are culturally sensitive, are perceived as more efficient than formal courts, provide a framework and venue for dispute resolution, and enable access to justice by marginalized people. In the centers studied, 30% of the cases handled arise from family disputes, largely involving complaints about offending male members in families. Further, respondents generally felt that ADR is important because it delivers solutions in a simple way unlike the courts. They were against courts because of demand for payment of registration fees, focus on reparation and retribution as opposed to reconciliation, lengthy dispute settlement process, and are largely not readily available or accessible.

Mr. Wasuge reported that ADR centers offer free services and 63% of center users surveyed reported that they felt that they were given the opportunity to contribute to the outcome or solution. This shows the ADR process is perceived as inclusive and participatory. Still, the study established that women do not always speak freely in ADR panels but rather seek private or separate spaces where they can speak openly.

Although 77% of study respondents reported being satisfied with outcomes from bringing their matter to an ADR center, community members did also report limited linkages between formal and informal dispute resolution mechanisms. Respondents generally agreed (95%) that ADR centers are impartial in delivering justice services in Somalia. Gender representation in the ADR centers is being supported by having female adjudicators and paralegals engaged in the centers.

In his concluding remarks, Mr. Wasuge observed that ADR centers still face challenges, including limited legal capacity and space constraints. He also said that there is lack of continuity of services as ADR and other community justice projects end abruptly due to lack sustainable funding. He also noted the need to ensure enforcement of ADR decisions which are ignored in some instances due to the lack of a law enforcement mechanism. This is in addition to the need to expand geographic reach of ADR centers in Somalia, strengthen capacity of ADR actors, expand interaction between ADR centers and other justice services, and increase public awareness about the role of ADR centers in ensuring access to justice as well as peace building and conflict resolution in the country.

Mr. Wasuge's presentation was followed by remarks from Somalia's Minister of Justice, *H.E. Avv. Hassan Hussein* who stated that before 2017, Somalia had Traditional Conflict Resolution (TDR) actors engaged in resolving disputes but data was not documented. He said that reforms changed traditional dispute resolution mechanisms into ADR centers, empowered them with technical capacity by providing paralegals, as well as by introducing documentation of case records. Access to and use of ADR centers was made voluntary.

ADR centers in Somalia, he said, are representative as selected adjudicators comprise both youth, women, and customary law practitioners. This ensures that the ADR centers are inclusive by achieving social representation in justice decision-making processes. Consequently, the ADR centers attracted keen interest from the public who wanted to access justice. Today, he pointed out, there are sixteen ADR centers across Somalia. They handle mainly land, family, financial and other relatively minor disputes.

H.E. Avv. Hassan Hussein reported that gender violence matters are addressed with seriousness, mostly through the mainstream legal platforms to discourage the practices. He pointed out that Somalia's judicial system is still under development and cannot handle significant caseloads hence ADR is necessary to complement the mainstream judicial system. There is, he said, an ongoing effort to expand the reach of ADR through the establishment of more ADR centers. The government of Somalia, he said, also encourages adjudicators to work on a voluntary basis, with the sole objective of deriving just resolution of disputes.

Finally, the Minister addressed the need to align ADR policies and its practice. He said that Al-Shabaab is emerging as a competition in providing justice services. This calls for concerted effort to win the trust and commitment of the people by adopting state supported ADR processes as the legitimate avenue of conflict resolution and justice service provision in the country.

The two presentations elicited feedback from delegates who remarked that:

- the Somalia study would have benefited from review of all ADR centers.
- customary justice is not a panacea to all community disputes and there remains a need to strengthen the mainstream legal system in the country.
- there are donors willing to invest in ADR and CIJ systems in Somalia to further facilitate peace building and the government has established Standard Operating Procedures and intends to ensure that ADR centers in the country work together without duplication with targets for genuine service gaps by geography and need.

#### **3.2.4. Experience sharing through parallel break-out groups**

During this session, delegates were divided into three thematic breakout groups to discuss various aspects that were core to the Forum, namely: (i) *the role of various actors in ADR and CIJ mechanisms*; (ii) *Overcoming access to justice challenges and inconsistencies in the constitutional, regional and international standards*; and (iii) *how the Judiciary enforced or otherwise related to ADR and CIJ mechanisms in enhancing access to justice*. Their feedback is sequentially presented under the thematic areas tackled by each group.

##### **The role of various actors in ADR and CIJ mechanisms**

This group discussed several matters including: (a) engagement of CSOs and paralegals to enable a deeper understanding of ADR and customary mechanisms; (b) extent of awareness among community members, and their involvement in dialogue and exchange in order to enhance justice delivery; and (c) experience sharing of good practices on the application of ADR and CIJ systems. The group members reported that:

- Some countries have legal aid frameworks that are approved and functional while others have draft policies that are not yet approved.
- There is a wide gap in engagement of CSOs and paralegals to enable a deeper understanding of ADR and customary mechanisms. This needs to be enhanced.
- There is need for periodic reviews to assess performance which does not currently happen.

- Time, resources and tools for conducting periodic reviews are missing as they have not been given due consideration.
- There is need to enhance community dialogue as a tool for assessing the relevance of ADR and raise accountability of ADR interventions among communities.
- Engagement with paralegals and community mediators should be routinely undertaken.
- Sustainability of ADR and CIJ interventions is not guaranteed.
- Paralegals' contribution should be sustained through proper state and other financing frameworks independent of donor funding. In this regard, Uganda was referenced as a case of good practice in which paralegals provide paid for training-of-trainers (TOT) services to raise funds. Here, it was noted, there is also use of radio, theatre and drama services to increase awareness on the utility of paralegal services. In addition, cases related to women are dealt with by gender committees.

#### Experience sharing on overcoming challenges in relation to access to justice and inconsistencies of constitutional, regional and international standards

This group discussed progress and challenges emerging from the employment of ADR where customary leaders provide negotiation and mediation to resolve disputes. In addition to this, the group was expected to reflect on the relationship between ADR and customary justice institutions with constitutional, international and regional rule of law and human rights standards, including: independent and impartial tribunals; fair trial safeguards; rights of women; rights of children; rights of indigenous peoples. The group had representation from Kenya, Uganda, Southern Africa, Somalia, Tanzania and Ethiopia whose experiences were shared.

In Kenya, it was reported that the Constitution of Kenya, 2010, recognizes ADR as a dispute resolution mechanism. The country also has Islam-based Kadhi Courts that have mainstreamed ADR into their justice service provision endeavors. The Kadhi Courts promote ADR wherein dispute settlement out of court is encouraged, after which the resolutions are presented and recorded in court. In spite of this, it was noted, the country still has challenges with mainstreaming ADR due to lack of adequate ADR centers. The few that are available are overwhelmed. Some cases referred to ADR, including mediation, result in poor user experiences and frustration of the parties to the dispute. Further, other than in Kadhi courts and court-annexed mediations, other mediators do not report back their settlements to courts. Similarly, litigants in some cases are also rarely given a record of their cases, which slows down finalization of the dispute resolution process. Mediation centers were reported to charge fees despite litigants having already made payments at the courts where the cases are initially filled. This results into double payment that discourages use of ADR.

In Uganda, it was reported that both formal and customary courts exist. Parties are free to choose between the two systems depending on what suits their needs. However, it was noted that the country has a challenge in legal training which only prepares judges to work in formal courts. The training does not account for or recognize cultural embodiments such as language, cultures, systems and governance that are needed to make customary courts effective. The fact that law is taught in English creates biases whereby lawyers are trained to defend written law and not customary law. Through this, the lawyers become instruments for alienation of the African culture. A legal requirement that customary marriages be registered as civil marriages to receive state recognition was cited as an example of alienation of African culture. The presentation from Uganda highlighted



the need to revisit the system of legal education. The review of the system, it was proposed, should elevate the role and value of ADR and CIJ within the justice system. This should be coupled with fighting the stigma that characterizes AJS as repugnant to justice and morality.



*Delegates taking part in one of the breakout sessions.*

It was reported that Somalia's Ministry of Justice has been supportive of AJS. However, it was reported that the rich have access to formal courts, as they can afford the costs associated, creating the notion that justice is for the rich. This was attributed to the fact that formal justice is expensive and highly commercialized with lawyers charging exorbitant fees. ADR therefore became the option in advancing free and accessible justice for all. The use of ADR in Somalia, it was said, began as a pilot project but has taken ground, especially in areas faced with conflict. As such, AJS-based justice has been used as a driver for peace with the mantra "No Justice No Peace". ADR is thus accessible and an acceptable means of adjudication of disputes. However, it was noted that their jurisdiction does not cover criminal cases, hence mediators have to refer such cases to court. It was noted that there have been challenges with respect to observing human rights within the ADR system. It was reported that there are ongoing efforts to build capacities and entrenching in acknowledge, and respect for human rights including the rights of women. Consequently, communities have introduced certain punishment for abuse of human rights, while also promoting education on respect for human rights.

Like all the countries above, Tanzania recognizes ADR and AJS for dispute resolution. It was reported that the country has 120 tribes with most having CIJ mechanisms which are recognized by formal courts. Further, it was mentioned that judges and magistrates consult those customary court assessors where necessary. In addition, the judiciary employs mediation and arbitration before cases are admitted in the formal systems. This, it was pointed out, applies to labor and marriage disputes. However, it was reported that most Tanzanians opt to go to formal justice systems, partly because CIJ are based on patriarchal systems that often advance gender inequality. In this regard, therefore, the need to reflect on the customary practices that impede constitutional and international rights in the country and change them was proposed.

It was reported that the government of Tanzania is considering the possibility of harmonizing AJS and mainstream legal systems. As was the case in Uganda, the country also has challenges with legally recognizing AJS outcomes such as marriages under customary and civil law. Hence, there is need for harmonization of the existing justice systems. It was also emphasized that there is need to act on and eradicate injustices that are treated lightly under customary law such as rape, gender biased handling of successions and unconsented marriages.

In Zambia and South Africa, it was reported that ADR has been applied with the involvement of local chiefs. High Courts and lower courts introduced ADR in family law and it is mandatory in most cases.

It was reported that within the Southern Africa region informal justice systems do not have jurisdiction over criminal matters. It was also noted that all appeals from the informal justice systems are taken before magistrates. However, the challenge with the systems is that magistrates often do not have much understanding of the customary law system. The CIJ systems also suffer lack of integrity where chiefs are compromised to deliver justice. In addition, CIJ decisions often fail to respect human rights and the rights of women.

It was reported that, led by local NGOs, Ethiopia developed a successful conflict resolution system for the pastoral communities. Warring communities came together and built peace without government involvement, mostly because government structures do not exist in these remote pastoral areas. Other than these NGO-based interventions, no comprehensive state-led ADR and CIJ mechanisms were reported to exist.

From the discussions within the group, and particularly regarding efforts to promote peace among pastoral communities in Kenya, South Sudan, and Ethiopia, involvement of governments was seen as frustrating and slowing down dispute resolutions. Generally, the group identified the following challenges to access to justice, particularly using ADR and CIJ mechanisms:

- Biasness and lack of integrity. The parties are never happy with the resolutions due to perceptions of bias.
- Lawyers would often frustrate efforts to adopt ADR due to fear of losing out on profits associated with litigation in formal justice systems.
- Most justice systems often fail to recognize and integrate women's rights and constitutional and international human rights.
- There is formalization of the informal justice systems, creating hurdles that impede access to justice, for example, in mediation centers.

The group therefore recommended several interventions to address these gaps including:

- continued capacity building to ensure lawyers take up ADR as an area of practice;
- addressing or doing away with customary beliefs and practices that violate constitutional and international rights,
- educating communities to understand the informal and formal justice systems,
- revisiting the system of education to give visibility to AJS and ensure it works to remove challenges that would make AJS repugnant to justice and morality,
- creating awareness and integrating human rights into ADR and CIJ justice systems.
- enhancing interaction and cooperation between judiciaries, ADR and CIJ actors including community courts, Court Annexed ADRs, NGOs, and donors.

### Experience sharing on promoting access to justice for all through the combined efforts of the formal justice system, ADR And CIJ systems

This group discussed ways of enhancing linkages between informal and formal processes through a comparative review of different jurisdictions. In Uganda, it was noted that, despite the existence of a policy on legal aid, there was no law on legal aid. Magistrates oversee small claims proceedings that require no formal process. Such small claims procedures that do not require participation of lawyers have enabled access to justice. However, lawyers often stop such proceedings by requiring power of attorney. Community members can, however, still opt for Local Council Courts that are led by communally-elected representatives to handle customary and land issues. It was also reported that clan elders who oversee CIJ proceedings have no legal framework for enforcement and recognition of their interventions.

In Zimbabwe, it was reported that village elders are the first point of redress to resolve disputes. The country has a Traditional Leader's Act which defines the mandate of traditional leaders (elders). This provides a platform for recognition and enforcement of decisions made by the leaders. In addition, community legal advisors are appointed from each community and are able to provide advice to disputants. The Community Legal Advisors, it was said, do not require certification and are local members of the Community. It was further noted that despite colonialization in Zimbabwe changing the land ownership structures from communal to individual, the traditional leaders are still considered as the preferred dispute resolution adjudicators for matters arising from communal land. Here, the decisions of the traditional leaders are recognized and enforceable.

Tanzania was reported to have *Mjikumi*- "Ten elders" - as a community policing method, but whose decisions are not binding. In the country, judges and magistrates have assessors who may be customary elders to provide advice to the judge on cultural matters. Such advice is also not binding. The country further has a Legal Aid Act (2017)<sup>12</sup> which recognizes paralegals who are trained using an approved curriculum and certified to practice as paralegals. The act also acknowledges community elders who may play the role of mediators in settling disputes. Additionally, Tanzania recognizes decisions from religious leaders on marital disputes (within ward tribunal boards). These leaders, like all paralegals, are chosen from the local communities and are required to resolve the dispute, or refer

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<sup>12</sup> Dancer, H. (2018) Power and Rights in the Community: Paralegals as Leaders in Women's Legal Empowerment in Tanzania. *Fem Leg Stud* (2018) 26:47–64 <https://doi.org/10.1007/s10691-018-9371-6>.

them to Legal Aid Institutions where the need arises. Solutions facilitated by paralegals do not require enforcement as such are often amicably reached.

Somalia reported that customary elders provide dispute resolution services with no appeal process from the local elders' process within this context. The ADR Centers have adjudicators from different backgrounds including experts and paralegals whose role is to assist participants to understand the processes and identify the right solution for each dispute. Here, trusted members from the community work as clerks who handle administration and filing tasks.

In Somalia, legal aid providers are key in enabling the resolution of disputes arising from Internally Displaced Persons (IDPs). Female adjudicators have a role equal to the male adjudicators and can be assigned disputes as they arise and filed at the ADR center. Respected members of the community are selected as adjudicators by the members of each community. Such appointments were initially carried out by the Ministry of Justice where the criteria for selection was provided to the different communities, including the need for gender inclusivity.

Once a decision is reached, the outcome is confirmed by the center and adopted. Somalia's ADR adjudicators refer disputes that remain unresolved under the ADR center to courts.

It was reported that South Sudan practices a tier-based system to justice service delivery. These tiers include: (a) tier one where elders (council of elders) hold forums; (b) tier two consisting of head Chief (only men); (c) tier three which consists of Boma Chief (Village Chief); (d) tier four headed by a Paramount Chief; and finally (e) tier five consisting of statutory Courts. This points to the existence of a system that aligns and recognizes ADR, CIJ and mainstream judicial systems, but where ADR and CIJ are deemed inferior.

Similar practices were reported in Sierra Leone where its CIJ system relies on elected chiefs. Such chiefs are first pre-qualified from selected list of families tasked with identifying a chief. The chiefs undertake mediations which are compulsory in commercial disputes.

It was also noted here that countries are adopting court annexed mediation as an approach to reaching out of court dispute settlement with specific cases in:

- Tanzania, where court annexed mediation is compulsory for all civil matters and where mediators are judges and magistrates.
- Uganda, where court annexed mediation is compulsory for all civil matters. Here, two files are prepared for each case: mediation and trial files. The mediators, who are premised in court, are paid by these courts and include registrars and magistrates who may be appointed as mediators.
- Kenya, where court annexed mediation entails compulsory referral of appropriate matters for mediation.
- Somalia, where there is referral of disputes from courts/ police stations to ADR Centers.

Additional success stories were shared for peer learning including:

- in Kenya where lead mediators report to the court on the conduct of lawyers and other parties which can enable the court to impose sanctions on the party frustrating the mediation process. Such sanctions can include striking perpetrators out of pleadings and charging them fees or imposing other sanction.

- in Kenya where there is a judiciary fund for the settlement of mediator's fees.
- in Somalia where an established framework on cross referral of disputes from one platform to another is used to facilitate cross over of disputes.
- in a number of jurisdictions where plea bargaining and diversion are recognized within the formal dispute resolution processes.

Following their elaborate discussion, the group members recommended the following:

- adoption and establishment of ADR centers within local communities;
- selection of ADR and CIJ members from communities in an inclusive manner;
- recognition of decisions from traditional and informal justice processes by the formal mechanisms;
- management of disputes over communal land by traditional and informal processes;
- free access to services provided at the ADR Centre to enhance access to justice;
- mandatory provision of legal aid by advocates in all jurisdictions as one of the mandatory annual performance measurement yardsticks;
- enactment of laws on legal aid for countries that lack legal aid laws.

### 3.2.5. Round Table Interview with a Judge, an ADR expert and a justice seeker representative

During the final session of the Forum, the overall moderator, Mr. Muchena, held a round table with three leading stakeholders. The three, Ms. Lilliane Adriko from FIDA Uganda, Professor Chuma Himonga from Zambia and Dr. Justice Flavian Zeija from Uganda were asked specific questions on how best to promote equal and effective access to justice for all through the combined efforts of the formal justice system, ADR and indigenous and other traditional or customary justice systems. The following is an outline of these interviews.

**Interviewer:** Professor Himonga, how do we ensure continuous learning and information sharing among stakeholders?

**Professor Himonga:** The interplay between customary and formal legal regimes should be enhanced. Whereas state courts base their practice on western legal systems, traditional courts rely on living and official customary law. Still, most professionalized courts employ official customary law which is customized based on westernized perceptions, and which does not reflect life practices of concerned communities. In such contexts, the formal and local courts will stifle each other. Customary courts define customary laws in respect of changes in customs and community practices through an evolutionary process that facilitates growth in response to community dynamics.

For example, as a result of lacking familiarity, formal Courts in Zambia routinely quashed the decisions of local customary courts regarding marital disputes. While bringing these two legal systems together can be achieved through appeals, the challenge would arise where professionalized courts may not understand the content of customary law and customary normative systems. Pushing

village matters into formal legal systems results in severe punishment for misdemeanors that can easily be addressed in community justice systems hence thus, the need for plural legal systems.

**Interviewer:** Ms. Adriko. What should be done to ensure independence of ADR and CIJ in delivering justice?

**Ms. Lilliane Adriko:** Formal justice systems do not put gender equality at the forefront. There is need to streamline jurisprudence within both formal and alternative justice systems. There is a challenge of patriarchy and gender norms seeping through legal practices. Women's concerns should be investigated holistically and mainstreamed into jurisprudence-related conversations. Adopted approaches, whether economic or social rights, should mainstream gender needs. It is only by making ADR and CIJ systems holistic in addressing all human rights, without the system themselves being violators, that it will be possible for them to freely deliver justice.

**Interviewer:** Justice Zeija. There have been calls not to regulate/structure ADR and CIJ interventions. How successful would such liberalization be in ensuring success of these interventions in addressing justice needs? Can we assume that unlike the rest of society, ADR and CIJ interventions are free of corrupt conduct that can impede access to justice?

**Dr. Justice Flavian Zeija:** Minimum standards for customary law mainstreaming should be: (a) non-repugnant; (b) dependence on proof; and (c) absence of conflict with any written law. Elements of CIJ that meet the above criteria can be recognized in the mainstream legal system. Ordinarily, ADR and AJS decisions cannot be recognized within mainstream legal systems due to lack of legal recognition of ADR and AJS interventions.

In Uganda for instance, local council courts exist but are not run by legal experts. Their source of legal knowledge is also different from mainstream training. The challenge of joining two systems that derive their wisdom from two different streams of thinking is unquestionable. In addition, the doctrine of precedent limits judges' ability to think outside the – ruling – box. This stifles creativity that would be necessary in incorporating AJS and ADR best practices into formal ruling.

**Interviewer:** Professor Chuma Himonga. How can ADR, CIJ and state-backed justice systems be seamlessly aligned to overcome conflicts and competition among stakeholders?

**Professor Himonga:** There is enough evidence of methodology and standards for ADR and AJS within the African context. Africans train and educate in western informed legal regimes. The continent's universities do not teach customary law yet 90-98% of the African population depends on customary law to meet their daily dispute resolution and justice needs. Institutions of higher learning should research customary law and find solutions to existing problems within these laws.

Although a few universities exist that teach customary law consistently to students who are aspiring lawyers, the rest do not. This is dangerous because no legal system survives unless it is taught scientifically: "taught law is tough law". There is no way customary justice regimes can be sustained if customary law is not researched on and taught in universities and other institutions of learning.

**Interviewer:** Justice [Zeija]. Despite all the great efforts towards mainstreaming ADR and CIJ into justice services, what challenges do African governments face in delivering on this mandate? How do we overcome the knowledge gap among judges with regard to referring to customary law in rulings?

**Dr. Justice Flavian Zeija:** In most cases judges, especially those from areas with different cultural background, may find themselves flat-footed. This results in overdependence on amicus curiae to provide insight into the prevailing customs. The use of amicus curiae helps but there is need to ensure relevance of assigned judges in cases that have cultural connotations.

**Interviewer:** Ms. Adriko. Whereas it would be true that ADR and CIJ are more resource efficient in delivering justice to their users, it has been observed here that they cannot be assumed to be without costs. How should this aspect be treated moving forward, particularly about their overdependence on donor funding and the resultant sustainability challenges?

**Lilliane Adriko:** There is ongoing effort to mainstream ADR and AJS practices into legal service delivery by practitioners such as FIDA. Efforts by stakeholders like FIDA to change the perception that there are not costs associated with ADR, have not yielded any results yet.

## **4. CLOSING REMARKS**

### **4.1. CLOSING REMARKS BY DR. JUSTICE MAVEDZENGE**

Dr. Mavedzenge thanked participants for taking time from their hectic schedules to attend the Regional Forum. He thanked the Republic and Canton of Geneva, Switzerland, for its generous support which made it possible for the ICJ to collaborate with IDLO to organize the Regional Forum in Nairobi. Dr. Mavedzenge remarked that the discussions during the Forum were robust and resulted in solid ideas being shared. He said that ICJ looks forward to incorporating some of these ideas into its programming. He further indicated that the ICJ, through its Centre for the Independence of Judges and Lawyers, is planning to convene another Global Forum on indigenous and other traditional and customary justice systems in Geneva later in 2020 and the ideas shared during the Nairobi Forum will help to shape the agenda.

### **4.2. CLOSING REMARKS BY MS. TERESA MUGADZA**

Ms. Mugadza thanked participants for honoring IDLO with their presence during the Forum. She expressed her appreciation to the delegates whom she felt not only gave very valuable contributions to the discussions, but also sowed seeds into the future agenda of IDLO and other stakeholders in strengthening ADR and CIJ on the continent.

Reflecting on the discussions, Ms. Mugadza noted that the Forum had been a great platform to reflect on questions relating to access for justice. She observed that while many questions could not be resolved over the two days of the Forum, it was important that stakeholders continue to engage with them, especially around defining “African Justice”; whether there should be codification of customary law; and how to ensure that CIJs do not undermine human rights especially those of women and the most vulnerable. She called on delegates to start thinking about justice and access to justice in a manner that is not so formalistic, but rather in ways facilitate access to justice. She emphasized that in her view, there is need to encourage people-centered justice, focus on strengthening ADR and CIJ and in particular seek to cure their weaknesses such as gender bias to enable them address justice across the board.

Finally, Ms. Mugadza thanked Ms. Barbara Kawira Japan-Senior Advisor for Africa, the research and learning team from IDLO, IDLO Kenya office team, partners such as ICJ, Mr. Romualdo Mavedzenge-the IDLO Regional Manager for Africa, the Embassy of the Kingdom of Netherlands in Kenya, as well as all other stakeholders for their varied support with the Forum.

### **4.3. CLOSING REMARKS BY JUSTICE FRED OCHIENG'**

On behalf of the Judiciary and the Chief Justice of Kenya, Justice Ochieng' thanked delegates for attending the Forum and participating in the discussions. He remarked that despite concerns expressed in the Forum, indigenous or customary law will not die and cannot die because it does not depend on codification. He however insisted on the importance of having ADR and CIJ work in harmony with human rights. He called on the need to liberate ADR/CIJ thinking. He said that both ADR and CIJ currently have cultural undertones that discriminate against women and consequently deny them access to justice. According to him, women do not need to beg for justice. This, he noted, called for the need to embrace and enhance equality within ADR and CIJ systems.



Justice Ochieng' praised the effort by Somalia in mainstreaming a customary justice system into the provision of justice services noting that Somalia has offered the region a good lesson. He underscored his earlier point that that African Indigenous Legal System has more to teach the world and cannot die. Still, he noted that there is over-reliance on a formalistic lens by judges in deciding access to justice in Africa. To this end, he advised on the need for African judiciaries to learn from experiences like Somalia's which now has records on the successes of ADR interventions.

Justice Ochieng' advised that lawyers should not be vilified for their perceived opposition to ADR but brought on board to enhance their participation in ADR. He remarked that lawyers need awareness and training in the use and utility of ADR mechanisms. He further acknowledged the effort of FIDA Kenya in training mediators. He further remarked that FIDA Kenya's success in bring men onboard as it champions the plight of women and children who are most often victims of abuse by men is commendable. This, he noted, has been achieved through FIDA Kenya's trainings, negotiations, awareness creation and continuously championing the plight of women, children and other cases which have heightened needs. Finally, Justice Ochieng' said that ADR and CIJ should document their interventions so that judiciaries and the rest of the community can learn from their successful interventions.



*Delegates during the Regional Forum at Safari Park Hotel in Nairobi 2-3 March 2020.*

## 5. KEY OUTSTANDING ISSUES AND RECOMMENDATIONS FROM THE FORUM

After two days of very engaging deliberations, the Forum identified several issues for particular follow up, including:

- Undertaking more robust engagement between academics, civil society and formal legal systems (judiciaries) with wide acknowledgment that there is a lack of close nexus between stakeholders within the justice sector and a need to create close working relationships between the judiciary and AJS in particular.
- Aligning ADR and CIJ interventions with fundamental human rights with an emphasis on the need to align customs and cultural practices of African communities to fundamental human rights obligations and standards under treaties that African states are parties to.
- Facilitating continuous education and awareness creation among traditional dispute resolution stakeholders in basic human rights and the prevailing customary laws and cultural practices, which are also informed by the changing socio-cultural, political, economic and environmental landscape of communities.
- Undertaking continuous training and awareness creation among legal practitioners on AJS. This should be done by introducing more of this content in legal training curricula, and through continuous education for already serving legal practitioners.
- Promoting the teaching of customary law as a separate course to undergraduates in all law schools to assist understanding of traditional justice by those who end up becoming judges to ensure the survival of customary law.
- Promoting empirical research into customary law justice systems in contemporary society to help in sustaining the role of customary justice systems and discover appropriate and beneficial ways of interaction between the formal and customary system.
- Pursuing research that helps develop policies and other interventions for effective combination of the two streams of justice on a country or community basis, recognizing the diversity in customary justice systems.
- Mainstreaming gender, children and other marginalized or at-risk groups' concerns into customary justice in line with basic human rights and ongoing global discourses.
- Ensuring continuous peer learning among judiciaries and AJS stakeholders across the continent to facilitate the sharing of best practices and overcoming challenges that frustrate efforts to increase access to justice.
- Recognizing different terminologies used in referring to African justice systems and, in particular, avoiding terminology that particular stakeholders regard as implying the inherent inferiority or superiority of one system over another.
- Institutionalizing, recognizing and financing ADR and AJS to seamlessly work closely with courts in resolving disputes. The need to introduce and enhance state financing to remove over-reliance on donor support was strongly emphasized.

- Continuously monitor the promotion of equal and effective access to justice for all through the combined efforts of the formal justice system, ADR and indigenous and other traditional or customary justice systems.

## ANNEXES

### 1. FORUM AGENDA

**REGIONAL FORUM:  
ALTERNATIVE DISPUTE RESOLUTION & CUSTOMARY AND INFORMAL JUSTICE**

**THEME: ADVANCING SDG 16 AND PATHWAYS TO JUSTICE**

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2-3 March 2020, Nairobi, Kenya

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**OVERALL MODERATOR: Deprose Muchena**

<b>Sunday, 1 March 2020</b>	
<b>Arrival and Registration SAFARI PARK HOTEL, NAIROBI</b>	
<b>TIME</b>	<b>ACTIVITY</b>
3:00pm – 7:00pm	Arrival of participants <i>Facilitated by: IDLO, JUDICIARY and ICJ</i>
7:00pm - 8:30pm	Dinner at the Safari Park Hotel
<b>DAY 1: Monday 2 March 2020</b>	
8:30am - 9:00am	Registration
	<b>Guiding questions for the forum:</b> <ul style="list-style-type: none"><li>• What is the role of alternative dispute resolution (ADR) and indigenous and other traditional or customary justice systems to help realize SDG 16 and international human rights and rule of law standards?</li><li>• How can we ensure equal access to justice for all, especially for the poor and most marginalized?</li><li>• What are the challenges within ADR and indigenous and other traditional or customary justice systems, including in fragile and post conflict contexts? How do these challenges affect access to justice for the poor and most marginalized?</li><li>• What are good practices to ensure that justice seekers are able to access justice, while navigating parallel or overlapping legal systems?</li></ul>

9.00am – 10.00am	<p>Opening remarks:</p> <ul style="list-style-type: none"> <li>• Romualdo Mavedzenge-Regional Manager for Africa, IDLO</li> <li>• Kelvin Mogeni, ICJ Kenya Council</li> <li>• H.E. Frans Makken-Ambassador of the Netherlands to Kenya</li> </ul> <p>Key Note Address: David K. Maraga, Chief Justice and President of the Supreme Court of Kenya</p>
10:00am - 10:30am	<b>Group photo and Coffee Break</b>
10:30am- 11:30am	<p>High level panel discussion to set the context in relation to customary and informal justice mechanisms and ADR:</p> <ul style="list-style-type: none"> <li>• <i>Judiciary Perspective: Judge President Cagney Musi (South Africa)</i></li> <li>• <i>Ministry of Justice (Somalia)-H.E. Avv Hassan Hussein</i></li> <li>• <i>Professor Thandabantu Nhlapo (South Africa)</i></li> </ul> <p>Overview of the program and brief introduction to the Forum objectives</p> <p><i>Overall Conference Moderator: Deprese Muchena</i></p>
11:30am-1:00pm	<p>Exchange of Information and Perspectives on national legal and policy frameworks on ADR and customary and informal justice to advance SDG 16:</p> <p><i>Presentation by: ADR Steering Committee Kenya Country experience: Mr. John Ohagga-Chairperson-ADR Steering Committee</i></p> <p><i>Country specific responses:</i></p> <ul style="list-style-type: none"> <li>• Sierra Leone-Martina Kroma-Chairman, Law Reform Commission</li> <li>• South Sudan-Hillary Koma-South Sudan Law Society</li> <li>• Somalia-Ahmed Ali-Head of Unit/ADR Coordinator-Ministry of Justice</li> <li>• Tanzania-Christina Kamili-CEO Tanzania Network for Legal Aid Providers (TANLAP)</li> <li>• Uganda-Rachel Odoi-Senior Technical Advisor JLOS</li> <li>• Zambia-Professor Michelo Hansungule-Leading Scholar on Human Rights Access to Justice</li> </ul> <p>Questions for consideration:</p> <ol style="list-style-type: none"> <li>1. Are ADR or traditional or customary systems recognized in the Constitution or other laws?</li> <li>2. What formal or informal provisions or mechanisms govern the relationships between the Systems?</li> <li>3. How is jurisdiction defined or determined, with particular attention to the character of matters, applicable law or regulation, geographic location of facts or litigants, and personal status?</li> <li>4. How are conflicts or overlap between systems resolved?</li> <li>5. To what extent do national courts enforce or otherwise give effect to ADR or traditional or customary decisions?</li> </ol>

	Moderated by: Justice Fred Ochieng'-Chairperson, ADR Task Force, Judiciary of Kenya
1:00 pm–2:00pm	<b>Lunch Break</b>
2:00pm –3:00 pm	<p>Practical challenges to accessing justice through AJS</p> <p>Presentation by: Hon. Justice Prof. Joel Ngugi - Chairperson, Taskforce on Traditional, Informal and other means of Accessing Justice (AJS)</p> <p><i>Guiding Questions :</i></p> <ul style="list-style-type: none"> <li>• <i>Challenges related to accessing justice in Legal Pluralist Systems in general?</i></li> <li>• <i>Participation of special interest groups with specific challenges and protection of their rights e.g; women and children at risk of discrimination and harmful practices seeking justice with AJS?</i></li> <li>• <i>Ensuring due process in ADR and procedural safeguards, including accountability o CIJ actors.</i></li> </ul> <p><i>Responses:</i></p> <ul style="list-style-type: none"> <li>• FIDA (consolidated feedback from FIDA's Kenya, Uganda, South Sudan and TAWLA)</li> <li>• Abel Chikomo TRACE program – Zimbabwe</li> </ul> <p>Moderated by: Teresa Mugadza, Country Manager IDLO Kenya</p>
	Plenary
3:30pm-4:30 pm	<p>Recommendations for a framework to monitor the use of ADR and customary and informal justice in advancing SDG 16 in a manner consistent with international and regional human rights and rule-of-law standards:</p> <p>Presentation by: UNDP Somalia</p> <p><i>Respondents.</i></p> <ul style="list-style-type: none"> <li>• Rose Foran, UNDP Somalia</li> <li>• Nicholas Joseph, IDLO</li> <li>• Justice Mavedzenge-ICJ</li> </ul> <p>Moderated by: Elsy Sainna-Deputy Director, ICJ Kenya</p>
4:30pm	<p><b>Coffee Break and networking</b></p> <p><b>Debrief session for the Forum Conveners</b></p>

<b>DAY 2: Tuesday 3 March 2020</b>	
8:30am -9:00am	<b>Recap- Moderator</b>
9:00am-10:30am	Relevant international and regional rule of law and human rights standards and mechanisms.

	<ul style="list-style-type: none"> <li>• Regional Legal Adviser-ICJ Africa- Justice Mavedzenge-ICJ,</li> <li>• Expert, African Commission on Human and Peoples' Rights' Working Group on Rights of indigenous people- Melakou Tegegn</li> <li>• Manager Research and Learning, IDLO-Pamela Kovacs</li> </ul> <p>Moderated by: Romualdo Mavedzenge-Regional Manager for Africa, IDLO</p>
10:30- 11:30 am	<p>3 parallel break-out groups:</p> <ul style="list-style-type: none"> <li>• Role of various actors in ADR and customary and informal justice mechanisms</li> <li>• Overcoming challenges access to justice challenges and inconsistencies in the constitutional, regional and international standards.</li> <li>• How has the Judiciary enforced or otherwise related to ADR and customary and informal justice mechanisms in enhancing access to justice</li> </ul> <p>(see descriptions at end)</p>
11:30am - 11:50am	Coffee Break
11:50am-1:00pm	Break out groups continue work
	Plenary session
<b>1:00 pm-2:00pm</b>	<b>Lunch Break</b>
2:00pm-3:00pm	<p>Review of ADR and Customary and Informal justice experiences and contributions to access to justice in line with Agenda 2030, SDG 16 targets</p> <p>Presentation of a research study in Somalia on the operation of ADR centres with contributions from:</p> <ul style="list-style-type: none"> <li>• Minister of Justice, Somalia- H.E. Avv. Hassan Hussein</li> <li>• IDLO Somalia Country Manager- Adam Shirwa</li> <li>• IDLO Lead National Researcher (Somalia)- Mahad Wasuge,</li> </ul> <p>Moderated by: Pamela Kovacs-Manager, Research and Learning, IDLO</p>
3:00pm – 3:45pm	Break out groups report back.
3:45pm - 4:15pm	Tea Break
3:45pm-5:00pm	<p>Interview of a judge, an ADR practitioner and a justice seeker representative</p> <p>How best to promote equal and effective access to justice for all through the combined efforts of the formal justice system, ADR and indigenous and other traditional or customary justice systems?</p> <ul style="list-style-type: none"> <li>• FIDA Uganda-Lilliane Adriko-CEO</li> <li>• Zambia-Prof. Chuma Himonga</li> <li>• Judiciary-Dr. Justice Flavian Zeija</li> </ul>
5:00-5:30pm	Wrap up and closing

	<ul style="list-style-type: none"> <li>• ICJ-Justice Mavedzenge</li> <li>• IDLO-Teresa Mugadza</li> <li>• Judiciary-Justice Prof. Joel Ngugi</li> </ul>
<b>DAY 3: Wednesday 4 March 2020: departure</b>	

The Regional Forum will follow an interactive format with a combination of plenary and break-out sessions guided by questions and facilitation intended to help focus discussion and advance policy priorities.

### Day 2 Morning Breakout groups:

**Breakout group I:** Role of various actors in ADR and customary and informal justice mechanisms:

Convener: AJS Taskforce-Kenya- Jane Murungi

(Panel discussion)-to discuss the following themes:

- Engagement of CSO's and Paralegals to enable a deeper understanding of ADR and customary mechanisms – what are pressing issues?
- Dialogue and exchange with communities on rights awareness to enhance justice delivery-are individuals aware of their rights?
- Experience sharing on good practices on the application of ADR and customary and informal justice

#### Countries sharing:

- Kenya-Vincent Mutai- Board Member, National legal Aid Service (NLAS)
- FIDA Uganda-Lilliane Adriko
- Sierra Leone-John Bangura-Programme Manager-TIMAP for Justice
- Malawi-Chief Benson William David Mtuwa
- Somalia-Mohamed Bashir- ADR Coordinator-Puntland, Somalia
- Somalia- Farhio Hussein-Adjudicator

Moderated by: Charles Makanga-Head of the Traditional Leadership Commission-MALAWI

**Breakout-group II:** Experience sharing on overcoming challenges in relation to access to justice and inconsistencies of constitutional, regional and international standards.

Convener: Barbara Japan-IDLO

Guiding discussion themes

- ADR with customary leaders providing negotiation and mediation to resolve legal issues – progress and challenges



- Relationship of ADR and customary justice institutions with constitutional, international and regional rule of law and human rights standards, including: independent and impartial tribunal; fair trial safeguards; rights of women; rights of children; rights of indigenous peoples.

Panel:

- FIDA South Sudan-Adut Daniel Chol
- Kenya – Hon. Al Muhdar A. Hussein-Chief Kadhi Kenya
- Uganda-Jimmy Muyanja Centre for Arbitration and Dispute Resolution (CADER)
- Somalia – Abdullahi Sheikh Abkar
- Zambia-Prof. Michelo Hansungule
- John Garang Ajok-CADER-South Sudan

Moderated by: Justice Mavedzenge-ICJ

**Breakout-group III:** How best to promote access to justice for all through the combined efforts of the formal justice system, ADR and traditional or customary justice systems?

Convener: ADR Taskforce-Justice Fred Ochieng'-Chairperson ADR Task force-Kenya

Experiential responses:

- Kenya – Justice Prof. Joel Ngugi
- Uganda-Judiciary of Uganda-Dr. Justice Flavian Zeija
- Tanzania-Judiciary of Tanzania-Justice John Mgetta
- Somalia-Ahmed Ali Aden-Head of the ADR unit-Ministry of Justice, Somalia

Moderated by: Justice Titus Mlangeni-Kingdom of Eswatini

## 2. MODERATOR CONCLUDING QUESTIONS TO KEY STAKEHOLDERS – FIRE SIDE TALK

- Learning and information sharing- How do we ensure continuous learning and information sharing among stakeholders?
- What should be done to ensure independence of ADR and CIJ in delivering justice?
- There have been calls not to regulate/structure ADR and CIJ interventions. How successful would such liberalization be in ensuring success of these interventions in addressing justice needs? Can we assume that unlike the rest of society, ADR and CIJ programs are free of corrupt conduct that can impede access to justice?
- How can ADR, CIJ and state backed justice systems be seamlessly aligned to overcome conflicts and competition among stakeholders?
- Whereas it would be true that ADR and CIJ are more resource efficient in delivering justice to their users, it has been observed here that they cannot be assumed to be without costs. How should this aspect be treated moving forward, particularly about their overdependence on donor funding and the resultant sustainability challenges?
- Despite all the great efforts towards mainstreaming ADR and CIJ into justice services, what challenges do African governments face in delivering on this mandate? What can be done to score better results?
- What are your takes on the observations that ADR specialists require more training? Should ADR and CIJ purely depend on existing community law? What threats are posed by such dependence with reference to human rights and constitutionalism?