

# Support for justice reform in ACP countries

September 2010



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# **Support for justice reform in ACP countries**

September 2010

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## FOREWORD AND ACKNOWLEDGEMENTS

This document was prepared by a team of consultants hired under a service contract concluded between HTSPE and the European Commission (EC), funded by the facility for studies of the 9th European Development Fund (EDF).

It has benefited from discussions in a reference group, a consultation workshop held in Brussels<sup>1</sup> and a peer review bringing together representatives of the delegations and services of the headquarters of the EC (EuropeAid RELEX, DEV, JLS)<sup>2</sup>.

The work was coordinated and completed by the unit "Governance, security, human rights and gender" of EuropeAid.

This reference document is addressed to EC staff working at the headquarters and in delegations, to national partners and donors engaged in promoting and supporting reform in the justice sector.

It is based on experience of support for the justice sector provided by the EC to ACP countries in a rapidly growing area of cooperation and offers a subsequent reference document that covers all countries benefiting from cooperation with the EC.

The contents of this publication do not necessarily represent the official position of the European Commission.

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There is an English version and a Portuguese version of the original French version.

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1) Consultation workshop with development agencies and NGOs operating in the justice sector in ACP countries, Brussels, June 10, 2008.

2) Pre-restitution Seminar bringing together representatives of delegations and headquarter units of the Commission (EuropeAid, RELEX, DEV, JLS), Brussels, 13-14 October 2008.

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# EXECUTIVE SUMMARY

This reference document has been designed as a practical tool for the use of the EU Delegations in approaching a complex and yet decisive area of development, that of justice reform.

The support of the justice sector as part of the EU's development cooperation policy is of utmost importance for three main reasons. First, the rule of law, human rights and democracy are the founding principles of the EU and its constituent treaties, turned into values to be promoted worldwide. Second, these principles are central to the Cotonou Agreement, which binds member states and ACP countries, and also prominent on the association agreements concluded by the EU and numerous third countries. Third, all studies show that the proper functioning of the judiciary is a sine qua non condition for stability, economic development and poverty reduction.

This version of the study is based on the experience of supporting justice reform in ACP countries and it will be followed by a more comprehensive study covering the EU support to this sector in all third countries. It does not analyze the details of implemented projects nor it identifies all features of the justice reform in ACP countries, but based on the experience and leveraging practices from ACP countries, it provides an overview of the main features of support to the justice sector.

**Chapter 1 [Features and approaches to justice sector](#)** aims at better identifying the justice sector by mapping all of its key actors and components, describing the different types and levels of legal system, as well as determining it from other related areas or concepts.

(i) It is particularly important to first understand what differentiates the justice sector from the rule of law and security, two other notions which are sometimes designed as intervention sectors of donors. The concept of rule of law has inevitable implications in the field of justice, especially with regards to the independence of judges, the legality of administrative acts, the existence of a professional body for the defence of human rights, etc. However, the concept goes beyond the justice sector as it applies to all the powers and areas of state intervention. The sectors of security and justice are also closely linked because they partly touch upon the same actors or similar institutions (police, criminal justice, prosecuting authorities, prison system, guarantees of individual freedoms, etc.). Therefore, the programmes supporting the security system reform (SSR) often include justice related components and vice versa. But the concept of security is distinct from that of justice, and in any event, the SSR programs reach only a part of the justice sector.

(ii) Section 1.1.2 describes in a dozen topics the magnitude of the field and the number of actors involved in justice reform. Some aspects (constitutional for example), some institutions (police or traditional justice), some actors (bailiffs or NGOs) are often underestimated in the sector's approach. The idea developed here, as in chapter 2, is not to induce a response to all significant concerns, but to lead to the adoption of an inclusive approach before designing an intervention plan, without ever omitting the gender dimension. [Annex 5](#) provides an example of gender mainstreaming to the justice sector, to be taken into account during the preparatory stage of programmes.

(iii) This section outlines why justice forms a system for several reasons: it belongs to a single legal system, either civil law or common law, briefly presented here; it belongs to a system of international standards whose elements, regional in particular, it recalls; finally, it is emphasised that its institutions are interdependent.

This presentation is supplemented in [Annex 1](#) by a glossary allowing the association of the major lexical differences with the conceptual differences between the two main legal systems (common law and civil law).

In addition, this chapter also provides a description of the main donors' approaches to this sector and in these countries where complementarity with the EU programs should be ensured.

**Chapter 2, [Analysis of the justice sector](#)**, provides two tools.

The first one is based on the methodology of analysing and addressing governance at sector level, as developed by EuropeAid and applied to the justice sector. The added value of this tool is to provide an analytical grid of the sector, both thematic and dynamic, taking into particular account the relations of governance and accountability among the actors as well as the sector's ability to reform its own governance. This concept has been modelled and [Annex 2](#) presents the application of this model to a justice reform in a fictitious country.

The second one is a list of possible entry points including an analysis grid of the key elements of the justice sector reform. The study has deliberately chosen brevity in identifying key vectors, retaining only four: the overall institutional framework, the sector professionals, access to justice and effectiveness of justice. Correlatively, this brevity leads to

many subdivisions of the analysis grid. In order to facilitate its use and make it readable, the sub-elements are presented as thematic questionnaires, followed by commentaries which, if any, are making the distinction between legal systems.

This is a rather descriptive tool which should be used in a flexible and dynamic manner. For example an intervention aiming at improving the access to justice for detainees should not be limited to the analysis of the sector from the 'access' perspective only, but it should include reflections on personnel (lawyers/human rights defenders, prison guards...), effectiveness of the judicial affairs' processes (see [Annex 4](#) on criminal justice system), type of conflict resolution, execution of court decisions and even the texts of the general organization of the sector ( including those governing the inspection of prisons).

**Chapter 3, [Strategies, methods and indicators](#)** deals mainly with operational issues.

The first section of this chapter identifies strategic recommendations regarding the justice sector, as gathered from practical experience and from the lessons learned extracted from the evaluation reports of EDF projects in this area since 2000. This chapter also tries, in a second stage, to apply the features of the justice sector to the operational criteria of various aid modalities. A particular attention is devoted to the sectoral approach, especially the sector budget support. This chapter also includes a section on sector specific indicators, according to the definitions and categories preferred by the EU in its conceptual tools. Again, special attention is paid to the indicators in their specific use in case of budget support. Finally, the important role of civil society has been placed in this chapter, given that its participation to justice sector reform could lead to the use of different types and mix of financial instruments.

**Chapter 4, [Responses adapted to countries in a fragile situation](#)**, is especially devoted to the implementation of programs in support of the justice sector in countries in fragile situations.

Insofar as the public service of justice is partly, if not exclusively, provided by the State, it seemed appropriate to specifically address the situations of fragility where the state authority itself in the exercise of its sovereign functions is destabilized or non-existent. These situations are often emerging in a particularly adverse context, where the respect of the State's obligations and guarantees towards its nationals is lacking. The decision to provide support to this sector can then become challenging, since it could involve supporting the effectiveness of a judicial system that is itself the source of serious human rights violations. Therefore, this chapter presents the main particularities and contextual changes required by a situation of fragility for the use of the financial instruments, including budget support. In addition, this chapter includes the application of the 10 DAC principles governing the international engagement in fragile states and precarious situations to the justice sector. Falling also under the justice sector, all mechanisms to fight against impunity in post conflict situations are described: quasi-judicial investigative procedures such as reconciliation commissions or judicial proceedings before courts or national or international chambers. A census is proposed in the last section.

# INTRODUCTION

## Why should the European Union support the justice sector in developing countries?

The preamble and Article 2 of the Treaty on European Union (EU) recall that the principle of the rule of law and respect for human rights correspond to the basic values on which the EU is based. The EU has the mandate not only to respect and promote these among its members, but also to promote them in its relations with the rest of the world (Article 3 (5) of the Treaty on European Union). As stated so eloquently in Title V, Chapter 1 (“General Provisions on the Union’s external action”), Article 21 of the Treaty on European Union, “the Union’s action internationally is based on principles that led to its creation and enlargement, and that aim to promote in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity and respect for the principles of the UN Charter and international law.”

These values can be summarized by the principle of good governance that, in recent years, has become a priority of the EU development policy and cooperation programmes. Good governance (or democratic governance) is based on objectives, universal principles and common aspirations that should apply to all areas of state intervention, especially its regulatory functions, as well as interaction between public institutions and citizens.<sup>3</sup>

Democratic governance, understood in a broad sense, requires among other things an independent judiciary capable of enforcing the rule of law for all citizens. Support for the justice sector in cooperation programmes thus has the primary objective of allowing the emergence or consolidation of the rule of law, and is more particularly acknowledged in the Cotonou Agreement as an essential element of the ACP-EU partnership<sup>4</sup>.

Democratic governance also includes respect for human rights and fundamental freedoms, which is another essential element that is also promoted by the Cotonou Agreement. The protection of individual freedoms and the guarantee of the rights of those most vulnerable, including through a better understanding of their rights and easier access to justice, correspond to a second objective of support for the justice sector.

Insofar as the judiciary intervenes in disputes between private parties, especially customers and suppliers, and between individuals and the state, the reliable operation of the courts is an absolute requirement for judicial certainty

without which investors may turn away from the country and in which case its development is doomed to failure. It is therefore crucial that the EU should pursue and support the justice sector in cooperation with partner countries in development, when the proper functioning of the judiciary is a *sine qua non* condition of economic development and poverty reduction. This is a third objective of support for the justice sector.

## Objectives of the reference document and the methodology used

This reference document, based on a study of EC support to the justice sector in several ACP countries, is designed as a concrete tool for the EC services and staff of EU Delegations to ACP countries. It aims to facilitate the implementation of support for the justice sector by providing tools to analyze the situation of the sector in each country and providing food for thought on how best to establish a support programme.

As mentioned, the geographical area covered by the study is that of the ACP countries, but a certain number of operational guidelines contained in the document may be applied *mutatis mutandis* to other regions while stressing that the support for the justice sector in a country always needs to be related to its context.

## Overview of the European Commission’s interventions in the sector in ACP countries since 2000

The EC uses a set of geographical and thematic financial instruments to support the justice sector in ACP countries, especially the European Development Fund (EDF), but also the Development Cooperation Instrument (DCI)<sup>5</sup>, Instrument for Stability (IfS) or the European Instrument for Democracy and Human Rights (EIDHR).

In the justice sector, geographic instruments, essentially the EDF, have often been used to support institutional reforms to strengthen the independence, impartiality and professionalism of the judiciary, the strengthening of the national judicial frameworks guaranteeing a fair trial within the time limits prescribed by law, the improvement of prison conditions and prison management, introducing alternative sentences to imprisonment and improving the efficiency of the judiciary. In the geographic programmes, civil society is often mobilized to provide services (legal consultations, etc.) or to monitor institutions.

At the thematic level, it should first be mentioned that the IfS allows, on the one hand and in the case of a crisis

3) COM (2006) 421 final, “Governance in the European Consensus on Development”.

4) Article 9 of Cotonou Agreement, [http://ec.europa.eu/development/icenter/repository/Cotonou\\_EN\\_2006\\_en.pdf](http://ec.europa.eu/development/icenter/repository/Cotonou_EN_2006_en.pdf)

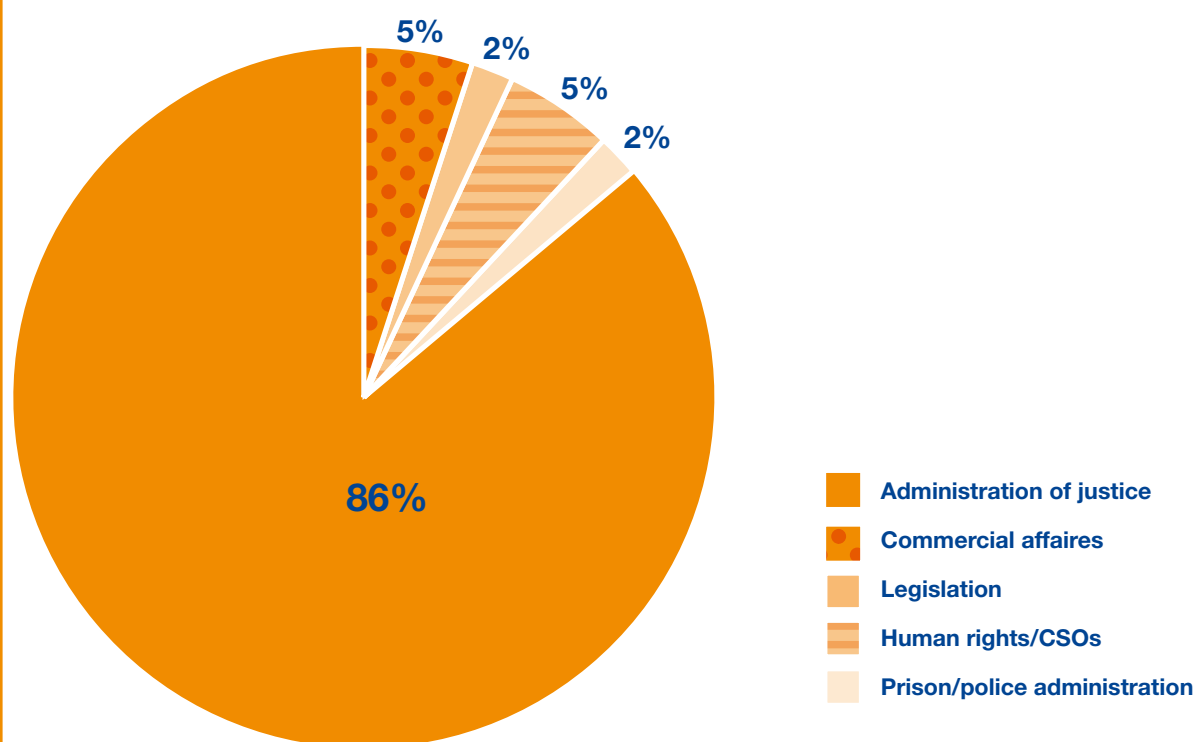
5) Geographically, the DCI covers especially South Africa which is the only ACP country not to be covered by the EDF. The DCI also covers a number of thematic programmes, including one for Non-State Actors and Local Authorities (NSA LA) or the Asylum and Migration Programme that may also act in support of the justice sector in ACP countries.

situation, a rapid and flexible response in particular in the justice sector in order to: (1) support the development of weakened institutions to maintain public order or the independence of the judiciary, (2) support for international criminal tribunals and *ad hoc* or judicial mechanisms for reconciliation, (3) promote and defend the respect for human rights and fundamental freedoms, democracy and the rule of law and related international instruments. The measures taken by the IfS in a crisis are limited in time (normally 18 months maximum) and therefore generally require monitoring in the context of the geographic programmes. On the other hand, in its long-term component where the IfS aims to support beneficiary countries to better fight against global or trans-regional threats such as terrorism or organized crime, it is possible in particular to support the harmonization of national legislation with relevant international law, or to reinforce the capacity of the police and judicial authorities in these areas.

The EIDHR is in turn a flexible instrument that may intervene: (1) in circumstances considered sensitive (e.g. to document and denounce violations of human rights), (2) in countries that do not deal adequately with the demand for justice (in terms of their geographic programme), (3) to meet an urgent need through small focused actions, (4) to support international and regional institutions, such as the International Criminal Court.

Without limiting the generality of the foregoing, it emerges that within the context of the geographic cooperation, between 2000 and 2009 65 projects/programmes<sup>6</sup> of various sizes were funded for an amount of approximately € 590 million, including 12 post-conflict zones and includes three transitional justice projects. The overall amount of support during this period in the sector (all instruments together) for all ACP countries, including South Africa, was almost € 671 million.

### BUDGET PER SECTOR OF INTERVENTION



6) The number of projects/programmes and the corresponding amounts are the numerical expression of the geographic cooperation financed by the EDF and the programme of cooperation with South Africa.

Although it is difficult to divide 65 projects/EC programmes in ACP countries by distinct broad areas of intervention, particularly because of the overlapping nature of the intervention actions in a given project/programme (e.g. support for the judiciary and support for strengthening Non-state-actors (NSAs) in the field of human rights, or support for the prison system and courts, etc.), a brief analysis of these actions yields the following findings:

The large majority of projects/ programmes (86%) focused on the administration of justice (support for the courts, for the Ministry of Justice, training for judges and court officers, etc.) while 5% were concerned with the defence of human rights, or access to justice through activities managed by the NSAs.

The other projects related to: i) support for business law and commercial law (5%), such as the actions for the implementation of the law of the Organization for the Harmonization of Business Law in Africa (OHADA), ii) support for the legal corpus (2%), namely support for the revision of codes, modernization of the judicial framework (constitution, laws, regulations, etc..) and finally 2% of the projects/programmes supported the prison system, sometimes with a component to reinforce the judicial police.

## Layout of the reference document

**Chapter 1** briefly describes the justice sector and the approaches of the other major donors in this sector.

**Chapter 2** provides a grid for the analysis of the justice sector existing in the country concerned, in the form of thematic questionnaires followed by comments to allow conclusions to be drawn from the answers obtained with the aim of defining a support programme.

**Chapter 3** provides some strategic guidance to be followed and considers how aid can be used for the support programme while taking into account the situation of the sector in the country.

**Chapter 4** is more specifically devoted to the implementation of support programmes in the justice sector in countries in fragile situations, and introduces the concepts and processes of the fight against impunity, transitional justice and restorative justice.



# 1. FEATURES OF THE JUSTICE SECTOR, APPROACHES OF OTHER DONORS

In some parts of the world, especially Latin America or Asia, some donors have undertaken projects since the 1980s with various components ranging from support for human rights organizations, through improving the access to justice, the revision of laws and codes, and the training of legal professionals in order to reinforce the capacities of institutions (courts, tribunals, judicial council, the Ministry of Justice) according to the level of commitment of the partner country.

However, it was not until the 1990s that structured projects in support to this sector emerged in the ACP countries. This sequence seems to be part of the phases of reclaiming the state that countries (especially African) have adopted following the waves of independence and following the Second World War. Initially, constitutional and economic, the reform movement only subsequently focused on the quality of the provision of public services, primarily in health and education, and then justice. With the exception of certain exchange projects (support to universities, schools and legal and judicial training institutes), the development partners and recipient countries also often hid behind the principle of sovereignty and non interference in the internal affairs of countries in order not to intervene in the justice sector. In fact, the state may be tempted to consider that justice is a sovereign power by which the state can practice legitimate symbolic violence and should remain under its exclusive control. Moreover, in that a judicial system reflects and is permeated with the values of the society of the State from which it springs, it can sometimes resist the intervention and adaptation of external systems, or even harmonization.

However, over the last fifteen years, in support of justice reform movements undertaken by the countries themselves and at their request, the majority have refined their approach strategies and methods of implementation of their support for better judicial governance.

The first part of this chapter provides a portrait of the justice sector in the ACP region and briefly outlines the different systems in which it develops. The second part will present a sample of major current trends and tools developed by various donors that are active in this field.

## 1.1 A distinct sector, large and that forms a system

### 1.1.1 A distinct sector

The justice sector should not be confused with the concept of the rule of law or the security sector. These distinctions are important for those responsible for the identification of a sector of intervention because it implies that the objectives be defined in a clear and shared conceptual framework with the intermediaries, beneficiaries and/or other international actors.

#### → The rule of law

Even if the EU treaties and many of the texts adopted by European institutions (e.g. European Council conclusions, or communications from the EC) regularly refer to the principle of the rule of law, these texts give no definition because this principle is not derived from the same philosophical traditions nor does it always cover the same dimension. In an attempt to overcome these differences some United Nations documents especially a report in August 2004<sup>7</sup> offered a meaning for the concept that is generally accepted. In this report, the UN Secretary General, Kofi Annan, described the concept of “rule of law” as “a principle of governance in which all individuals, institutions and public and private entities including the State itself, are accountable for compliance with laws that are publicly promulgated, applied to all identically and administered independently, and are compatible with international rules and standards with respect to human rights. It implies, secondly, measures to ensure compliance with the principles of rule of law, equality before the law, responsibility under the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, the avoidance of arbitrariness as well as procedural transparency and legislative processes.” Supplemented since then<sup>8</sup> to apply in particular to the international sphere, the definition of the concept of the rule of law serves as a reference point in the donor community. This concept has implications that are required in the justice sector, the independence of judges, the legality of administrative acts, the existence of a professional body for defence of rights, etc.. However, it goes well beyond the justice sector as it applies to all powers and areas of state intervention, including constitutional power and the functioning of democracy, to the point of often describing more an ideal than a statement of fact.

7) S/2004/616\* Restoring the rule of law and administration of justice during the period of transition in societies experiencing conflict or emerging from conflict

8) See UN Report, A/63/64, 2008, The rule of law at the national and international level

## → Security

The security sector, sometimes also called the security system, covers both the domestic and external security of a State. In its May 2006 Communication on the reform of the security sector, the European Commission advocates a concept of security that does not concern only the state with its territory and its institutions, but also and above all its people, a principle that is particularly reflected in the concept of “human security” and that should be at the heart of the security sector concerns. This concept implies that citizens are entitled to expect the State to guarantee not only peace and the country’s strategic security interests, but similarly also their fundamental freedoms, including against possible violations by the State itself, and including measures undertaken in the name of the fight for security and against terrorism. It is important to ensure a balance between respect for fundamental freedoms on the one hand, and the need for order and security in a society on the other hand, so that the security aspirations of a state does not result in a systematic decrease or suppression of individual liberties. In this regard, we have to underline the right of any person not to be arbitrarily detained, as determined by the principle of *habeas corpus*, enshrined in the law of individual security.<sup>9</sup>

As defined by the DAC of the OECD<sup>10</sup>, the security sector corresponds to all state institutions and entities that play a role in the security of the state and its people. Therefore, the security sector covers not only the actors responsible for ensuring security, such as the army, police and customs, but also organs or other actors involved in management and supervision, such as relevant ministries (Defence, Interior, Finance, ...), parliaments and civil society, as well as judicial institutions (courts, prosecutors, prison service).<sup>11</sup>

Even if the security and justice sectors are distinct, they are closely linked because they partially cover the same actors (especially those comprising the “penal system”, namely the police, criminal justice authorities and the prison service) that fulfil both security and justice functions. Whatever the angle of approach, security or justice, the actions that are most often carried out to reinforce justice in this context, focus on the rehabilitation of the legal system and judicial cooperation in criminal matters. For example, in projects in Eastern DRC, activities were conducted: i) to give military courts the means to work with respect for human rights and defence, ii) to make justice accessible to the poor and to victims of sexual violence; iii) to review the criminal justice in the courts; iv) to reinforce the capacities of justice actors v) to rehabilitate prisons, and vi) to provide means to NSA to conduct investigative activities, monitoring (in prisons) and assistance to victims.

## → Justice

As in the case of the rule of law concept, the concept of justice is often mentioned in the texts of the EU but without being precisely defined. For the United Nations, the concept of justice encompasses the ideal of admissibility and fairness in the protection and guarantee of civil, political, economic and social rights and the prevention and punishment of offenses<sup>12</sup>. The UN definition encompasses both the formal mechanisms of the state judiciary but also the mechanisms of informal justice, Non-state or even traditional and customary justice. Thus conceived, the justice sector includes a number of structures, including symbolic, as the legal or codified framework of the rights and obligations, including criminal, civil, administrative and even customary proceedings, of the bodies of legal professionals (judges, lawyers and other judicial officers, including traditional ones), the courts and tribunals, police, prison service, the specific appeal organs for the defence of rights (ombudsman-type or human rights commission) and all the administrative departments concerned.

According to the concept of separation of powers that springs from the principle of the rule of law, justice, the third branch of power alongside legislative and executive powers, enjoys a special status of independence, since it must be able to operate without undue interference from the other two branches. This requires a system of “checks and balances” between the three powers in a State that respects the principle of the rule of law. If the functional independence of the judiciary is somewhat relative because as a public service, its budget is normally passed by the legislature, its functional independence must be preserved, as well as that of the actors who are mandated to deliver justice, namely the judges.

### 1.1.2 A large sector

As mentioned before, the justice sector comprises a large number of actors who contribute to the objective of ensuring the functioning of the justice sector and/or sub-sectors that will be presented in more detail below. This functioning is based primarily on a legal framework that defines the status, powers and responsibilities of each actor.

### → The constitutional and legislative framework

In principle, justice benefits from a special status with the independence of judges usually being declared in the Constitution. All ACP countries have a written constitution that enshrines this principle that is also promoted by all non-binding international documents that are available on the subject<sup>13</sup>. The reality is often quite different, since, due to the sensitive nature of judicial decisions, the government makes every effort to practice

9) Which comes in several dimensions and is recognized as distinct from law and security. See, for example, Article 5 of the European Convention on Human Rights and Fundamental Freedoms, which distinguishes the right to liberty and the right to safety.

10) DAC Guidelines on Security System Reform and Governance (2005), page 20 ([www.oecd.org/dataoecd/20/31/39297674.pdf](http://www.oecd.org/dataoecd/20/31/39297674.pdf)).

11) In this context it should be noted that in some areas related to the security sector (especially the military sector), some activities are not eligible for Official Development Assistance and cannot be funded by some donors, especially the European Commission.

12) UN Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance (2008), p. 2. Source: <http://www.unrol.org/doc.aspx?n=RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf>

13) See references document of relevant texts in the Annex.

effective control over the activities of the courts, usually through the control of the placement and promotion of judges. It is thus exceptional, even in developed countries (including common law countries), that assignments are carried out by an independent body without any intervention from the Ministry of Justice and/or any other interference.

While a Constitution usually provides that judges are appointed for life, at the same time the Supreme Judicial Council (or the Privy Council in common law countries), if any, may see its role confined to more or less expressing an opinion on the appointments. The government or influence networks can therefore sometimes manage, directly or indirectly, the assignment of judges and in some cases have the option to move them depending on political circumstances, especially to ensure the control of criminal judgments targeting political opponents, or even in response to a decision that displeased the government. There is also often the existence of manoeuvres aimed at paralyzing the execution of court decisions in civil and commercial matters between two parties on the instructions of the Ministry of Justice under pressure from one of the parties. Such practices deprive the very notions of legal and judicial independence of all meaning.

The Constitution of a state often defines human rights and fundamental freedoms that the state must respect and that the judiciary is called upon to protect. It may also define other characteristics of the justice sector, especially the type of courts that exist (e.g. the existence of administrative courts alongside the ordinary courts), the fields of law and justice in which regulation is reserved for the legislature, or the delimitation of powers in matters of justice in a federal state between the Federation and the states. Finally, the Constitution sometimes provides a constitutional court that is supposed to ensure compliance with the Constitution by the legislative, executive and judicial powers.

It is then up to the legislature to define the main elements of the legal framework that must be respected by all, particularly the executive, and the application of which is secured by the judiciary. However, the legislative body in many ACP countries is often outdated and inappropriate to their societies when it has not been subject to a review and adaptation since the end of the colonial period (this is particularly the case for family law and property law). In addition, international conventions, covenants and other international instruments, although very often signed and ratified by ACP countries are not always incorporated into domestic law; for example, equal rights for women are rarely transcribed into national legislation although the CEDAW convention was ratified by most ACP countries. Finally, the links and bridges between formal and informal justice are often poorly understood and misused.

### → The governmental and administrative framework

Although it is supposed to respect the independence of the judiciary, of necessity the executive plays an important role in the justice sector. At the government and administration level, the justice sector may be under the responsibility of several departments, often a Department of Justice for the judicial and prison administration, the Ministry of the Interior for police services (and sometimes for the prison) and the Ministry of Finance to determine the budget of the justice sector. Sometimes a Ministry of Territorial Administration is responsible for the administration of prisons or traditional courts. Depending on the country, one may see responsibilities shared with a possible Department of Human Rights for the promotion and protection of human rights, that of the family for the management of custodial facilities for children in conflict with the law, or defence for countries with a police force with military status.

Departments with responsibilities in the justice sector not only participate in its administration, but also and above all in the definition of government policy in this sector (e.g. penal policy), especially through the preparation of new legislative proposals, negotiation of international treaties and agreements, decisions on resource allocation, or the development and implementation of reforms at the administrative level. Thus the government has also a role to play in the development and implementation of a strategy or action plan for reforming the justice sector.

In some common law countries, the judicial administration is under the responsibility of the judiciary and therefore under the authority of the Chief Justice of the country's highest court or an independent body created for this purpose. In Canada, the functions of the Minister of Justice are provided by the Attorney General who also provides the functions of the Public Prosecutor. In England it was following the constitutional reform of 2005 that the Lord Chancellor's judicial functions are now shared with a Chief Justice established in 2007 under the influence of continental European law. In the tradition of common law, where many judges are not professionals but are elected officials (magistrates), the heads of the court placed at the top of the judicial hierarchy, ensure administration (training, distribution, control, litigation, liability) while the other actors (lawyers, bailiffs, etc.) continue to be managed in a strictly private manner and the prisons are the responsibility of the Ministry of the Interior<sup>14</sup>. In addition, the maintenance of the places of justice is not necessarily the responsibility of the central government.

The conception in the civil law countries is very different even though it is not homogeneous<sup>15</sup>, and generally attributes to the Ministry of Justice, under the authority of the Minister and member of the government, a decisive

14) In Canada and the United States again, the functions of the Minister of Justice are provided by the Attorney General who is also responsible, in Canada at least, for the functions of the Public Prosecutor. In England, the constitutional reform of 2005 led, under the influence of European law, to the autonomy, with respect to the House of Lords, of the Lord Chancellor's judicial role that is now shared with a Chief Justice (2007), and the creation of a Supreme Court (2009), itself autonomous itself from the Queen's Privy Council.

15) For example in Romania or Spain the Council of the Judiciary provides a similar function, entirely independent of the Ministry, for the management of the body of judges.

role in training, recruitment, Inspection of judges and prosecutors, but also in prisons and their personnel, the regulation of all ancillary professions, legal aid, and national responsibility for criminal records, criminal policy, archives, statistics, the distribution of courts and the buildings.

In many ACP countries, structural weakness of the Ministry of Justice, or of the the Chief Justice offices is often found. This may be due to lack of staff skills *per se* as it is a fact that they are sometimes magistrates who may not have management skills, or a weak organization that is unnecessarily subdivided into multiple subdivisions, services and offices whose functions are, furthermore, unclear.

The budget for the judiciary, intended to cover salaries, operating expenses and investments or renovation, rarely reaches 1% of the national budget, an objective widely accepted as minimal as it often includes, whatever the system, the sector of the courts and the prison administration.

In many countries, courts, tribunals and prisons are in an advanced state of disrepair and without the means to properly function due to a lack of desks, paper, pens and forms, not to mention the absence of IT equipment and office tools. The lack of resources is one of the causes of delays recorded in the processing of cases and rendering decisions, but without necessarily being the only one. To this cause is added a deficit in the processes of decision making and management and a lack of transparency and accountability in the system.

#### → The judges sit in courts, tribunals and other quasi-judicial organs

The judicial system of a country consists of a set of hierarchical courts and tribunals often organized according to different branches of law (e.g. Romano-Germanic law, criminal law, administrative law, commercial law, etc.). The second degree of jurisdiction reflects the principle of the rule of law according to which a trial at first instance should be subject to appeal before a higher court in order to retry the case on its merits. One or more supreme courts (e.g. Court of Cassation) are generally established to ensure uniform application and interpretation of law at a national level.

Judges who sit on these courts are professional judges, who may, as appropriate and based on different legal traditions, be assisted by other Non-professional judges selected from the population (e.g. for juries in criminal cases). Even if judges are recruited by the state, they usually enjoy a special status that is distinct from that of the public function in order to ensure their independence. Moreover, in developed countries, the judges benefit from a salary and prestige that would normally protect them from possible abuse of power.

However, in many ACP countries, low salary and the irregularity of its payment often trigger corruption of judges, resulting in clientelism that may take various forms other than the direct transfer of funds (buying petrol, paper, carbon paper, typing fees, etc.). All these forms are particularly damaging in an institution charged with upholding the rule of law.

In addition, the institutional approach of the justice sector must not neglect, as will be seen below, the operating conditions and therefore also training, remuneration and statutes of the other national bodies that may exist to resolve conflicts, and that include the mediators, the national bodies of respect for human rights and in countries emerging from crises, institutions whose function is to reduce, by appropriate judicial processes, the inequities of the conflict (see Chapter 4).

#### → The prosecutors

The judges sitting in the courts are sometimes called “sitting magistrates” as opposed to “standing magistrates”, which designates the public prosecutor or the attorneys, because the latter are required to stand in court where they are responsible for defending the public interest. The status and function of the public prosecutor (also called the “prosecution”) depends on whether the country is subject to common or civil law. The former generally does not require that prosecutors are magistrates and do not guarantee their independent status as they usually enjoy a public function. In the countries of Romano-Germanic law, prosecutors prepare and present the accusation before the courts in criminal cases, but do not generally direct the investigations of the police. In countries with Romano-Germanic law, although the prosecution is very often under the authority of the executive branch through the Minister of Justice, it is composed of magistrates whose training and career are the same as that of judges. Even if independence is not guaranteed in the same manner as for judges, the possibility of a career change between the functions of prosecutor and judge can create a professional ethos and solidarity that strengthen the independence of prosecutors with respect to political power.

#### → The police<sup>16</sup>

The police is mandated to primarily ensure the maintenance of order and to prevent threats to the security of the state, people and goods, and secondly to conduct police investigations and participate in the functioning of criminal justice. While in all cases, the police act under the authority of the Ministry of the Interior (or equivalent) and thus the government, in the second case it also acts, in principle, under the direction of the judiciary, namely the public minister (and sometimes an investigating judge in systems where they exist). This oversight by the judiciary is stronger in countries subject to civil law than those subject to common law, where the police traditionally has greater autonomy in investigations and greater powers during the investigation. But even in



civil law countries, the relationship of subordination between the police and judicial authorities may be somewhat theoretical, especially due to the fact that police officers continue to rely primarily on their own hierarchy.

Regarding the activities of the police, one should also distinguish between the function and the body of the police. While, in general, in each state there is a service called “police”, there may be several services in a state using the skills of the police and especially the judicial police such as, for example, police with a more or less military character often responsible to the Ministry of Defence (e.g. the military police) or even the customs service that often has very extensive powers of investigation and is accountable, in principle, to the Ministry of Finance. The respective responsibilities of the different services exercising police functions are generally established by statute or regulation (e.g. the police covers urban areas while the military police covers rural areas), but it is common, in many ACP countries, to find oneself in the presence of ill-defined mandates and overlapping jurisdictions that impede proper inter-agency cooperation and often leads to infighting between administrations.

The powers that the police exercises as part of its mission of judicial police are usually defined and limited by the Criminal Procedure Code of each country that, in principle, aims to strike a balance between the needs of the investigation and fundamental freedoms, especially the rights of defence. While a modern criminal justice system favours, in principle, physical evidence as opposed to evidence of a personal nature, in many ACP countries, the police rarely has available capacities and means of scientific and technical police to obtain forensic evidence by taking samples and analyzing traces and clues. The actions of the police are thus excessively based on confessions and frequently leading police personnel to use violence against suspects in order to obtain the desired confession. This technique is used all the more in that inadequate training leads to a low awareness among the police of respect for human rights or even that the promotion of police officers is based on the number of “solved” cases. In this regard, it should be mentioned that in many ACP countries the excessive delays in police custody<sup>17</sup>, that mostly occur in inhumane conditions (unhygienic premises, abuse, etc.) in cells that sometimes become, in the absence of a nearby prison, long term detention centres.

### → The prison

The action of justice is closely linked to that of the prison administration. The latter is responsible for holding persons sentenced to imprisonment, but also those whose preventive detention has been ordered by a judge before reaching a verdict in a criminal case. In a country respecting the principle of the rule of law, preventive detention should in principle be subject to the Code of Criminal Procedure for crimes or offences of a certain seriousness, especially where there is a risk of flight or

concealment of evidence, but it is not uncommon to see in many ACP countries that people are detained for trifles awaiting trial.

In ACP countries, the prison usually gets little attention. This results, among donors as well as among recipient countries, in potentially contradictory debates where the rights of prisoners (convicted or not) may seem to oppose the right of victims to the truth, where the security discourses in countries with a high crime rate drive lead inevitably to a strengthening of the enforcement policy and the fight against impunity to a consideration of the rights of suspects and criminals, where the cost/benefit may lead to the establishment of a priority to support the poor in general. However, the narrowness of available budgetary resources often leads to a tragic situation for human rights of detainees: dilapidated and unhygienic buildings, overcrowding, spread of infectious diseases, degrading treatment, lack of training for reintegration, the terrible shortfall in food supply in the prison<sup>18</sup> as inmates cannot survive without the food brought by their families or by NGOs in some countries.

### → The officers of the court

Just as the justice stakeholders are not limited only to courts and tribunals, professional bodies involved in reaching and enforcing court decisions are indispensable for the proper functioning of justice. Just as each suspect deserves to be defended if the principle of presumption of innocence is to be meaningful, the imposition of civil fines should be notified and enforced if justice aims to be effective and credible.

The bailiffs, notaries, auctioneers, mediators and clerks and/or administrators of the courts in different countries are essential to the proper functioning of justice. As in the case of lawyers, too few officers double the difficulties related to the execution of an office (notaries, bailiffs, etc.), lack of qualifications or lack of control of these professionals by disciplinary bodies. Depending on the system, their status can be very different: members of the public function or private sector employees. This heterogeneity is one of the difficulties that may be considered by the sector reform.

It should be noted in particular that registrars in countries with a Romano-Germanic tradition are not statutorily judicial officers but are part of the court. In common law countries, the court clerk or court administrators, elected as judges for a long time, are now usually recruited by the judges.

Lawyers, generally organized in bar associations at the national level and sometimes at the courts, are generally few and sparsely scattered over the territory, as they are most often present in the capital and sometimes in certain large cities. This reduced numerical strength gives them little weight against prosecutors and judges. Their very uneven geographic coverage deprives numerous individuals of defence, including in criminal cases.

17) It is frequent that police custody can be extended by the travel time to reach the police or military police station or to get to court. Thus in Madagascar, custody of 48 hours could be extended into 10 days.

18) In Madagascar in 2007, the budget devoted to the daily diet of a detainee amounted to 0.30 €

When they exist, the bars are poorly equipped to enforce discipline within the legal profession and especially the control of the use of funds entrusted to lawyers by litigants or to defend the vulnerable people in court (free legal assistance, etc.). In the ACP countries, the bar associations are less and less present as a pressure group to influence the improvement of judicial governance in their countries.

#### → The civil society organizations (CSO)

The civil society organizations, in which one can include the national offices of international NGOs, but that should not be assimilated, have a great role to play in the administration of justice. The sector reform includes them now as participants and triggers certain issues related to their status and independence. (See point 3.2.5 below)

#### → Traditional or customary (or informal) justice

Reference is made here to all the mechanisms of conflict resolution that are not managed by the State. In this regard, mediation or arbitration organized by the State would be part of the justice sector but not of this subsector; however, the ministries of cultural affairs that manage the religious tribunals would be included. To the extent that these mechanisms contribute to the resolution of conflicts on the basis of standards that are not included in the formal hierarchy of standards but remain outside of it while sometimes being indirectly recognized by the judicial links allowed between the judicial systems, they are undoubtedly part of the justice sector.

In many ACP countries, traditional judges, tribal or community chiefs, religious or lay leaders are important links to resolve conflicts between neighbours, family, etc. With the exception of some countries (e.g. Benin), decisions made by these “informal courts” are not recognized by common law judges who, in many cases, refuse the integration or even the simple recognition of such justice, while alternative approaches to dispute resolution are increasingly used in North America or Europe. However, although figures are difficult to verify, individuals often prefer to turn to these systems in order to resolve conflicts. The familiarity, proximity, language, mechanisms of restorative justice (compensation), the lack of legal representation, procedural flexibility, low cost, the largely voluntary nature of the process and community involvement are all characteristics that explain why this is still very much alive in the ACP countries where it is estimated that in some countries up to 80% of all contentious cases are still handled in this way.

The main difficulties in supporting this sector are a result of:

- The rules of procedure and/or normative principles at work in this judicial approach are often difficult to access, usually transmitted orally, or through initiation, rarely codified, and therefore not predictable and verifiable, in particular with regard to international standards concerning the respect for human rights;

- The jurisdiction is most often given to traditional leaders who have other administrative and/or executive functions within the community. The mixing of these functions is obviously inconsistent with the principle of separation of powers.

### 1.1.3 A sector that forms a system

It should be stressed that this sector is a system considering the following three aspects: the legal tradition, the international environment and the national level.

#### → The judicial systems

The justice sector is part of a judicial system, understood as the totality of its corpus of standards as well as a judicial system that depends on the judiciary (jurisdictional or non-jurisdictional, i.e. courts, tribunals, forums of arbitration, mediation or conciliation), the mechanisms of operation and the services rendered to the population. Regarding the set of standards that make up the law of a country, each lower standard is theoretically based on a higher standard according to the principle of hierarchy (or pyramid) of standards<sup>19</sup>. Thus, any law passed by the legislature is based on the Constitution, while the acts adopted by the executive (regulations and decrees, but also the specific decisions taken by the administration that have legal consequences) must respect the laws. To enforce respect for the hierarchy of standards, the legality of actions taken by the executive, and in some countries also the constitutionality of laws adopted by the legislature, are in principle subject to judicial control.

However, in reality the hierarchy of standards can be difficult to establish, particularly because of the coexistence of different legal systems within countries as is often the case in ACP countries. Moreover, because of the diversity of their traditions and their respective histories (especially colonial), the ACP countries do not all have the same legal system(s). While each legal system is obviously unique, it is nevertheless possible to distinguish a few broad categories that identify the relevant reference system(s).

The five main categories of legal systems in the world are<sup>20</sup>:

- The common law system
- The system of Romano-Germanic law
- Religious law (Islam, Hindu, etc..)
- Customary law
- Mixed systems.

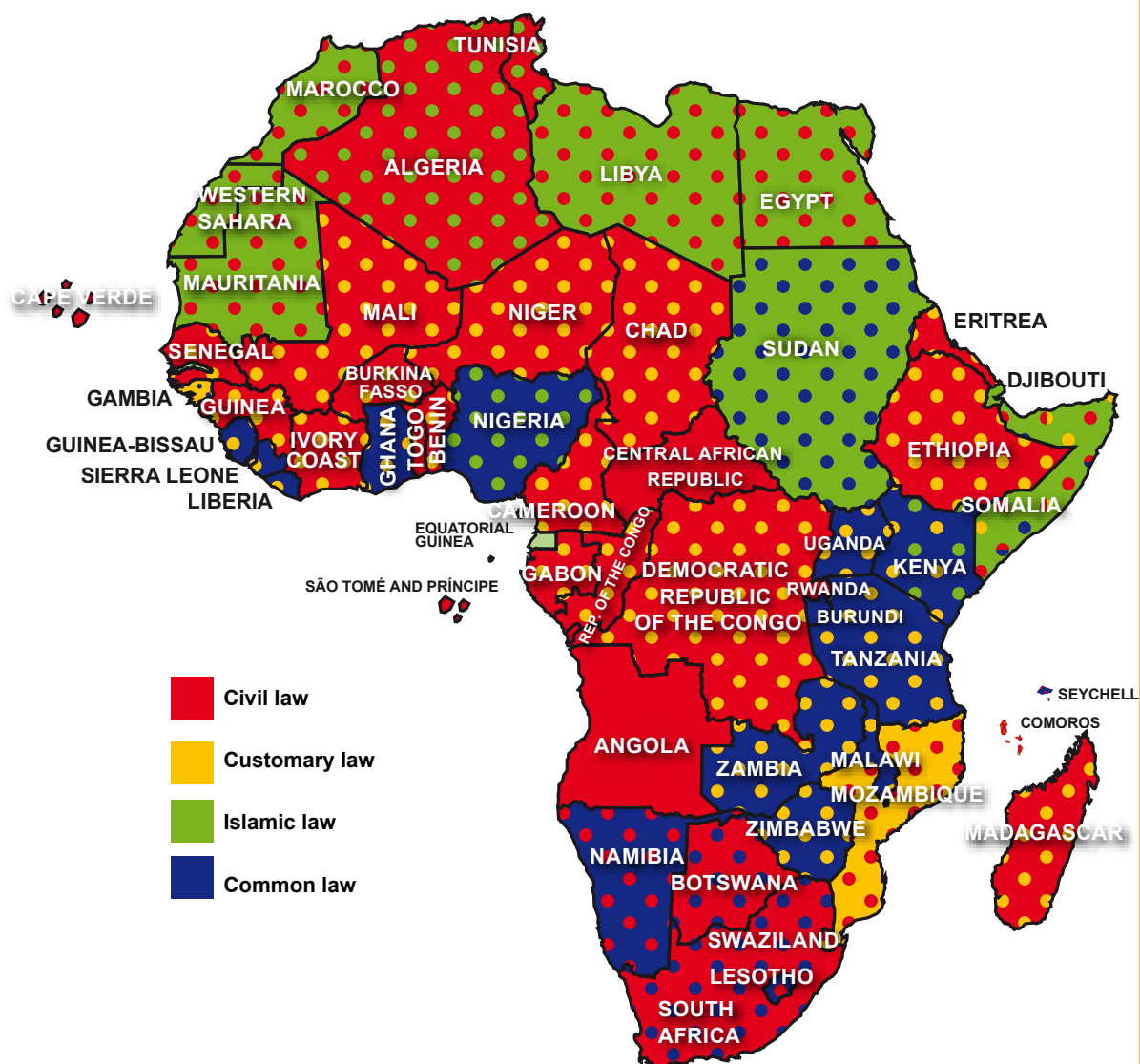
The objective of this section is not to develop a treaty of comparative law, but to provide in a simplified and schematic manner the key elements that distinguish the systems and that may serve as entry points for intervention in a reform process. To assist in this identification, a glossary is provided in Annex 1.

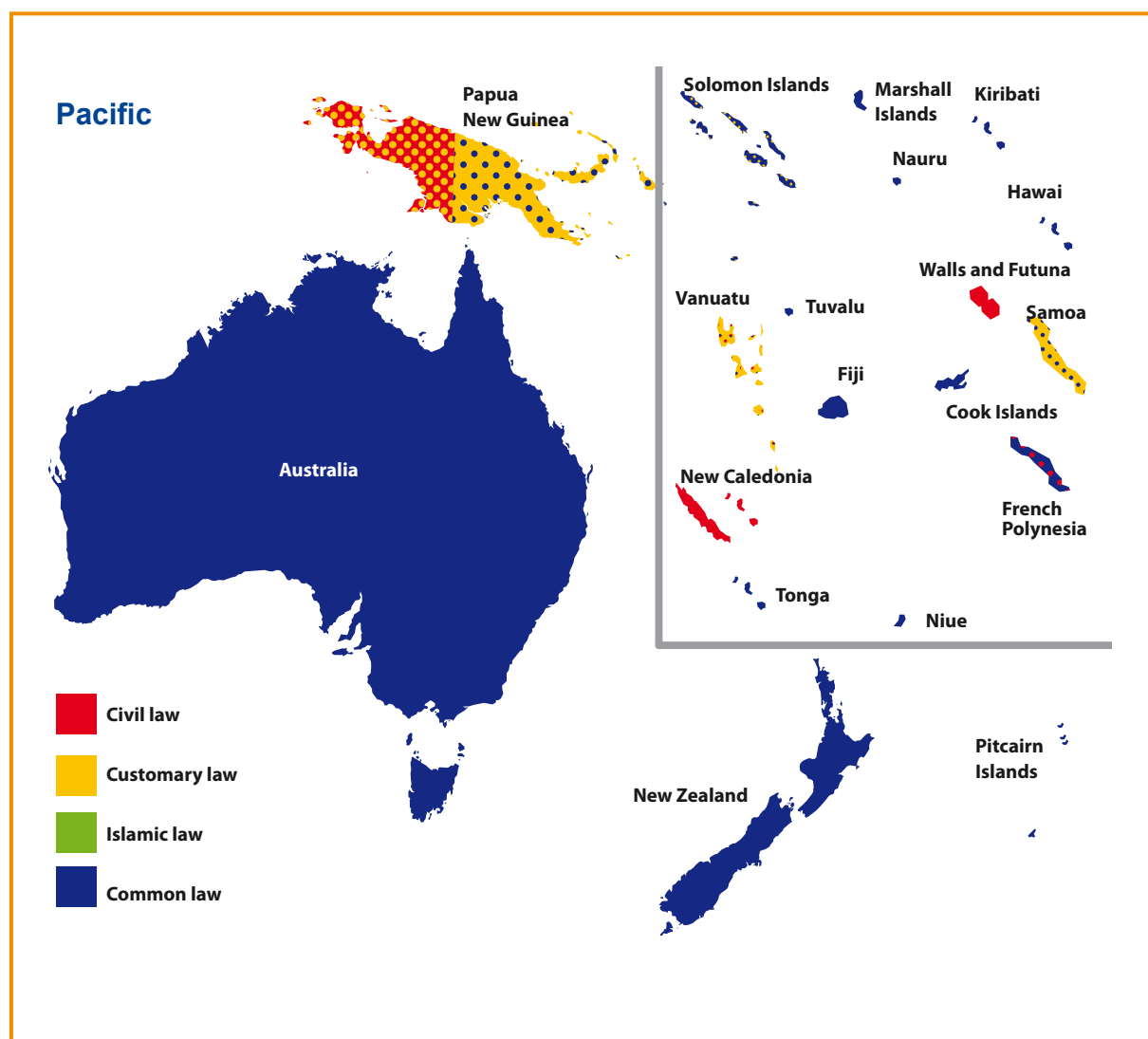
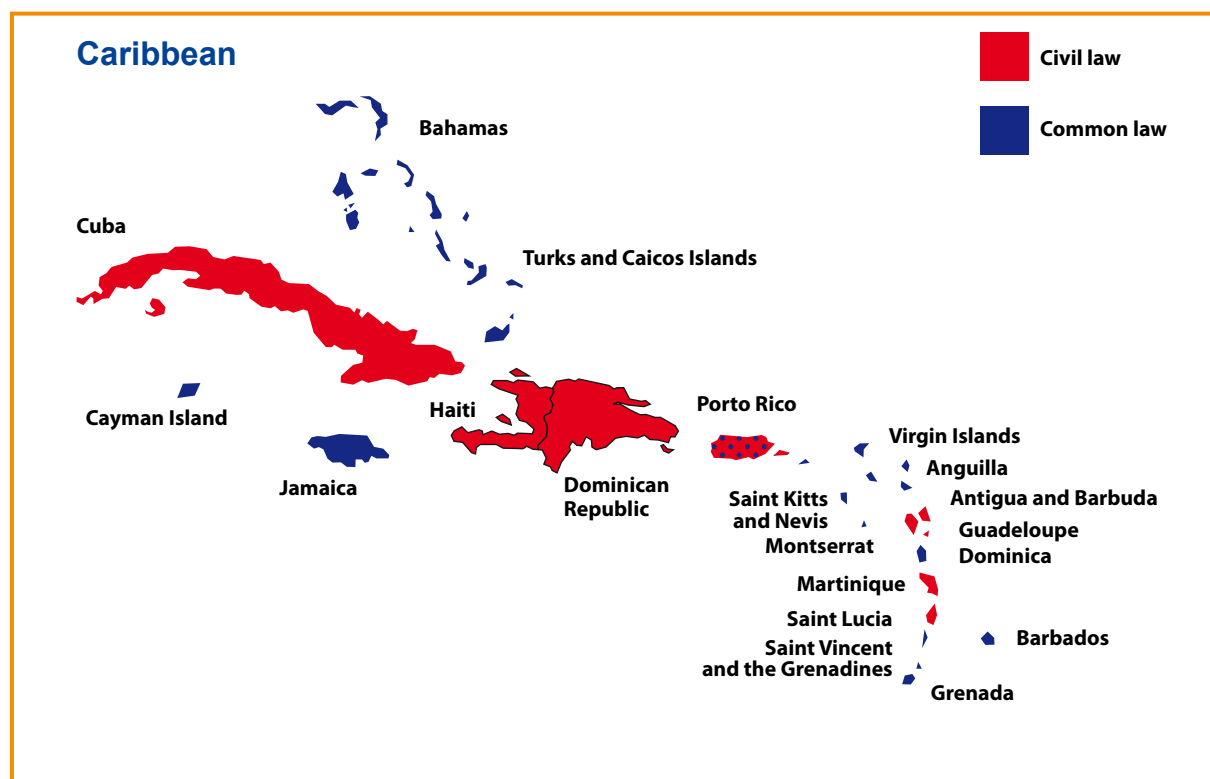
These systems are distributed as in the ACP countries as follows:

19) It should also be mentioned that states having a federal structure can have coexistence of two different judicial systems, of which the respective extent is generally governed by the Constitution: the federal law and the judicial system of each state.

20) The maps are from the website: <http://www.juriglobe.ca>

## Africa







## → The common law system

### • The legal system

The common law system (“the right of all”), born in England and therefore sometimes also called “Anglo-Saxon law” was then spread to Commonwealth countries, and thus to several ACP countries. This system was originally built around court decisions representing case law, as opposed to written and codified law. The judges, who are given a right to opt for a wholly or partially dissenting opinion, make their decisions based on the theory of ‘precedent’ that includes three basic principles, namely:

- (i) the courts are bound by the decisions of the courts that are their superiors in the judicial hierarchy;
- (ii) each court is bound by its own decisions;
- (iii) the courts may be bound by decisions of equivalent courts in the hierarchy.

The precedents established by the highest courts of a country are the sources of law, also called “case law” or rules derived from the judgments. Therefore, the regular publication of decisions and opinions (“law reporting”) plays a key role in legal practice. However, it is always possible to take advantage of the dissent of one judge (different opinion from that of the majority) to request the court to review the principle of law in another case. The highest courts may under certain conditions (dissent is one of the openings) reverse the decisions they made previously and the principles of law arising from them. In most common law countries, judges are competent to rule on the constitutionality of a text and order the partial or total cancellation that is only endorsed when the Supreme Court confirms it<sup>21</sup>.

### • The judicial system

For several centuries, judicial development in the United Kingdom saw the co-existence of two branches. Courts based on law and those based on “fairness” were created by the king at the request of individuals and started in 1300. The fairness judgments were made on a case by case basis without the construction of case law and not by professionals, chancellors, and competed with those courts judging “in accordance with the law”. But as of 1870, England and its colonies merged the two systems into one, although in practice many decisions still consistently rely on fairness before law, especially with respect to law for the family, companies, mortgages, etc.

To illustrate: in the United Kingdom, common law is an oral and adversarial procedure that covers areas such as criminal law or contract and civil liability (claims for damages, etc.) while one uses the procedure of fairness, which is a written and inquisitorial procedure, in commercial matters. In the U.S., some federal states have retained the procedure for certain matters and sometimes even have separated courts, that try according to fairness. At the federal level, bankruptcy courts still operate

exclusively on the basis of fairness; the Supreme Court may follow the two procedures.

### • The rights of defence

The defendants are represented by “solicitors” who are counselling lawyers; they prepare cases and procedures and plead before the lower courts; on the other hand, barristers are lawyers who argue before the higher courts. The interests of the state and society are defended by “attorneys” who are prosecutors while the defence is represented by “lawyers”.

In the common law system, the procedure is often called “adversarial” because the parties, via their lawyers, have the responsibility to prove their rights or the guilt of the other party, hence the importance of the rights of defence of the parties as they have an active role in the establishment of evidence, the development of the record and the hearing. The judicial police has a range of measures and techniques that are not different from those in countries of Romano-Germanic law. However, as already mentioned in Section 1.1.2, unlike in countries subject to Romano-Germanic law where the police investigation is normally directed and supervised by the public prosecution, in common law countries the judicial police has greater autonomy and extensive powers (e.g. arrest, detention, bail may be decided by the police without court intervention). This is changing. Many ACP countries with a common law tradition have introduced functions comparable to the Crown Prosecution Service in the United Kingdom (established in 1986) but without the scope of powers of a prosecutor in a country subject to Romano-Germanic law, but nevertheless with the effect of introducing increased judicial control over the police investigation phase. In the adversarial system, the phase of the trial is central. Here are exchanged in an adversarial manner the results of investigations (of the police and of the parties), sometimes before a jury where the judge’s role in directing the debate remains discreet, which often leads to hearings lasting longer than in the inquisitorial system.

### • The recruitment of judges

In the United States, judges are lawyers who are elected or appointed by the executive. At the federal level, they are normally appointed for life by the President of the United States with Senate approval. Depending on the degree of jurisdiction and the subject matter, other judges are either appointed or elected for a renewable term.

In Canada, judges are co-opted by their peers who take into account their entire career as a lawyer, but also their commitment to the community. Their appointment is confirmed by the executive. Most recently, the procedure has changed for the judges of the Supreme Court whose appointment is now endorsed by Parliament. Judges in Canada are appointed for life.

21) The U.S. Supreme Court, like that of Canada or of the supreme courts of other common law countries, only accepts a few appeals (less than 5% per year), selected according to strict criteria.

In England and Wales, following widespread criticism, the Constitutional Amendment Act established the Lord Chief Justice and a commission for judicial appointments, the “Judicial Appointments Commission” (JAC), which, since 2001, has carried out the pre-selection of candidate judges according to objective criteria. The functions of the JAC are in some respects similar to those of some supreme councils of the magistracy. Judges are appointed for life.

- *The jury system*

In some countries like the United States, the right of every citizen to be tried by a jury is a right guaranteed by the Constitution, even in civil matters, but the plaintiff may waive this right. The jury system is mainly used in criminal cases. It determines whether the accused is guilty of the offence but the judge sets the sentence. However, this system involves hearings lasting several months resulting in considerable delays in processing the cases pending before the courts and tribunals.

To overcome the delays inherent in jury trials, many countries have introduced “plea bargaining”, which is a form of negotiation to allow prosecutors and lawyers to agree on the guilt, on the classification of the offence and the sentence in front of the judge. The sentence is then directly determined by the judge. This system avoids a lengthy and costly trial for society and for the parties.

- *The major common law countries among the ACP countries are, in general<sup>22</sup>, still members of the Commonwealth:*

Botswana, Cameroon, Gambia, Ghana, Kenya, Kiribati, Lesotho, Malawi, Mozambique, Namibia, Nauru, Nigeria, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, Uganda, Vanuatu, Zambia, Jamaica.

As an example, the legal and judicial system in **Jamaica** is a common law system organized around four levels of courts, in ascending order “Petty Sessions (Justices of the Peace), the” Resident Magistrate’s Courts “(covering parishes), the “Supreme Court” with unlimited jurisdiction in criminal matters, and the “Court of Appeal”, the decisions of which may be brought before the Privy Council in London.

## → System of Romano-Germanic law

- *The legal system*

The legal system of Romano-Germanic law, also called “Continental law” or “civil law” in common law countries, has its origins in Roman law and affiliated laws that include canon law (Roman Catholic church law) and Germanic law. One of the main characteristics of this system is that it is built on a corpus of written texts, on which the judges base their decisions. In this system, case law (decisions made by judges), doctrine (analyses,

consideration by the legal profession), usage and custom are used by the parties to illustrate the merits of an argument but they do not have the force of law. The judge is obliged to make a decision according to the text of the laws.

- *The judiciary*

The judiciary is usually hierarchically organized according to the following principle: courts of first instance, appeal courts, court of cassation. Except in very small cases, the parties may challenge the decision of the first instance by appealing. The case is then tried again by the Court of Appeal, located at a regional level.

The Court of Cassation, located at the top of the judiciary organisation, does not consider a case again for a third time on the merits. It may only be called upon by the parties in the event of a procedural flaw or misapplication of the law by the lower court, which is the Court of Appeal. Its decisions aim at imposing a uniform interpretation of the law. The Courts of Cassation generally cannot select the cases they examine, as do the supreme courts of common law countries. They are frequently overloaded with numerous appeals.

In some countries, a separate system may exist alongside the judicial courts, the specialized courts, including tribunals, which are also placed under the authority of a supreme court (State Council in France, Madagascar, Burkina Faso, Algeria ...), whose goal remains the same, namely the unity and coherence of the judicial system.

- *Criminal proceedings*

The Criminal Procedure called the “inquisitorial” type has traditionally been marked by the importance of the powers given to authorities to investigate and prosecute. The charge is supported by the prosecutor who leads the police and undertakes the prosecution. In some countries there is an investigative judge who intervenes from the criminal pursuit to trial to deepen the investigation and decide on preventive detention. At the end of the investigation, he/she considers the charges and decides on the case, to either indict the defendant or to dismiss all charges. The trial phase, during which the judge plays a prominent role, is generally shorter than the one in the adversarial system. After reading and studying the trial record, the judge organizes and conducts the hearing and questions the suspects, witnesses and experts. The prosecutor and defence counsel are only involved by asking additional questions. In other words, in this system, it is rather the investigation phase, prior to the trial, that takes place under judicial authority and investigates the case both for the prosecution and the defence (public prosecutor and/or investigative judge) that is central.

- *The recruitment of judges*

Judges are often recruited out of university through open competition and undergo training in the form of

internships or in a school of magistracy. In other cases, they may be recruited without any exam, on the basis of certificates and professional record, particularly among legal professionals with several years of activity. It is common for prosecutors to be recruited following the same procedure and that judges and prosecutors are part of a single judicial body in which the transition from one type of function to another is possible.

In such a system, the judiciary is composed of different hierarchical levels and the promotion to a higher level is most often decided by the Minister of Justice. The Superior Council of Magistracy, where it exists, usually has only an advisory or proposal role. It is rare for it to exercise final authority on appointment and promotion of judges and prosecutors. However, if such an opinion is ignored, this would be an indication of the influence of the executive over the judiciary.

- *The main countries subject to Romano-Germanic law*

The ACP countries subject to this tradition are those in which there was a strong influence of Western European countries (France, Belgium, Spain, Portugal and Italy) through the exercise of colonial domination and thus the basis of the legal system is the first French civil code, the Napoleon Code, itself springing from the principle of codification of the Romano-Germanic law. The ACP countries subject to Romano-Germanic law are: Angola, Benin, Burkina Faso, Ivory Coast, Congo, Cuba, Guinea-Bissau, Haiti, the Central African Republic, Madagascar, Mozambique, Niger, the Dominican Republic, the Democratic Republic of the Congo, Senegal, Chad...

### → Religious law

Islamic law, Hebrew law or canon law systems are religious in nature. They have their sources respectively in the Koran, the Talmud and the Bible, but not exclusively. In fact, for each religion and to varying degrees, the books of jurisprudence or doctrines of "Wise Men" influence the judges in Islamic, rabbinical or ecclesiastical courts.

No ACP country works with a system of pure religious law. Many, however, to varying degrees include Islamic law and courts, mainly with respect to family law and personal rights.

### → Customary law

The existence of custom implies two elements. One is related to the "repetition" of gestures and acts in order to become a "usage". The other is the belief that the repeated usage is a rule of law and its application follows consensus with respect to its binding nature.

Customary law as a system still plays an important role in the world and especially in the majority of African countries, Asia (China, India, Thailand ...), in the Pacific countries (Vanuatu, Timor Leste, Papua New Guinea, ...) or in America, particularly in indigenous communities in Canada and the United States.

The composition and procedures applied by customary courts are closely related to usage. In general, the proceedings are oral and based on testimonies.

The customary system may be recognized and integrated by state justice. In Niger, the customary courts adjudicating in disputes concerning property are made up of one professional judge and two customary assessors who are expected to know the applicable local custom. In Benin, the courts of first instance call on assessors familiar with the customs of the pending cases and their decisions may be subject to appeal in the ordinary courts.

### → Mixed systems

The mixed judicial systems are also called "hybrid" or "composite" systems. Historically subject to successive influences, they result from the combination of two or more judicial systems. The sources of law of these systems are often associated with custom, religion and historical influences related to colonization.

The characteristic of mixed systems is the presence of two or more systems that overlap, namely common law, religious law, Romano-Germanic law or customary law. Such is the case of Ethiopia, which has written law in the form of codes inherited from French law for its judicial system but for its functioning, the judiciary must apply the rules of common law.

In certain countries, several systems may be enshrined in the Constitution or the founding documents. For example, in Canada, the French-speaking provinces use the Civil Code while the English-speaking provinces use common law, while leaving an important place in the application of customary law in indigenous communities. This is also the case of Cameroon, a state that is predominantly French-speaking with an English-speaking minority: out of a total of ten provinces, two located in the West are English-speaking. Thus, Cameroon has adopted a dual legal system allowing cohabitation between Romano-Germanic law and common law, without forgetting the importance of endogenous laws (Islamic law, Islamic custom and the customs of each group that settle between 80% to 95% of disputes).

It should be noted here also that systems of common law and Romano-Germanic law, even if they retain their own individual characteristics, have come much closer over recent decades, particularly due to the development of international law and, in Europe, of European law. Thus, many areas of law in common law countries are now governed by laws while case law also plays an important role in the creation of law in countries subject to Romano-Germanic law.

### → The international system

International law is especially composed of all treaties, conventions, agreements or other international juridical instruments, of a bilateral or multilateral nature, but also some major principles (called *jus cogens*) that are binding

on all states, even in the absence of any written commitment on their part. The way in which international law is received and therefore implemented within the internal judicial order of a state is generally described in its Constitution. Regarding treaties and other instruments, this implies not only their signature by the government but their ratification that in principle involves the parliament that must approve the ratification by a favourable vote.

However, in order for an international legal instrument to be fully applicable in national law, it still generally requires incorporation into national law, which often requires that the law be amended to make it consistent with the commitment that the state took by signing and ratifying this international instrument. While in developed countries, transposing into national law usually comes before the ratification of an international instrument<sup>23</sup>, it is clear that in many ACP countries, the ratification carried out without the national law being brought into conformity. In the context of support for the justice sector in these countries, it may sometimes be necessary in order to effect a successful reform of the sector to also ensure the proper incorporation of applicable international law into the national law.

It should also be emphasized that ACP countries have joined the United Nations and most of them also belong to regional or sub-regional entities. All these organizations may impose respect for, or even integration of, standards that affect the organisation or the competences of their judicial system, and even influence the judgments at national level. Many of these organizations, especially the United Nations, are also behind many treaties, agreements or other legal instruments that have a significant impact on national law especially the justice system of a country when this country decides to sign and ratify them.

It is possible to cite as an example in the ACP countries the regional unions (there are a dozen on the African continent, including eight recognized by the AU as intermediaries) that, at first focused on customs or economic unions, are based on treaties that now include more and more provisions and general commitments, including with respect to governance and human rights<sup>24</sup>. These organizations generate institutions, sometimes jurisdictional to deal with disputes related to the implementation of treaty provisions and may thus be directed to address emblematic issues related to human rights. In Africa, there are four of them, namely the Common Market for Eastern and Southern Africa, the Economic

and Monetary Community of the Central African States, the Economic and Development Community of the States of West Africa and the Development Community of Southern Africa<sup>25</sup>.

Thus, the decision taken in October 2008 by the Court of ECOWAS (West Africa, established in 2002), for instance, sentenced Niger for conducting slavery and to pay around 15,000 Euros in compensation to the victim. Another example is that, this time in the Caribbean, the Court of Caricom (Caribbean Community, established in 2001) rejected two executions in a decision of 2006 made on appeal by the Governor of Barbados against the commutation, by the Court of Appeal, of the death sentence pronounced by a court of first instance to sentencing the two condemned prisoners to life imprisonment.

Admittedly, these courts are young, without resources, without heavy caseload and have yet to impose their legitimacy. The court of the EAC (East Africa) had not received any case while the court of SADC (Southern Africa) has received very few cases, except for a famous case that led to the sentencing of Zimbabwe in 2007 to pay compensation for unlawful eviction of a white farmer. The court's final decision was not accepted by Zimbabwe that challenged the jurisdiction on the grounds of inconsistencies in the drafting of the Treaty and the Protocol establishing the court.

The international dimension of the system concerning these regional or subregional courts has so far not been favoured by donors which have maintained an institutional approach by supporting regional institutions (OAU and AU) or instruments of commercial justice (OHADA, SADC), but have not consolidated, except for the African Commission on Human and Peoples' Rights, the defence systems of human rights at the subregional level. This is partly explained by the fact that the skills, institutions and treaties overlap in terms of participation and substance and do not offer a clear landscape of objectives, and partly because the demand has not been insisted upon on the part of regional and subregional bodies for such harmonization and strengthened accordingly. In particular, in the case of the African Union, the judicial structure protecting the different charters of the AU is not clear as two dynamics have long coexisted, each with their institutional mechanism.

On the one hand, the dynamics of the African Charter on Human and Peoples' Rights: the Charter was signed in 1981 and came into force in 1986. It provides for the

23) In theory we should distinguish two systems, one called "monistic" in which international agreements have a direct effect and as such in the national courts from their internal publication or date of entry into force (which can be very distant from one another as to come into force a treaty requires multiple signatories to complete the ratification procedures), the other is called "dualist" in which it is necessary that a national transposition law takes the content to make it operational in the domestic sphere. However, this theoretical distinction is not always well understood and it is rare that its effects are implemented. Sometimes the only parliamentary action with respect to the law for ratification of a treaty is to present it as an act of transposition. Most traditional ACP countries subject to Roman-Germanic law are monist, which should imply that the provisions of all treaties, once they have been ratified by the State and come into force, are in principle enforceable in courts and tribunals of this country. It is clear that the implementation of recommendations or commitments made by the ratification of a treaty, such as CEDAW, should, even in monist states, result in legislative changes to relevant laws and codes in order to ensure more effective compliance. It must also take into account the characteristics of some legal areas especially criminal law, that requires transposition into national law (especially in the definition of offences and penalties) to be applicable irrespective of whether a country has a monist or dualist system.

24) For an up-to-date portal, see the website, *African international courts and tribunals*: [aict-ctia.org](http://aict-ctia.org)

25) In this regard, it is the Commonwealth of the Pacific that is the least advanced, being an intergovernmental organization, with a secretariat.



establishment of an African Commission on Human and Peoples' Rights, established on the model of the Committee on Human Rights of the UN whose recommendations are not binding. The Commission was installed in 1987 and acquired a permanent secretariat in Banjul (Gambia) in November 1989. Very rapidly, the need was recognised to complete this Commission, largely advisory, with a Court with jurisdictional skills. In a 1998 Protocol, an African Court on Human and Peoples Rights (ACHPR) was established. This Protocol came into force in 2004 and the Court became operational with the election of its first 11 judges in 2006. It is based in Arusha, Tanzania. It made its first trial for (incompetence) in December 2009.

It should be noted that the characteristics of the African Court that distinguish it from its counterparts, the Inter-American Court or the European Court of Strasbourg, is the possibility of suing any case based on any of the international instruments protecting human rights and signed by member states of the AU, that is to say, potentially all the above-mentioned sub-regional treaties, but also, theoretically, any international agreement signed under the auspices of the UN (CEDAW ...) or the ILO for example, and this even though these agreements do not contain any judicial mechanism to ensure their implementation. This extremely wide authority is offset by the narrowness of the access as only States that are parties (26 in late 2009, out of the 54 AU member states) have the opportunity to appeal. However, these states may agree in a supplemental submission, to allow individual applications or appeals by accredited NGOs (by the end of 2009, out of the 26 signatories, three states had made this commitment).

On the other hand, the dynamics of the African Union, which, at its Summit in Maputo in 2003, led to it having an African Court of Justice (ACJ), an organ of the AU, separate and distinct from the mechanism of the Charter. This Protocol came into force in 2009 following the 15 necessary ratifications. But the Court of Justice of the AU is not operational, and probably will never be, because in reality, following Maputo, the AU is considering a merger of these two courts springing from two distinct dynamics.

A protocol providing for the merger was adopted in 2008 at the Summit in Sharm El Sheikh. 15 instruments of ratification are required for its entry into force. In early 2010, two States ratified the protocol creating a Court of Justice and Human Rights. (CJHR).

As a result, today, at the AU level, there is a single functioning judicial body that was designed as a mechanism for compliance with the Charter but not the Treaty<sup>26, 27</sup>, and that exists temporarily because as soon as the merger protocol enters into force, the African Court on Human

and Peoples' Rights will be incorporated into a new body, the Court of Justice and Human Rights (CJHR) that is common to the two dynamics.

The interstate aspect of the juridical systems in ACP countries is fragile but could, if strengthened, contribute to the credibility of its components and continental structures themselves, particularly in Africa.

One cannot talk about this without remembering that this system is now also structured by the International Criminal Court (ICC). 30 of the 54 member countries of the African Union have ratified the Rome Statute which established the Court. Five member states of the AU (Sierra Leone, DRC, Uganda, Sudan and CAR) are currently under investigation or trial, often at the request of African countries themselves. The prosecutor of the ICC, for the first time in history, issued a warrant against a sitting head of state in office, namely the President of Sudan. The AU is seriously considering extending the jurisdiction of the ACHPR, in order to "continentalise" the judgement of universal crimes, in the name of the principle of complementarity put forward by the Rome Statute itself<sup>28</sup>.

### → Finally, the judiciary system forms a specific national system

Whatever the legal system and its connections with external legal architectures, a judiciary system is pyramidal and hierarchical. The pyramid reflects the need to allow appeals and to allow the dismissed party in proceedings to challenge the ruling or the state representative (Public Prosecutor or Attorney General) to argue, if he/she considers the interests of society would be harmed.

This hierarchical approach includes a dimension of subordination to the extent that the decision on appeal imposes itself in the same way as a Supreme Court decision is not subject to appeal and serves as the jurisprudential reference point harmonizing the interpretation of the applicable rules of law.

These hierarchical relationships outweigh the effects of the intervention of donors. Three examples are given, all from apparently obvious but unfortunate practices resulting from lack of coordination between donors, more generally from a lack of awareness of functional links between sector institutions. The compilation of judgments of the Supreme Court for dissemination via an internal information system with the aim of harmonizing practices and, ultimately, reinforcing the credibility of the judgments and judicial certainty, must be designed to be compatible with the information processing facilities and comply with the encoding tools and choices made in drafting the court rulings of lower courts, or run the risk of them not being able to be circulated or usefully articulated. Another example is the computerization of the registry offices of a court at a given level that should

26) In addition, the African Court on Human and Peoples' Rights is not an organ of the AU on its official website, although judges are elected by its executive board and its budget depends on it.

27) Pending the establishment of the single court, the application and interpretation of the founding documents of the AU are the sole responsibility of the AU Assembly, the decision-making body comprising the heads of State and Government once a year.

28) See the successive resolutions adopted by the Assemblies of the AU in 2009 in preparation for the meeting of States that are parties to the Rome Statute in May 2010 in Kampala, see § 9 Assemblée/AU/Déc.213 (XII), 1-3 February 2009. , § 85.5 Assemblée/AU/Dec.13 (XIII) or paragraph 9 of the 243, both July 2009

allow for better case management and better value for the courts, but must take into account what has been done or should be done at other levels or run the risk of creating bottlenecks and increasing the frustration of users. A third example involves the computerization of the inspection service that contributes significantly to better management of resources and the fight against corruption, and should therefore be designed so that the administrative agents of the court providing information have the same tool.

## 1.2 The approaches of donors in the justice sector

The Millennium Declaration adopted by the UN General Assembly stressed the importance of good governance for poverty eradication and development. In 2002, the Heads of State reiterated this commitment through the Monterrey Consensus<sup>29</sup>. This consensus binds the international community to adopting sound policies, good governance at all levels and the rule of law in order to mobilize financial resources and use them effectively to achieve the Millennium Development Goals<sup>30</sup> related to health, education, gender equality and environmental sustainability.

The Paris Declaration on Aid Effectiveness<sup>31</sup> and the Accra Agreement<sup>32</sup> have endorsed all the essential elements of good governance, stressing the importance of accountability, transparency and development of institutional capacities as factors of development. The Accra Declaration (Article 9), meanwhile, acknowledged “the positive results of political dialogue, intra-ACP and ACP-EU” while reaffirming that “Political dialogue is the basis behind the promotion of peace, security and stability and the consolidation of democracy in ACP states.”

Developing countries along with multilateral and bilateral agencies have materialized these declarations by including commitments to good governance, especially judicial and judiciary governance in the key planning documents and strategies, such as the Poverty Reduction Strategy Papers (PRSP).

Thus, in recent years and taking into account lessons learned, many aid agencies have developed tools enabling them to plan their support in this sector. Below are some references that are limited to those agencies active in the sector and in the region having published on the subject in recent years.

### 1.2.1 Multilateral donors

- *The United Nations Programme for Development (UNDP)*

The United Nations Programme for Development (UNDP) published a guide in 2005 (*Programming for Justice: Access for All*)<sup>33</sup> on the reform of justice taking its orientation from the access to justice and in accordance with a human rights approach. It includes a section on the case of countries in a post conflict situation and includes informal justice. Moreover, on this subject, the agency will publish in 2010 a more comprehensive study devoted entirely to non-state justice.

- *The UN Office against Drugs and Crime (UNODC)*

In 2008, UNODC produced a compilation of tools for evaluating criminal justice. This compilation brought together several fascicules, filled out regularly, the last in 2009<sup>34</sup>, devoted to various sub-sectors, stages in the criminal chain, namely: (i) the police, (ii) access to justice, (iii) custodial measures and non-custodial measures, including pre-detention and reintegration measures (iv) cross-cutting issues, including juvenile justice and victim protection. Each of the documents follows the same pattern, mention is made of the differences between legal systems (Romano-Germanic law and common law) and several types of indicators are suggested. These tools can assess institutions and processes, taking into consideration the relevant provisions of conventions, norms and standards of the United Nations and customary international law.

- *The World Bank (WB)*

The Comprehensive Development Framework of the World Bank stresses the importance of a “legal and judicial effectiveness” for the development of a country. In essence, this development framework states that “without the protection of human rights, property rights and a legal and regulatory framework, there can be no equitable development.”<sup>35</sup>

According to one of the central missions of the World Bank, which is to contribute to poverty reduction – taken in its sense of lack of resources and the sense of powerlessness in an insecure environment (not very reliable legal and judicial system that is ineffective, biased and poorly managed) – has identified four possible strategies: (a) improving access to justice for the poor, (2) private sector development, (3) the fight against corruption, and (4) reform of justice in fragile states. In addition, a team from the World Bank developed and published in 2007 the “*Justice Sector Assessment Handbook*” for use by its staff. This manual provides methods and

29) [www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf](http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf)

30) [www.un.org/french/millenniumgoals](http://www.un.org/french/millenniumgoals)

31) [www.oecd.org/dataoecd/53/38/34579826.pdf](http://www.oecd.org/dataoecd/53/38/34579826.pdf)

32) Nations Conference on Trade and Development that led to the Accra Agreement, followed by the Accra Declaration of the 6th Summit of Heads of State and Government of the Group of African, Caribbean and Pacific States (ACP Group), on the 2 and 3 October 2008.

33) <http://hrbportal.org/?p=645>

34) <http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html> See also in Annex 5, the proposed table of the criminal chain.

35) <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20746116~menuPK:1990161~pagePK:148956~piPK:216618~theSitePK:1974062,00.html>

assessment tools to perform a diagnosis of the justice sector, mainly formal. Another tool that may be useful for delegations is the compendium where the Bank regularly publishes information about its activities in the area of justice reform, by country. The last *“Initiatives in Legal and Judicial reform”*, dates from 2009.

### 1.2.2 Bilateral donors

- *Department for International Development (DFID)*

The publications of the UK agency are of different kinds.

The densest publication to date on justice dates from 2002 *“Safety and accessible justice – putting policy Into practice”*. The agency report recommends:

- Prioritize a sectoral approach, while remaining open to the possibility of funding activities that may resolve a crisis situation, even when the conditions for success are not met or that other partners withdrew from this type of initiative.
- Have a strategic approach to meeting the guidelines outlined in the Poverty Reduction Strategy Papers (PRSPs), especially with respect to making their priorities the poorest and most vulnerable;
- Consider the reform of the justice sector as an integral part of security sector reform (SSR)
- DFID encourages action along the entire criminal justice chain, taking into account the needs of those most vulnerable.
- Start the evaluation of the sector by a diagnosis, even though this exercise may take some time. The diagnosis should identify entry points that have results with maximum impact, preferring from the outset joint actions with other donors. In fact, it is important to select interventions in terms of emergencies, priorities in the intervention sequence and costs.

In May 2008, a note on *“Justice and accountability”* complete these guidelines and highlights the role of justice in the mechanisms of accountability.

The last strategy paper, *“White Paper, building-our-common-future”* released in July 2009, insists on justice as a condition of development, because of access to security and justice as a public service in the same way as health and education and proposes concrete initiatives, including a tripling of its aid in the sector by 2014.

- *Danish Agency for International Development (DANIDA)*

Danida has several projects related to the justice sector in ACP countries. The Danish Ministry of Foreign Affairs issued in March 2009 a document entitled *“Democratization and Human Rights for the benefit of the People – Strategic Priorities for Danish Support*

*for Good Governance”*<sup>36</sup>, which proposes for the justice sector:

- justice and the rule of law;
- have a sectoral approach – improve the justice institutions and links between them;
- maintain a balanced approach between assistance for judicial institutions and CSOs, while promoting partnerships and coalitions;
- emphasize the rights of women and children.

- *Spanish Agency for International Development (AECI)*

*“The Handbook for judicial diagnosis”*<sup>37</sup> published in 2004 offers methodological tools to make a diagnosis of the justice sector, particularly focusing on identifying performance indicators and performance suited to this sector. This paper provides an analytical framework that takes into account the following dimensions: (1) the independence of justice, (2) liability, (3) control, (4) efficiency/effectiveness, (5) access to justice, (6) the economic performance of justice: legal security. The list of proposed indicators is particularly rich and gives useful insights.

- *German Federal Ministry for Economic Cooperation and Development (BMZ)*

In *“Human Rights in practice – fact sheets on the concept of human rights in development cooperation”*<sup>38</sup>, published in December 2008, the German cooperation is based on the principle that: “A reform of justice based on the Human Rights strengthens connections with other fields of action.” The proposed areas of intervention are based on: i) equality before the courts (accessibility, the right to be defended, etc..) ii) due process (fair and public) without personal or political influence, iii) independence and impartiality of the judiciary, and iv) compliance with the requirements for the presumption of innocence, to the access to remedies.

More recently, in February 2009 in its document entitled *“Promotion of Good Governance in German Development Policy”*<sup>39</sup>, BMZ recalls the fact that the rule of law is an area of intervention that is broader than the sector of law and justice, and suggests that the principles of good governance be applied to all sectors. As regards justice, the application of these principles recommends ensuring the professionalism of all actors, including judicial officers, to ensure that the legal texts in their drafting and implementation guarantee respect for all human rights and that access to the law includes access to other forms of conflict resolution as well as courts, particularly mediation and traditional law.

36) [www.um.dk/NR/rdonlyres/D04B984F-41A2-4E7E-81C1-A35C09F95964/0/DraftDHRstrategyFINALVERSION030309.pdf](http://www.um.dk/NR/rdonlyres/D04B984F-41A2-4E7E-81C1-A35C09F95964/0/DraftDHRstrategyFINALVERSION030309.pdf)

37) Spanish cooperation, Handbook for judicial diagnosis, March 2004.

38) [www.bmz.de/en/service/infothek/fach/fr/thematique\\_196.pdf](http://www.bmz.de/en/service/infothek/fach/fr/thematique_196.pdf)

39) [www.bmz.de/en/service/infothek/fach/konzepte/konzept178.pdf](http://www.bmz.de/en/service/infothek/fach/konzepte/konzept178.pdf)

- *Development Agency of the USA (USAID)*

The agency operates in many sectors and in all parts of the world. Its publications, often exclusively focused on the common law systems, provide, however, some interesting developments and useful references. The latest publication, dating back to June 2009, deals with corruption in the judiciary. As part of the guide “*Country Analysis: The Rule of Law*” of 2008<sup>40</sup>, a significant part is devoted to justice because of the five pillars identified as supporting the rule of law (1/ order and security 2/ legitimacy, 3/ checks and balances, and 4/ fairness 5/ effectiveness), the final two, in particular, focus on justice.

The proposed approach comprises four steps, namely:

**Step 1:** Analyze the political and historical context, identify the country’s juridical traditions and events that shape the environment, such as a recent conflict or the creation of a new state;

**Step 2:** Understand the roles of the key political actors. This step identifies the roles, resources and interests of those who could potentially support reform, and those who prefer to maintain the status quo. Assess the level of political will to complete reforms and develop options to capitalize on them;

**Step 3:** Examine programme options beyond the justice sector. This step extends the evaluation beyond the

justice sector institutions, to the overall political order. This approach allows one to go further, including initiatives related to several pillars of the rule of law, such as the development of political parties or support of parliament;

**Step 4:** Evaluate the justice sector. This step provides a structured evaluation of each essential element, according to the two components of the justice sector, the judicial framework and the judiciary institutions, and takes into account all the actors, judges, prosecutors, defence, police, prisons, civil society and Non-state actors (informal justice<sup>41</sup>). Once the priority elements have been identified, the programmes should focus on laws, institutions and actors that weaken the system.

This review is not meant to be in any way exhaustive. But it shows that in a fairly consistent and shared manner, donors, whether bilateral or multilateral, European or not, have moved from an approach centered on institutions and the legal profession to a much broader approach involving all stakeholders, especially the users and especially the poorest, often neglected rights’ holders. By shifting from an approach centered on “duty-bearers” to an approach that integrates the “rights’ holders”, it is an entire public service that is subject to reform and needs support to achieve not only better performance but better governance, that does not only target management of the courts, but also the accountability of the judicial system as a whole and in all its forms, from the law to justice.

40) [www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ROL\\_Strategic\\_Framework\\_Sept\\_08.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf)

41) Often silent on informal justice, the action of USAID seems to evolve, particularly in Afghanistan, where several studies have been conducted under its auspices on this sector.



## 2. ANALYSIS OF THE JUSTICE SECTOR

### 2.1 A key aspect of governance

Judicial governance is an essential component of governance in the same manner as economic or political governance. The analytical framework developed in the reference document No. 4 of the European Commission's "Analysis and consideration of governance in sectoral interventions", is an indispensable analysis tool. By way of illustration, it has been applied to the justice sector in the following paragraphs.<sup>42</sup>

#### 2.1.1 The dimensions of the concept of governance adopted by the EC

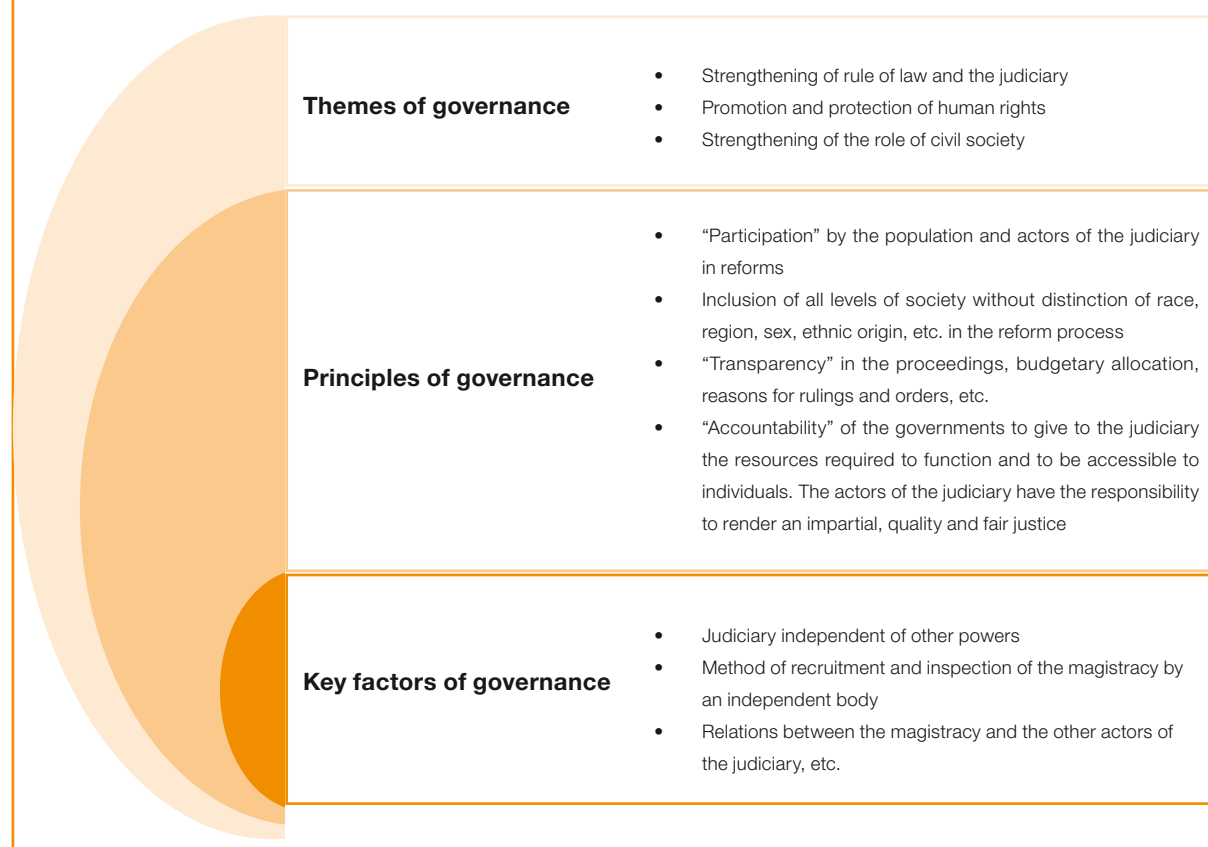
The three principle dimensions of the concept of governance adopted by the EC apply to the justice sector. (See figure below)

#### 2.1.2 Application of the analytical model of governance to the justice sector

The analysis model proposed by the EC is divided into four steps:

- analysis of the context;
- analysis of the actors;
- analysis of the relations of governance and accountability;
- analysis of the sector's ability to reform its corporate governance.

Figure 1. The different dimensions of the concept of governance applied to the justice sector



42) [http://ec.europa.eu/europeaid/infopoint/publications/europeaid/149a\\_fr.htm](http://ec.europa.eu/europeaid/infopoint/publications/europeaid/149a_fr.htm), Source: DG EuropeAid 2008.

### → Step 1: Analysis of the context of governance in the justice sector

This analysis should include an analysis of:

- (1) the political context (political system, democratic process, level of civil liberties, etc..)
- (2) the legal framework (constitution, codes, laws, administrative acts, court cases, etc..)
- (3) the organizational capacity of the sector to reform (budget, political will, skilled personnel in the institutions of justice, etc.)
- (4) the regional and international context in which the sector evolves: for example membership of regional and sub-regional organisations (e.g. OHADA, SADC, CARICOM, African Court of Justice, etc.); national adoption and implementation of treaties, covenants and other international instruments, including respect for international conventions of human rights.

### → Step 2: Mapping of actors

The main actors are the judges, prosecutors, traditional judges (customary or religious), secretaries and clerks of courts, lawyers, court officers (bailiffs, auctioneers, lawyers, etc.); judicial police, prison officers, as well as other institutional and non-state actors may be involved depending on the systems at the periphery, such as law reform commissions, parliament, civil society actors, the monitoring institutions (inspection of judicial and prison services, the Superior Council of the Magistracy, Bar association, Chamber of Notaries, National Accounting Court, Commission of Human Rights, etc..), other government departments involved in the justice sector, such as the Ministry of the Interior, Ministry of Territorial Administration or the Civil Service, etc.

Once the mapping of the actors is completed, including their distribution in terms of types for the country, it is necessary to check with donors whether the justice sector is included in their programming framework.

### → Step 3: Analysis of the relations of governance and accountability in the justice sector

This step involves describing the relationships (formal and informal) of governance among key actors and their links with their environment (internal and external). For example, what mechanisms permit the exercise of authority

and power in the justice sector: the Council of Justice, the Chief Justice, the Minister of Justice, etc.

What are the relationships between these institutions? Are they hierarchical, patrimonial, negotiated, or a voluntary network? Does the Minister of Justice exercise informal patrimonial governance with respect to the judges, a relationship characterized by loyalty and fidelity to the “Minister” in exchange for protection or the possibility of promotion? In common law countries, the appointment of judges may be closer to governance through a voluntary network because the individuals are nominated by their peers on the basis of trust and mutual recognition.

Similarly, we must consider whether the rules that govern the justice sector are accessible (vocabulary and language understandable by all), implemented by competent human resources capable of making quality decisions within timeframes prescribed by law. Do the judiciary actors feel they are indebted with respect to the acts/actions they take and to whom?

For example, under the guise of principles of tenure and independence of the magistracy, are dishonest or incompetent magistrates accountable and to whom? Who has the responsibility to take sanctions against them? In principle, ethical codes of conduct take care of this kind of question but sometimes public pressure is so strong, through the press, that the magistrates resign.

### → Step 4: Synthesis and analysis of the ability to reform the governance of the judiciary

Key elements resulting from the analysis of the justice sector may be summarised in the table below that reveals the key characteristics of governance in this sector, the main strengths and opportunities of the sector, the main weaknesses/threats and overall trends

This analysis tool helps to define activities prior to the development of sectoral policy of the sector or any activity contemplated in the context of budget support, particularly with regard to the preparation of indicators for disbursement.

In Annex 2, as an example, a synthesis-analysis of the ability to reform the governance of the judiciary is shown.

	Key characteristics	Main strengths/opportunities of the sector	Main weaknesses/threats	Overall trends
Broader context (beyond the justice sector)				
Actors, interests and incentives				
Governance relationships				

## 2.2 The entry points for the analysis of the justice sector

The conceptualization of a project to support the justice sector requires that the situation is known in this sector in the country under consideration. To have a vision at the outset of the justice sector even before the results of a definition mission are obtained, various entry points are provided below in the form of questionnaires presented by theme. The various entry points, broken down into sub-sections, should facilitate the perception of the magnitude and diversity of the sub-sectors in order to better identify data sources and contacts. This will help in the preparation of the intervention and in the dialogue with partners. They are accompanied by an analytical approach to derive conclusions from responses to different questions. It is also important that this analysis takes into account the gender dimension. In fact, equality issues both among justice professionals as well as litigants are not neutral and may be even discriminatory. An analytical framework is specifically requested by the EC for each project during the two phases of its development. To illustrate the point, an example of these grids applied to an imaginary justice project in a fictional country is included in Annex 5.

### 2.2.1 The institutional and legal framework of the justice sector

*It is, of course, not the intention here to analyze the entire legal framework of the state concerned, but only the essential legal aspects that determine the legal and judicial system of this state and that the justice system must respect and implement (especially some basic elements of constitutional, civil and criminal law), and/or the knowledge of which is important for the programme/project under consideration. Thus, for example, the analysis of commercial law of the state is a priori not necessary unless the proposed programme would specifically focus on this area. Even if some of the aspects discussed here will be covered in more detail in the following subsections, it is in fact important to know the general characteristics of the legal system of the state concerned and any proposed legislative reforms in order to better analyze problems in the sector and so better assess the impact (or potential risk of lack of impact) of the proposed support and be able to conduct the dialogue on justice policy with the national authorities. Given the broad scope and complexity of some of the questions below, delegations may wish to call on outside expertise for their analysis.*

#### → Constitutional law

- What are the main constitutional bodies, their powers and relationships?
- Does the constitution define the fundamental rights, and how does it protect them? How is gender equality dealt with? Are these rights defined in a manner consistent with international standards (including the various UN conventions on human rights) and

the commitments made by the state with respect to them?

- What are the matters reserved for the legislature, particularly in the field of justice?
- How is the integration of international law into domestic law governed?
- What other aspects of the justice sector are regulated by the constitution?

#### → Civil law

- What are the main characteristics of civil law and civil procedure (especially with respect to categories of legal systems, see Section 1.1.3)? Are certain population groups particularly advantaged compared to others? Does the civil procedure promote access to justice, including for the poor?
- Do other systems of law (religious law, customary law) govern the civil law alongside the formal law? How are these systems are interlinked?
- What is the role of women in society according to civil law?
- Does the legal system allow judicial cooperation with other countries in civil matters? How does it work in practice?

#### → Criminal law

- What are the main characteristics of criminal law and criminal procedure (especially with respect to the categories of legal systems, see Section 1.1.3)?
- Do the definitions of offences under the criminal code (e.g. regarding freedom of expression and sexual freedom) generally reflect a criminal law policy of the state that is rather repressive or liberal?
- Do the penalties under the criminal code generally seem proportionate to the seriousness of offences, particularly with regard to prison? Is there the death penalty, and for what types of crimes? Are there any alternative sanctions and how are they applied?
- Does the criminal procedure provide sufficient room for human rights including the rights of the defence? Does it favour the use of modern possibilities and methods of investigation, particularly in the collection and recognition of physical evidence?
- Do criminal law and criminal procedure conform with international standards (especially the United Nations conventions on human rights, but also the United Nations conventions on international criminal law) and the commitments of the state with respect to them?
- Does the legal system allow judicial cooperation in criminal matters with other countries?
- How does it work in practice?
- Is there a criminal policy at government level aimed at promoting positive or negative priorities in implementing the legislative framework for the justice sector or to reform the legislative framework?
- In particular, is there a body of thought and criminological studies to guide and nourish the penal policy?

*The need for a penal policy is essential to implement, for example, alternative sentences to incarceration*

*and adaptation of sentences to reduce overcrowding in prisons. It is also necessary to address such issues as juvenile offenders and vocational rehabilitation of prisoners, as well as to prepare the legislative and regulatory changes necessary for reform, etc.*

### 2.2.2 The personnel of the justice sector

The same remark as made above applies here. The word “judge” is a generic term which, according to the country, does not apply to all those who participate in a trial (e.g. the assessors, or tribunal advisors in France, or the members of a jury in a court, or the arbitrators), but only to those whose position is governed by special regulations. The issues raised here must thus be adapted, extended or restricted, depending on the objective of the project/programme envisaged.

In this connection, it may be useful to examine whether there is any law or code of the judicial organisation (or equivalent document) establishing the roles and responsibilities specific to each judicial profession.

#### → Judges

- *Recruitment:*

- Minimum academic qualification required?
- Competitive or based on record?
- What is the appointing authority?
- How are men and women divided among them?
- Are there any quotas to ensure the recruitment of women?

*In a system of Romano-Germanic law, the recruitment of judges on the basis of their record and their appointment by the political authority at the beginning of their career can be a bad sign for the future independence of the nominees. Conversely, a competitive hiring process with a correction system ensuring anonymity, open to candidates having a minimum academic level, generally offers the highest guarantees.*

- Is there an election of judges?
- If yes, does it involve all judges, including those at the highest level?
- Are judges chosen by the political authority from among the leading lawyers?

*The common law systems may have a process of election of judges (American model). It calls for significant reserves: financing the campaign by individuals or companies who will expect favours in return; temptation of the judge to modify his decisions at election time to please his electorate.*

*The election is often rejected in favour of an appointment to higher positions (judges of the Supreme Court). The questionable nature of a nomination by the political authority is lessened if the nomination is subject to ratification by parliament by a qualified majority, insofar as it leads to the nomination of candidates*

*through consensus. The questionable nature of a nomination by the political authority is also reduced when an independent mixed commission plays a role before nomination by the political authority, either by suggesting nominations (power of initiative), or by exercising a power of assent (which binds the executive). If the body that is asked for its opinion on the nomination of judges is a body controlled by the executive, or is an independent body but only has a simple power to give an opinion (that is not binding on the executive), the independence of the judges is in jeopardy.*

*The nomination of judges from among experienced lawyers with impressive credentials (English system) provides an a priori guarantee of quality. The independence of interested parties is guaranteed by the fact they do not enter a career process but instead remain generally in the same position until the termination of their functions.*

- *Training:*

- Is there a school or a specialised structure offering initial training?

If so

- Does it also ensure continuing education (seminars, regular cycles of compulsory education)?
- Who are the trainers (permanent trainers or professionals ensuring holidays)?
- What is the percentage of judges (broken down by gender) following continuing education each year?

*A school focused on providing initial training and continuing education is also an important guarantee of the quality of the judges recruited (it often exists in the systems of Romano-Germanic law) and then in function (for all systems).*

*An important indicator of the quality of training is the existence of permanent trainers within the school; on the other hand, education dispensed only by judges in office in a sporadic manner to ensure the holidays vacations is a bad sign.*

- *Statut:*

- Is the status of judges written in the constitution?

*How are the judges assigned and promoted: by the Minister of Justice alone or following the opinion of a judicial council, the Supreme Court, or an independent body (the Council of Magistrates)?*

- How is the Council of Magistrates composed (if there is one)?
  - members of the judiciary?
  - members outside the judiciary?
  - a mixture of both?
- How are members appointed? (election, designation?)
  - Does the head of state chair the council?
  - Is the Minister of Justice a member of the council?
- Judges tenured?



- Is the principle of tenure enshrined in the constitution?
- Is a transfer of office for reasons of service allowed?

*The constitutionality of judicial independence and tenure of judges is an essential safeguard. However, one should check that it is not only a protection of pure form. Such is the case if 1) the processes of assignment and promotion of judges are vested in the Minister of Justice following a simple opinion of a judicial council, 2) it is chaired by the head of state and includes the Minister of Justice as well as members essentially appointed by the executive, 3) the law on the status of the judiciary allows a transfer of office for reasons of service.*

*In fact, in such cases, judges are at the mercy of the political authority and may be moved automatically as soon as they take a decision that displeases the authority or a personality.*

*The test of true independence of judges is when a council decides the assignments and promotions of judges independently. It is preferable to include in its membership people from outside who are not judges to avoid the risk of corporatism. It must have an administration and a budget to manage the human resources of the judiciary.*

*In common law systems where judges are appointed from among experienced lawyers, it is common that this issue does not arise because judges remain tenured in their appointed positions. Where this is not the case, one should check the process of promotion through the above questions.*

*The common law judicial systems rarely involve a Council of Magistrates. Decisions relating to the promotion of judges and their appointment to the superior courts, where used, mainly depend on the political power. If they are taken without supervision by another authority (parliament), the risk is high that the executive will arrange the composition of the supreme courts to manipulate decisions, sometimes involving kickbacks.<sup>43</sup>*

- *Responsibility and discipline*

- Do judges have criminal immunity?
- (if yes) whom is this immunity lifted?

*The existence of immunity for judges is often regarded as a guarantee of their independence. It is actually a negative sign because immunity has the purpose and effect of improperly protecting them from prosecution for corruption or other crimes. The problem is compounded when the Minister of Justice is the authority that may lift the immunity. In fact, there is a risk of protective phenomena or, on the other hand, measures of retaliation against a judge who has displeased the authority.*

- Is there an inspection of the services of the judiciary? (if so)
  - To which authority is it responsible? (minister, judicial council?)
  - Who has the power to give an order to investigate? (Minister, heads of court, judicial council, self-referral?)
  - To whom are the reports sent? (Minister, judicial council?)
  - Are these reports acted upon?
  - What investigations does it carry out? (in-depth inspections of operations, investigation of individual behaviour?)
  - Does it have a real activity (inspection staff, number of annual surveys?)

*The inspection is the central mechanism in the fight against corruption and against the malfunctioning of the judiciary. Its numerical size, the quality of its members, the effectiveness of its activity and the authority that mandates it and receives its reports are decisive criteria.*

- Who has the power to initiate disciplinary proceedings?
  - minister?
  - heads of court?
  - is the ruling body in disciplinary matters?
  - judicial council?
  - another body?
- How are members appointed?
- Number of disciplinary proceedings undertaken each year?
- Number of disciplinary sanctions announced each year?
- Can decisions in disciplinary matters be challenged? If yes, what is the competent authority to pronounce a final decision?
- Are sanctions published?
  - in the profession?
  - by the press?

*Disciplinary action is a strong sign (while its absence is a very bad sign) of the authorities' determination to fight against corruption and against professional incompetence. Publicising the decisions taken should be ensured so that the public might be aware of the actions taken. This often confronts a strong reluctance of the judiciary that prefers "to wash its dirty linen in the family" by imagining that it will thus preserve the reputation of the institution, whereas, in fact, in the eyes the public only the transparency of the sanction process guarantees the reality of the fight against corruption.<sup>44</sup> On the other hand, it is very important to know whether the subject of disciplinary action has the right to challenge the disciplinary decision in court. If so, then this means that the system can challenge possibly arbitrary actions effected under the guise of disciplinary action.*

43) See the serious disturbances created in Pakistan by the ouster of the president and judges of the Supreme Court by President Musharraf, which ultimately contributed to his downfall

- *Remuneration*

- What is the net salary of a beginner judge, and how does it increase over his career?
- By comparison, what is the minimum wage in the country?

*The existence of remuneration of a sufficient amount is one of the first conditions of the fight against corruption in the judiciary. The comparison with the minimum wage paid to employees in the country allows positioning of the pay scale of judges. A study by the Council of Europe revealed that in Western Europe, a judge having 5 years work experience receives 2.5 times the minimum wage (except in Portugal where this multiple was 4). In ACP countries, where the minimum wage is often very low, this multiple should ideally be substantially higher.*

- *Integrity*

- Are judges subject to accusations of corruption?
- Are these accusations justified?
- Is there a code of ethics for judges?
- Does this code deal with questions of conflict of interests?

*Judicial corruption obviously undermines the rule of law and judicial certainty. The existence of a code of conduct or statutory regulations in lieu thereof, and the effectiveness of its/their application, measured through the implementation of disciplinary action, are indicators of the level of the struggle against corruption.*

→ **Public prosecution (prosecutors)<sup>45</sup>**

*In common law countries, the public prosecutors are often lawyers for the prosecution, sometimes elected, who are responsible for initiating the prosecution after a police investigation that they do not direct or only slightly, then supporting the accusation in court.*

*In countries subject to Romano-Germanic law, prosecutors are generally magistrates recruited as judges. In countries with the French tradition, the transition from one category to another is possible. In most cases, prosecutors are in a hierarchy with respect to the Minister of Justice, to whom they owe obedience.*

*Thus, some of the questions below will not apply to common law countries.*

- *Recruitment:*

- Minimum academic qualification required?
- By competition?
- By record?
- What is the appointing authority?
- What is the division among men and women?
- Is there a quota guaranteeing the recruitment of women?

- *Training:*

- Is there a school offering initial training?

If so:

- does it also ensure continuing education (seminars, regular cycles of compulsory education)?
- who are the trainers (permanent trainers or professionals ensuring holidays)?
- what is the percentage of judges (broken down by gender) following continuing education each year?

- *Status:*

- Do prosecutors form a single body with the judges, with possible transition from one category to another?
- Do they constitute a separate body; do prosecutors have the status of judges?
- Is the status of prosecutors in the constitution?
- How are prosecutors appointed, promoted and assigned?
- Election?
  - Minister of Justice alone?
  - Minister after opinion of a judicial council?
  - independent (Council of Magistrates)?
- (if there is a council) How is it composed?
  - members of the judiciary?
  - members outside the judiciary?
  - A mixture of both?
  - How are members appointed? (election, designation?)
  - Does the president of the Republic chair the council?
  - Is the Minister of Justice a member of the council?
- Are prosecutors independent of the Minister or are they under his authority?
- Is there an attorney general whom the prosecutors must obey?
- If yes, what is this attorney general called and what is his degree of independence from political power?

*Given the important role of prosecutors in the initiation of proceedings, their degree of independence from political power is an important analytical tool. It is rare that prosecutors act independently. In some countries<sup>46</sup>, they are subject to the instructions of an attorney general, himself, in principle, independent of political power, but appointed by it.*

*In most countries of Romano-Germanic law, prosecutors are close to the Minister of Justice, a fact that may influence their decisions on undertaking prosecution or otherwise discontinuing the proceedings of “sensitive” cases.*

*In common law countries, the situation is, in fact, often identical to the extent that investigations are conducted independently by the police that are under the authority of the government. The prosecutor only has a technical role in implementation or not of a prosecution in the event of insufficient charges.*

44) See in this regard some of the documents listed in Annex 3

45) “Prosecutors” in the broad sense of members of the public prosecution, regardless of their rank

46) Portugal

*The dramatic results obtained in the mid-1990s in the fight against the corruption of politicians by the independent Italian prosecutors show the effectiveness of the independence of prosecutors, that common law countries sometimes have (system of special designated attorneys in high-profile cases in the United States). This explains the strong reluctance of governments to the establishment of the prosecuting authorities acting outside their control.*

- *Responsibility and discipline*

- Do prosecutors have immunity from prosecution?

(if so) Who can lift this immunity? ?

- Who has the power to initiate disciplinary proceedings?
  - Minister?
  - heads of court?
  - what is the ruling body in disciplinary matters?
  - judicial council?
  - another body?
- How are members appointed?
- Number of disciplinary proceedings undertaken each year?
- Number of disciplinary sanctions announced each year?
- Can decisions in disciplinary matters be challenged? If yes, what is the competent authority to pronounce a final decision?
- Are sanctions published?
  - in the profession?
  - by the press?

- *Remuneration*

- What is the net salary of a beginner prosecutor?
- By comparison, what is the minimum wage in the country?

- *Integrity*

- Are prosecutors subject to accusations of corruption?
- Are these accusations justified?
- Is there a code of ethics for prosecutors?

See the comments made above for judges for these topics

## → **Clerks and administrative officers of courts**

- *Recruitment:*

- minimum academic grade required?
- by competition?
- by record?
- what is the appointing authority?

- *Training:*

- Is there a school offering initial training?

If so:

- Does it also ensure continuing education (seminars, regular cycles of compulsory training?)
- Who are the trainers? (permanent trainers? professionals ensuring vacations?)

- *Responsibility and discipline*

- Are the specific responsibilities of clerks detailed in a text? (For example, in some cases they may be responsible for ensuring compliance with human rights defence, ensuring authentication of legal documents, execution of judgments, conservation of judicial decisions, etc..)
- Are there objective criteria for the evaluation and promotion of clerks?

*The quality of clerks and administrative staff of the courts has a direct bearing on the functioning of justice. The clerks present at the hearing retranscribe in writing and guarantee the authenticity of the judge's decisions. They record the complainants' requests, notify the judgments to the interested parties and retain records of actions and judgments in order to provide copies. In fact, a judgement, even pronounced by the judge, remains a dead letter if not edited and issued to the parties (prosecutor, prison, prevailing party in civil or commercial proceedings) in order to be implemented.*

## → **Lawyers**

- *Number of lawyers*

- Is there a national Bar association?
- are lawyers attached to
- each court of appeal?
- each court of first instance?

*There is no true justice without legal counsel and defence. It is therefore important to investigate whether lawyers are attached to each court, including in the regions.*

- *Recruitment:*

- minimum academic qualification required?
- by competition, examination or record?
- What is the appointing authority?
- What is the division among men and women
- Is there a quota guaranteeing the recruitment of women?

- *Training:*

- How is the initial training provided? Through training in a law firm? If so, for how long?
- Is there ongoing training? If so, by whom is it ensured: Bar, university? What is the actual average duration per lawyer each year?
- Is there a school offering initial training? If so, does it also ensure continuing education (seminars, regular cycles of compulsory training?). Who are the trainers? (Permanent trainers? Professionals ensuring vacations?)

*The quality of recruitment is important, as is that of training. In the absence of a school (the most common), training is provided on the job in the office of a more experienced lawyer (professional training) and continuous education may not exist. The results in terms of quality of lawyers are thus highly variable. A professional entry examination may take place; it may also take place after the internship.*

- **Status**

Are there any incompatibilities between the lawyer and the function of other activities (parliamentary, commercial activities)?

- **Discipline**

What is the body responsible for discipline?

Can individuals go directly to that body to complain about the conduct of a lawyer?

- number of disciplinary actions taken each year
- number of sanctions imposed each year

→ **Agents enforcing court decisions**

- Who enforces court decisions in criminal matters:
  - for fines: bailiffs? tax administration? police?
  - Are there any probation officers (for community service, parole)?

Who enforces court judgments in civil matters:

- bailiffs?
- officers of the court?
- How and by whom are the agents paid for the acts they perform?
- Number of enforcement agents (excluding police)
- Can the enforcement of court decisions in criminal or civil matters be discontinued by a decision of the Minister of Justice?

*The lack of enforcement of a court decision detracts from the efficiency of justice. The status and activities of enforcement agents must be considered.*

*It is also important to know whether the Minister of Justice claims the right to stop the enforcement of court decisions. An affirmative answer is a very negative sign.*

### 2.2.3 Access to justice

→ **Number and geographical distribution of courts:**

- local courts (sometimes called justices of the peace, magistrates' courts, courts of the sector ...)
- first instance courts
- courts of appeal
- administrative courts

*The level of coverage of the territory by the courts allows identification of the parts of it that are "judicial deserts". Ideally, judiciary coverage must not be limited to a court, but should also include the nearby police*

*station and prison. The presence of local courts in sufficient numbers in the area is a good barometer of access to justice, because this level of instance, too often overlooked in the redefinition of the judicial map, is nevertheless one that is closest to the populations.*

→ **Costs of proceedings:**

- Does a person have to pay money into court to initiate a Non-criminal case?
- If yes, how much? Percentage of this sum with respect to the minimum wage?

*The existence of "provisions" required of individuals can be a significant barrier to access to justice. It also generates corrupt practices (amounts paid to a chief clerk to get the case passed more quickly).*

→ **Legal aid (or jurisdictional aid)**

- Does the lawyer offering legal aid work there voluntarily? Is he paid by the state?
- If yes, what is the amount of remuneration (for example in a case of property claims at the first instance)?
- What is the amount budgeted each year for legal aid? Percentage in the budget for justice?
- Are there any conditions to obtain legal aid in non-criminal cases? means? if so, what are they?
- Who decides to grant legal aid? an office within the court?
- Number of persons who have resorted to legal aid? what type of case? (with breakdown by gender)
- (if possible) Number of cases per year using legal aid in Non-criminal cases? percentage of total number of cases in this category?
- Are there any conditions for legal assistance in criminal matters ("automatic fee")?
- What is the amount of the remuneration of lawyers? (e.g. for a case of theft before the criminal court, for a murder case before the criminal court)
- If the number of lawyers established within the country is not sufficient, can a defendant make use of paralegals?)

*Legal (or judicial) aid, granted by the state to litigants, enables litigants whose income does not exceed certain limits, to use the services of officers of the court: lawyers, solicitors, bailiffs, experts, costs of proceedings ... In most cases, the lawyer who is involved within the framework of legal aid is not paid; this mission being assigned to trainee lawyers or beginners with results rather depending on the professional conscientiousness of the persons concerned. The obligation on the lawyer to work for free leads, in fact, generally to a lack of defence for those most in need. Legal aid only really achieves its goal when the state adequately supports the lawyer's fee (and not just the compensation for expenses) and devotes a sufficient budget to this.*

*It is also important to check the process of granting legal aid. A heavy bureaucratic process requiring proof*



*discourages many potential litigants and does not allow them access to justice.*

*In some cases, paralegals perform some of the functions of a lawyer. This situation often prevails within a country where the number of lawyers is very low or Noexistent. Depending on the mandate given to them, paralegals can provide frontline legal advice, refer the matter to a lawyer when the case is complex, represent the link between prison, police and the prosecutor in order to verify the legality of detention ... Sometimes they even have the mandate to assist the litigant during the proceedings in small cases.*

#### → Legal information for the public

- Are there reception offices in the courts providing users with general legal information?
- Does the Ministry of Justice publish legal information leaflets? If so, where are they distributed (courts, government, municipalities)?
- Do courts organize open days?
- Is legal information given regularly on the radio? If so, by whom?
- Is there an initiative to provide information to particularly vulnerable people who are disadvantaged and living in rural areas?

*Ignorance of the basic rules of law and the functioning of the courts by people is a significant barrier to access to justice. It facilitates the activities of fraudsters operating in the vicinity of the courts (“touts”).*

#### → Alternative methods of dispute resolution

- Do citizens have access to the traditional justice bodies?
- If so, which (village chiefs, prominent individuals, customary “judges” etc.)?
- For what types of cases?
- Estimation of the number of cases resolved in this way
- Estimation of the percentage of cases solved in this way compared to the cases resolved by formal justice
- Can the decisions of these bodies be challenged through formal justice?
- Can the mediation process be used before resorting to formal justice?
- Is there the possibility of calling on arbitration in commercial matters? Is it common?

*The frequent inaccessibility to formal justice in many ACP countries leads people to turn to other processes of conflict resolution. More generally, justice, even if it works properly, can see its importance lessened by the use of traditional processes for small claims. These alternative methods can solve a considerable number of cases<sup>47</sup>. It is important to measure their importance and to consider whether they meet the rights of the parties.*

*On the other hand, the organization of mediation before trial or at the very beginning of it, with appropriate safeguards (quality and training of mediators, detailed arrangements for the agreement of the parties), can help solve litigation and relieve the court system.*

*In large commercial disputes, the parties are wary of justice and often prefer to defer to an arbitrator or arbitration panel (high-level professionals) chosen by them. It is useful to examine whether this process is organized (e.g. by the Chamber of Commerce), whether it is common and whether it gives satisfaction.*

#### 2.2.4 The effectiveness of justice

##### → Ministry of Justice (or Office of the Chief Justice in common law countries)

###### • Budget for the judiciary:

- overall amount:
- amount for the judiciary alone (without the prison sector):

(If possible separate):

- salaries
- operation
- investment
- percentage of budget for the judiciary in the state budget:
- percentage change over the last three years

*The share of the judiciary in the state budget (which rarely reaches 1%) is a test of the political will to develop this sector or, on the other hand, marginalize it.*

*If the figure is available, the share devoted to investment (purchase of materials, construction and renovation of premises) is also a sign of the determination with respect to developing the justice sector.*

###### • Personnel and organisation

- Are the departments and services mainly composed of magistrates?
- If so, how are those interested assigned to the central administration?
- What is the organisation chart of the Ministry of Justice or the Office of the Chief Justice?

*If the presence of magistrates within the central administration is justified, given their knowledge of the judicial system, it is, however, inadvisable to entrust them with purely managerial, especially financial, tasks. One also frequently observes that the assignment to the central administration has a “quasi-disciplinary” aspect in that it relates to not very competent judges that have to be removed from the courts, or judges that are deemed “unreliable” by the political power in place. Such a mode of employment is a particularly negative signal to the effectiveness of the central administration that thus comprises unmotivated personnel.*

47) In Mali, as in many other ACP countries, traditional justice decides 80% of disputes between individuals

*Attention should also be given to the organization chart that is often characterized by an excessive division of responsibilities leading to low efficiency.*

- *Judicial statistics*

- Is there a statistical service in the Ministry of Justice? If so, are there professional statisticians?
- Has the Ministry of Justice established a framework for gathering statistical data?
- Does this framework contain basic data: stock of cases at the beginning of the period, cases entered during the period, cases decided during the period, stock of cases at the end of the period?
- Do the statistics identify the users of the judicial system, for example by gender or social groups?
- Are the data regularly transmitted by the courts to the Ministry of Justice?
- Are these data used? If so, in what form: annual summary of activity throughout the country?
- Does the summary document allow one to determine the average duration of cases?
- Are the results disseminated to the courts themselves?

*Knowledge of the functioning and effectiveness of a judicial system requires the existence of reliable statistics: the establishment of standard data by the courts in accordance with a framework established by the central administration, regular transmission of data, use of these data by the central administration. In the absence of such an instrument, the Ministry of Justice will be unaware of the results of the activity of the judicial system and cannot know, for example, that the courts are experiencing difficulties due to insufficient resources or poor management. Likewise, in the presence of a lack of detailed knowledge, international donors are unable to target their support operations.*

*In most ACP countries, the judicial statistics are neither kept nor used judiciously. There is, at best, the sending of annual reports on the activity of the courts but which, most often, are not subject to any monitoring by the central administration.*

→ **Logistics:**

- General condition of court buildings?
- Level of computer equipment? Is there any communication by intranet/internet?
- How is the budget set for each court and how is the overall budget managed? By the central administration? By the court of appeal? By an independent body such as a Council of Magistrates?
- Who manages the budget allocated to the court? President? The chief registrar?

*Centralized management of the overall operating budget is a handicap to the effectiveness of justice in that it causes delays in the availability of funds and may impair the daily functioning of the courts. However, where financial authority is granted to an external budget control body such as a Council of Magistrates with respect to the negotiation of the annual budget for the judiciary and its administration, tighter links between the administration and justice generally lead to more efficiency.*

→ **Human Resources:**

- Number of judges (with data broken down by sex)
  - professional judges
  - Non-professional judges (permanent assessor citizens, e.g. juvenile courts, labour courts, customary courts<sup>48</sup>, etc.)

*In countries subject to Romano-Germanic law, the number of professional judges with respect to the country's population gives a first idea of the level of judicial effectiveness. This figure is often very low in many ACP countries<sup>49</sup>.*

*The assessment may be tempered by the extensive use of lay judges who sit in the courtroom alongside professional judges (this does not concern traditional or customary judges intervening outside the judicial system, nor jurors in criminal courts that only sit for a few cases).*

*In common law countries, there may be "magistrates" (British system), namely persons of good standing exercising a part-time judicial office for the trial of almost all small cases. There are thus very few professional judges.*

- Number of prosecutors
- Number of clerks and administrative staff

*The number of personnel who are not judges, responsible for managing records and editing judgments, directly affects the effectiveness of the judiciary.*

→ **Specialized courts and tribunals**

*Here, also, only the main types of court are mentioned. Many specialized courts (e.g. labour law, social security, land leasing, right of asylum, are not mentioned specifically). The common law specialized courts must be distinguished from specialised courts (especially military courts) that are not always considered as satisfying the criteria of impartiality and independence that, according to international standards, are a characteristic of a tribunal.*

48) Current system in Niger especially in cases of real estate: two customary assessors sit with the judge and have the role of informing the judge on the custom applicable in the region involved

- *Constitutional judiciary*

- Is there a court allowing a law to be challenged because of its non-compliance with the Constitution?
- If so, who may appeal? Is it permanent and can it be exercised principally? In this case, is it subject to a delay following the enactment of the law?
- Can it instead be exercised only during a trial to challenge a law applicable to it?
- How is the Constitutional Court composed and how are its members appointed?

*A constitutional court gives the judicial system an important role with respect to the content of the law itself. Its field of action and the procedures for its intervention condition its effectiveness.*

- *Administrative judiciary*

- Are there special courts allowing citizens to challenge the decisions and actions of the state, public bodies and local authorities?
- If so, how are they organized? Chambers in the ordinary courts? Single chamber at the Supreme Court with jurisdiction for the whole country? Administrative tribunals around the country?
- Does the state implement the court decisions that penalize it? In particular, does it pay damages to those who were sentenced?

*The existence of specialized administrative courts is infrequent. In many cases, appeals against the state are handled by a chamber of the Supreme Court. The existence of independent courts, specialised or not, allowing judgements to be made with respect to challenges to decisions of the state or public authorities is a positive sign with respect to the rule of law. The geographical distribution of these courts, however, must allow easy access for citizens. The effective implementation of decisions by the state is an important criterion.*

- *Juvenile judiciary*

- At what age does criminal responsibility begin?

*This is usually fixed at 14 years of age, at which age one is supposed to be able to differentiate between good and bad, but it varies from one country to another depending on the values and principles that society promotes and respects. It is a sensitive issue likely to raise debate and passions. The lower the age, the more the rights and interests of the child may be compromised. But between the age when criminal responsibility begins and adulthood, i.e. during the period when an offender would have been held criminally responsible except that he/she is still a minor, the legal framework (e.g. the Criminal Code) generally provides for limited criminal responsibility leading to the application of specialized justice for minors that places more emphasis on education rather than penalties.*

- Are there any provisions or special institutions that regulate and control the rehabilitation of criminal juvenile offenders?
- Are there specific procedures for the investigation, prosecution and adjudication of juvenile offenders?
- Does the law provide for the penalties for juveniles being lower than those incurred by an adult based on the same facts?
- Is there any staff specifically responsible for handling juvenile criminal justice (juvenile judge, children's court ...)?
- Do applicable laws envisage opportunities for delegalisation, mediation, supervised educational measures in the community, placing in education centre, etc., prior to conviction?
- Are there opportunities for special sanctions for juveniles (e.g. services of general interest, reintegration programmes, supervised educational measures in the community, placing in education centre, ...) and specific institutions providing non-prison services?
- Are there any rehabilitation centres for convicted criminal juveniles? If so, are they managed by the state or by associations?
- Are the detention centres adapted to the peculiarities of juvenile prisoners in terms of age, sex, educational and social needs? Are children imprisoned separately from adults, and boys from girls?
- If it exists, does the juvenile justice system also deal with the situation of minors in danger?

*The preceding elements condition the organization and operation of a juvenile justice system that would meet minimum international and European standards.*

- *Financial judiciary*

*There are three basic models:*

- *an Anglo Saxon system adopted by many Commonwealth countries: audit agency attached to the Parliament,*
- *a judicial system, an accounts court,*
- *a peer system without jurisdictional power.*

*The first two are found most often in the ACP countries*

- Are there any independent bodies to monitor the accounts of the state and public authorities?
- If so, how are they organized? Specialized chamber within the Supreme Court? Financial tribunals around the country? Audit agency attached to the Parliament? Peer body without jurisdictional power?

*The existence of independent bodies to monitor the public accounts and to sanction poor financial management is a very positive sign. Sometimes there is a Court of Accounts constituting one of the chambers of the Supreme Court and, more rarely, financial courts established in the regions. This configuration allows decentralized control particularly with respect to the accounts of municipalities and regions.*

*Projects intended to strengthen the financial judiciary are generally specific support components for PFM but it is desirable that strong coherence and synergies between are developed between PFM/courts of accounts' projects and projects in support of the judiciary by paying special attention to the following:*

- strengthen the capacity of judges of accounts when there are courts
- irrespective of the institutional system, strengthen the capacity of investigators (especially the police) and the services of prosecutors as well as magistrates in the techniques of auditing, accounting and financial analysis.
- *Religious judiciary*
- Is there a religious judiciary?
- If so, what is its domain (parentage, family, inheritance, etc.)?
- Is it mandatory in this field for the believers concerned or they can they make the choice to go to the state judiciary?
- Do decisions of the religious judiciary have identical value in their field to those of the state judiciary?

*The weight of the religious judiciary may be important in countries with large Muslim populations. One must then know the respective value of the decisions of the religious judiciary and those of state judiciary.*

- Judicial times?
- average length of time of non-criminal proceedings:
- divorce proceedings; in first instance; on appeal
- litigation real estate, in first instance; on appeal
- average length of criminal proceedings:
- theft case before the criminal court, with detainee and without detainee; in first instance; on appeal
- criminal case with detainee
- Are cases judged at the first hearing where they are called? Or are they instead subject to referral? If so, are these referrals many and usual?
- What is the time it normally takes between the delivery of judgments in civil and commercial matters and the issuance of the enforceable copy of this judgement?

*Even with an operational statistical system, the average duration of a case can only be known by using a computer system with which the Ministries of Justice are rarely equipped. The answer to these questions can be obtained through interviews with practitioners, judges and lawyers.*

*The time required to render a decision as of the initiation of the procedure is obviously a crucial factor in measuring the effectiveness of a judicial system. The existence of many referrals (examination of the case postponed to a later date) is the sign of a lack of control over case management by judges and is a very negative indication of their performance.*

*While the time between the beginning of the proceedings and the date of the trial is important, the deadline for the issuance of the written copy of the ruling is just as important as it determines the effective enforcement of the court. This must also be measured. This indicator is also an important element.*

#### → Legal information for professionals

- Is there an official journal for the publication of the new legislation and regulations? How is this official gazette accessible?
- Are the decisions of higher courts (courts of appeal, or Supreme Court) distributed in the tribunals?
- Is it distributed to lawyers? To the faculties of law?
- Are there one or several legal journals run by scholars who comment on and analyze the case law? If so, is it disseminated in the courts? To lawyers? Can the public access them?

*The dissemination of precedents represented by judgments is crucial in systems of common law. This is especially important in systems of civil law as case law has a creative role of law and must be known to practitioners.*

#### → Training

- What is the organization and capacity of the education system (universities, specialized schools) that provide training in law.
- (Number of establishments, capacity, enrollment, number of degrees, number of teachers ...)

#### → Other appeal bodies

Once again, the list of organizations given here cannot be exhaustive (National Commission on Human Rights, commissions related to transitional justice, ombudsman systems, agencies reviewing applications related to asylum ...). This section serves to give a glimpse of the various elements, bodies, authorities, involved in the implementation and enforcement of national law and that may be involved in a project/programme to reform the justice sector.

##### • Mediator

- Are the decisions of the administration be subjected to a body such as a mediator, ombudsman or a national commission for human rights?
- If so, what are the powers of this body?

*These organizations generally only have the power to inform public opinion and make recommendations for the amendment of questionable practices. Their role may nevertheless be important when their action is relayed by the press or NGOs.*

##### • Supranational court of human rights

- Is the country subject to the jurisdiction of supranational courts involved in violations of human rights
- Have cases of referral to one of these courts been observed in the country?

49) For example: 540 professional judges and prosecutors in Madagascar for 18 million people, or one magistrate for 33 000 inhabitants, compared with the French figure of 8,500 professional judges and prosecutors for 63 million people, or a magistrate for 9000 inhabitants



- If so, if the country is sentenced to pay damages to the complainant, will the country implement the decision?

*In addition to a possible sentence to pay damages, the intervention of a supranational court may have an important symbolic value (see, for example, the condemnation of Niger in 2008 pronounced by the Court of Justice of the Economic Community of West African States (ECOWAS) with respect to acts of slavery).*

- **Judicial police**

- Do the police perform acts of criminal investigation (judicial police); do they act independently? (This situation is usually that of common law countries)
- On the other hand, are they legally subject to the management and supervision of the prosecutor?
- Is this control effective in practice?
- How does it work? Do the police have to report regularly on its investigation in a particular case? Should it ask the prosecutor for instructions at the end of the investigation with respect to the arraignment of the suspect before the judge or his release?
- For how long can the police keep a suspect in its premises after the latter's arrest before having to arraign him before a judge? (the period called "custody" in countries subject to Romano-Germanic law)
- Is there an initial period that may be extended? If so, by whom (the prosecutor or the judge?) And for how long?
- Does the law provide for an extension of this period in the event of geographical distance of the local police from the court? If so, what is the deadline?

*The length of the period of detention of a suspect by police, which in principle should be strictly limited by the Code of Criminal Procedure, is an important factor in protecting individual liberties. It must therefore be known as accurately as possible.*

- What are the rights of suspects during arrest/custody?
- During this period, can the suspect see a lawyer?
- Is it possible to have the presence of a lawyer during questioning by the police? Is it mandatory?
- If either of these guarantees exist, is it effective?

*The presence of a lawyer during the interrogation conducted by the police is the highest level of guarantee of individual liberties during the police phase. It is rare that it is prescribed by law and, if provided, it rarely is effective. It is therefore important to investigate what is the usual practice.*

- Have the police been subject of allegations of abuse during interrogations? Are confessions obtained under torture admitted as evidence by the judge at the trial?
- What are the equipment resources of the judicial police units in forensic science and technology? Is there a science and technology laboratory and how is it equipped and used?

- If this equipment exists, have the personnel received the technical training needed to use it?

*In the absence of forensic and technical methods of collecting physical evidence, the judicial police are more likely to seek a confession from the suspect; this may increase the risk of ill treatment during interrogation.*

- Do the judicial police personnel receive any training in criminal proceedings?
- Do they receive training in respect for human rights?

*It is common for training in one or the other of these materials to be lacking.*

## → Prisons

- number of prisons
- status and training of prison staff
- total number of prisoners (broken down by gender)
- Given the number of inmates, is the theoretical capacity of the institutions exceeded?
- Given the country's population, what is the number of prisoners per 100,000 inhabitants?

*This indicator measures the use of prison in the country. By comparison, the figure is just over 100 in France and 900 in the United States.*

- number, gender and age of prisoners in custody
- number, gender and age of convicted prisoners

*The proportion of people in custody in relation to the total number of inmates is an immediate indicator of the effectiveness of the judicial system: if this proportion is high (50% or more), the criminal justice system is failing in that it is unable to try the detainees with sufficient rapidity. A rate of defendants under 30% is generally considered satisfactory.*

- Is there a law on the maximum periods of preventive detention?
  - on periods during the investigation
  - on periods between indictment and the trial
- What are the average detention periods generally observed?
  - for offences
  - for crimes
- What is the longest period of preventive detention currently observed?
- Have the losses of records resulting in abnormal extensions of detention between indictment and trial been observed?
- Who controls the period of detention?
  - the Ministry of Justice?
  - the magistrate (judge, prosecutor)?
- How is this control performed?
  - periodic transmission of statements of registered detainees?
  - site visits?
- Does this control allow abnormal periods of preventive detention to be remedied?

*The existence of legislative provisions (usually in the Code of Criminal Procedure) limiting in all situations the period of preventive detention is a requirement of international law. The absence of such laws or the persistence of unlimited periods in certain situations is a very negative signal.*

*The effectiveness of the control of the periods should also be measured. The existence of pretrial detention for very long periods, especially between the indictment and trial, is an indicator of both a malfunctioning judicial system as well as inadequate monitoring of the periods.*

- What is the general state of prison buildings?
  - Are there separate sections for minors and for women?
  - Are there any special provisions to meet the needs of pregnant women or those accompanied by very young children?
- Food for detainees:
  - What is the daily budget devoted by the prison administration to feed a detainee?
  - Are families allowed to supplement the diet?
  - Is the feeding of detainees satisfactory or not?

- What is the health situation in prison?
  - Is there a nurse in each institution?
  - Medicine in the infirmary of the institution?
  - Are there doctors visits? Possibilities of hospitalization?
- Are NGOs involved in the institutions? Are they well accepted? What is their field of intervention?
- Are socio-economic reintegration activities organised for the detainees?
- Do the conditions in prison breed crime (violence, drug traffic, radicalization, etc.)? Are there provisions to prevent sexual harassment and rape in prison?
- Is there a text regulating the operation of prisons, and does it respect international standards?

*The very common low budgets of the prison administration results in catastrophic situations, particularly in terms of human rights. This should be evaluated as accurately as possible.*

The texts governing the organization of prisons has a very direct impact on daily functioning: the obligations of supervisors, family visits, disciplinary measures, etc. Often the text is very old and has become inadequate to the point that reformulation is essential.



## 3. STRATEGIES, METHODS AND INDICATORS

The analysis of the sector (Chapter 2) allows the gathering of the data needed to define an intervention strategy (goals and methods) that is most suited to the situation. This chapter presents on the one hand the understanding of the sector analysis that allows its implementation, its transformation into the identification of a possible intervention (given the status of the sector, the lessons and constraints that guide the interpretation, what can be considered?), and on the other the methods of intervention (which method seems best suited to achieving the objectives?) and, finally, the indicators that may accompany the process.

### 3.1 Strategic orientations

“Strategic orientations” mean the various elements of principle and/or drawn from experience that guide the identification of an intervention and its methods, according to the state of the sector.

#### 3.1.1 Consideration and evaluation of a difficult context

It often happens that the analysis leads to the description of a judicial system whose operation results in serious violations of universal principles such as:

- The independence of the judiciary where there is a close monitoring of the judiciary by the government: key appointments of judges who agree to abide by the instructions of the Executive (arrests and convictions of political opponents), where direct interventions by the government paralyze enforcement of court decisions to protect political interests, or when judges are corrupt;
- The rights of defence in the absence of procedural safeguards during the trial;
- The presumption of innocence, especially when the detention is not limited in time;
- Access to the judge when, in fact, excessive costs of the procedures prohibit an appeal before a judge and result in denial of justice;
- The prohibition of torture and degrading treatment.

One needs to assess the severity and systematic violations of human rights and the fundamental values of the EU, such as the abolition of the death penalty before deciding whether and how the Commission may consider possible support to the justice sector in the country concerned. This analysis affects not only the political dialogue, but will also have an impact particularly on the choice of the aid modality for a possible intervention. Indeed, in some contexts, it is not recommended to choose sector budget support, given the fungibility of funds, without taking special precautions. (See below Section 3.2).

#### 3.1.2 Ownership and sector policy dialogue

There are several types of policy dialogues. The one that the EU delegation undertakes before and during the intervention in a sector is the sector policy dialogue, where it exists, and that is designed ideally as a strategy defined by the government and translated into an action plan and a proposed budget. With regard to the justice sector, the section below describes the main facets. But the EU is also involved with most countries and regions in a more general political dialogue that may specifically cover either human rights, or a greater number of areas of cooperation, which usually also include governance, the judiciary and human rights, and where particular difficulties can be raised in respect thereof by the partner country or region, e.g. the individual situation of political opponents and defenders of human rights. In ACP countries, the Cotonou Agreement explicitly provides for this political dialogue under Article 8. Consequently, with respect to the judiciary and human rights, these two dialogues may both mutually support and complement one another, but as they do not take place on the same level or at the same pace and do not necessarily involve the same actors or have the same purpose, it is necessary to fully understand the differences to avoid that, conversely, one blocks the other.

In the context of the sector policy dialogue, if any, the exchange of views directed by the EU Delegation and the search for agreement on the respective commitments between the government on one hand and the EU and other donors on the other hand, are necessary for the establishment and support of reform and is therefore a necessary step regardless of the method adopted. If the sector dialogue does not exist, it should, wherever possible, be put in place (see below).

The support programme, whatever its form, will not reach its goal unless it is accompanied by precise appropriate commitments from the government. These may be, for example:

#### → Financially:

- additional funding in the context of the operating budgets to allow the use of equipment or buildings (computer consumables, operating costs generated by new buildings);
- special funding for the maintenance of new equipment (office, ...) and maintenance of the buildings;
- undertakings reflected in a budget for the recruitment and assignment of personnel for the operation of the new infrastructures;
- funds guaranteeing the daily feeding of detainees after the construction of new prison buildings.

These funds should be costed and programmed for a period significantly beyond that of the support programme in order to ensure its sustainability.

The dialogue on the sector policy to be implemented for this purpose falls primarily with the EU delegation. It should include, in order to be implemented appropriately, the prior carrying out by the government of an assessment of the financial charges involved in the development of the infrastructures and the purchase of equipment planned as part of the support programme.

Government commitments in the context of this dialogue should not only be financial, but should also focus on the substance of the reforms to be undertaken, especially such as:

- independence of the judiciary,
- respect for the principles of the rule of law,
- respect for human rights.

Finally, the government should commit to establishing a consultation framework involving all relevant stakeholders (especially any ministerial or judicial authorities involved in a reform process, whose coordination and common strategic views are sometimes delicate).

In this context, the support programme should be tailored to the priorities identified by the recipient and strengthen the pre-agreed actions to this effect. If the government has not developed a sector strategy or plan of action (see below), the support programme can help identify strategic priorities and develop the necessary interventions. The fact that the support programme is based on national initiatives is a guarantee of sustainability and ownership by the recipient.

### **3.1.3 The main lessons learned from projects/programmes funded by the EU in support of the justice sector**

The following lessons have been learned from evaluations and monitoring reports available on the projects/programmes financed by the EDF since 2000. They are broken down according to the phases of the projects and illustrated with case studies.

#### **→ Rigorous identification and formulation procedures**

- Joint Identifications

The involvement of the beneficiary as of the identification stage implies the benefit of national expertise both from the technical, anthropological, social and political points of view as well as enhanced ownership from the outset. For example, the UHAKI SAFI programme in the DRC has benefited from identification and formulation by a joint team of consultants from Belgium (one of the financial contributors to the programme), the EU and the recipient country itself.

#### **– Status and action plan:**

Over the past two decades, audits or reviews of the justice sector have been carried out in several countries (Tanzania, Cameroon, Madagascar, Mali, Senegal, Benin, Haiti, DRC, Republic of Congo, Rwanda, etc.), but not with the same thoroughness. A lack of political will has also been recorded in some cases when turning the action plans into investment plans or medium-term expenditure plans. However, the assessment of recurrent costs helps in strategic decision-making. For example, should one build courts or promote a mobile judiciary while waiting to secure its operating budgets?

In some countries such as Madagascar, DRC and CAR, the EC co-financed audits of the justice sector as a basis to the preparation of the sector policy and action plan on justice reform. These documents have helped to identify relevant initiatives by involving programme beneficiaries from the identification stage. Knowledge of the orientations chosen by the EU by the authorities has promoted ownership and involvement of recipients from the very beginning of these programmes.

#### **• Statistical surveys**

The surveys of household living conditions and access to services performed during the preparation of poverty reduction strategy papers (PRSP) allowed the assessment in some countries (e.g. DRC, Madagascar, etc.) of the perception of justice by its users. Due to the high cost of such surveys, ongoing monitoring is not really feasible.

Statistical data systems are more common. The data collected is used: i) as a reference when developing the logical frameworks of the programmes ii) to supply the results framework of the justice reform action plans, and iii) in the development of indicators, particularly in the context of budget support.

#### **Case of Benin: Support project for the integrated programme to strengthen the legal and judicial systems (2004-2009)**

In 2005, the Integrated System for the Production, Analysis and Management of Statistics (SIPAGES) was established within the Ministry of Justice to collect key information regarding the operation of the judicial system. Corrective measures were introduced in the latest Statistical Yearbook 2009 to suggest ways to establish links between the indicators and the strategic decisions in the sector (construction of new first instance courts, ratio between the number of magistrates to number of decisions reached by each magistrate, etc.)

- *Risk assessment*

The analysis of the ROM<sup>50</sup>, in general, shows that the expected results of projects and programmes in the justice sector are too ambitious and/or too large. The justice sector lies at the heart of sovereignty (unlike agriculture, health, education, etc.) where reforms, which often involve legislative changes and a possible impact on the overall judicial system or all of the criminal justice system, can only be considered gradually. Ignorance of the donors' procedures by aid beneficiaries and the resistance to change among actors in the justice sector are risk factors to be considered when proceeding with the identification.

The excessive number of planned activities, the difficulties in accessing certain zones (poor infrastructure, insecurity, etc.), the difficulties of coordination in an extensive sector where the stakeholders are many, or even the low absorption capacity of the recipients for support are often the cause for the poor results obtained.

### → Implementation

- *Matching the terms of reference of the project implementation units (PIU) and the expected results:*

When a PIU was established in the context of a programme in the justice sector, its terms of reference were not always in line with the expected results of the programmes. For example, there was a lack of thoroughness in the definition of the profiles of the technical experts as well as inaccuracies in the regularity of reporting requirements and their content. Concerning the choice of technical staff, they often lacked experience in managing EDF programmes, knowledge in selected areas of law (business law, criminal law, etc.) or capacity to work in a multicultural context.

- *Regular monitoring of multi-donor programmes managed by other agencies*

Contributions to programmes implemented by other agencies can only give conclusive results under certain conditions: i) proper planning with realistic objectives, particularly in governance programmes (case of the Chad programme where support for the justice sector was drowned among other objectives, namely, support to decentralization, public finance, civil status, etc.) ii) sufficient human resources, and iii) regular monitoring of the contributions of the EC by the Delegation. It is essential that the EC secures its presence in the steering committee and the technical programme monitoring group, thus allowing it to be closely involved in monitoring of the implementation of the programme.

### → Institutional relationship

Through regular consultations with the actors and CSOs active in the justice sector, the EC and the National Authorising Officers (NAO) need to have a political and technical dialogue with sectoral ministries and justice partners throughout the project cycle.

### **Case of Madagascar: A good example of consideration of the criminal justice "chain"**

The first project (2004-2008), entitled "Community support in the area of good governance and the rule of law" (€ 9.5M), covered the judiciary, prisons, police and customs. It focused on a series of construction and renovation works, training (judges, lawyers, forensic science policing, proximity policing, customs), grants to the civil society organisations for legal information for citizens and reintegration of minors, the purchase of equipment (many vehicles for the mobile hearings, for the forensic science policing and customs, as well as equipment for forensic science and technical policing).

Sustainability was sought through the support of major legislative reforms (preventive detention, the Council of the Magistracy, the prison sector) that were actually implemented. It was more difficult to obtain progress on other issues (legal information kiosks in the courts, withdrawn at the last minute by the Ministry when faced with the success of the operation).

The main difficulties were linked to a lack of preparation and capacity to address the complexity of the procedures, with 6 programme estimates, 7 renovation projects and a very large construction site (Supreme Court). A weak presence of CSOs in the justice sector diminished the impact of the actions. A mapping of CSOs, prior to project design would have been needed.

The interest of the programme has been in its very good coordination between the police, the judiciary and the prison administration, with long-term TA vested in the latter sector. This allowed a decisive action with respect to preventive detention: inventory of very long detention situations, with release of "forgotten" detainees, instructions followed by action from the Minister of Justice to expedite the adjudication of cases involving detainees leading to a sharp decrease in the proportion of preventive detainees, development and passage of a law limiting the duration of detention in all cases.

The integration of the customs sector, however, weighed down the programme.

50) ROM: Result Oriented Monitoring

The steering committees have proven their merits, provided that their composition is balanced. The provision of too many members can make them dysfunctional.

The technical committees, lightweight structures capable of meeting every month, have shown great effectiveness. They allow for periodic monitoring of the programme, resolution of specific problems (NAO, DCE, actors and recipients), advancement of actions and, if necessary, the alerting of the authorities of the need to initiate a dialogue at a political level.

### **Case of the Republic of Congo: Programme in Support of the Rule of Law (PAED)**

The technical committee of the PAED has enabled a climate of trust and dialogue between the PAED management unit, the Ministry of Justice, the National Authorising Officer of the EDF and the EC Delegation. Monthly meetings of the Technical Committee have facilitated the implementation of activities, while compensating for the shortcomings of the Steering Committee that was dysfunctional because of the large number of members. Halfway through, the Steering Committee was the subject of a reorganization.

In countries that have adopted a sector policy and an action plan for justice reform, there was better donor coordination right from the start. However, it is regrettable that these coordinating committees are rarely “institutionalized” within the Ministries of Justice or within institutions guaranteeing the power of the judiciary.

### **Case of the DRC: the Joint Committee on Justice (JCJ)**

Following the multi-donor audit of the justice sector in 2004, the Ministry of Justice and the donors established a Joint Committee on Justice, co-chaired by the Minister of Justice and the Head of the EU Delegation. The JCJ was financed successively by the UNDP/DFID, Sweden and the EC through the Governance Support Programme (GSP). It has to its credit the development of the action plan on the reform of the justice sector in 2008, participation in planning missions of the donors and – as necessary – project monitoring. Since 2005, the JCJ meets once a month, but its current mission must eventually be revised so as to enable the Directorate of study and planning of the Ministry of Justice and the future planning unit of the Superior Council of Magistracy to allow them to fully play their respective roles.

### **→ Complementarity of activities between the components and with the actions of other donors**

The evaluations of EC programmes in support of justice sector show that:

- It is better to reduce the number of components. A too large a number of components or thematic strands requires considerable effort and the results are more difficult to achieve. If the number of components must remain high, then priority should be given to their complementarity and synergy.
- Actors in the justice sector are more willing to change their work practices and behaviour when the programmes provide a variety of activities ranging from strengthening capacity to improving the operating conditions (infrastructure, equipment supply, etc.), through the establishment of management systems.
- Good coordination between the programmes of the various donors may prove to be the key to the success of the programme.

### **Case of the DRC: The Governance Support Programme (GSP)**

The justice component of the GSP (EU funded) and the U.S. support programme for the judiciary pursue the same goals. Due to the vastness and extent of actions to strengthen the judiciary and improve judicial governance, the teams from both programmes have worked closely together, including the establishment of the Superior Council of Magistracy and the training of magistrates.

### **→ The assessment and the monitoring of programmes**

Mid-term assessments are very useful because one can take corrective actions quickly. For example, the number of selected geographic zones, activities or method of implementation can be designed to meet the needs of beneficiaries.

### **Case of Malawi: Programme promoting the rule of law and strengthening of justice**

The regular monitoring of the programme promoting the rule of law and strengthening of the justice system in Malawi allowed:

- the prioritizing of activities and their monitoring while taking into account the indicators imposed by the EDF procedures;
- long-term planning (January 1998 to December 2005) through successive funding in the context of various EDF;
- the realignment of activities by the beneficiaries who proposed: i) planning and periodic monitoring of training, ii) better synergy of training between the various programme components, and iii) building on lessons learned in the form of a permanent structure.



### 3.1.4 Recommendations on the method of preparation and content of the support

#### → Involve the national stakeholders in defining the projects objectives

The precise definition of the objectives of a policy or programme must take place after a series of consultations with stakeholders in the justice sector as mentioned in Chapter 1, among which are: the Executive (government, especially the Ministry of Justice), magistrates, clerks and court officials (and their trade unions or other organizations if any), lawyers, representatives of the CSOs involved in the justice sector, economic actors (Chamber of Commerce). Thematic workshops should bring together these stakeholders in order to take stock of what exists and to define the objectives in the context of sectoral policy.

#### → Clarify the roles of the different actors.

For example: government (justice policy, provision of human and budgetary resources), magistrates and judicial staff (involvement in strengthening capacity, integrity, implementation of new methods, etc.), lawyers (better training, better geographical coverage, improved legal aid, etc.), CSOs (follow-up assessment of trials, involvement in improving access to justice, etc.).

#### → Avoid “gift projects”.

By this is meant the implementation of turnkey infrastructures that the recipient country receives passively without having anticipated the measures required by these new facilities. This behaviour can lead to severe failures<sup>51</sup>.

#### → Do not limit the support only to constructions

The EU Delegations should resist the sometimes strong temptation to limit their support projects to the construction of buildings (courthouse, prison buildings, police stations) on the ground that these projects are easy to manage from a technical point of view and allow guaranteed and relatively fast disbursements. The possible EC support with respect to infrastructure and equipment is a very useful argument in discussions with the authorities on the reforms needed to ensure a better functioning justice system, but it should not be an aim in itself and cannot be accepted without a return in terms of reform.

#### → Use programmes focused on key sub-sectors when available

Given the situation of each country, a support programme for the justice sector may not always concern the whole sector but only cover part of it. Thus, some programmes support a system of traditional justice or only, for example, support of commercial justice and administrative justice<sup>52</sup>.

#### → Know the activity of the justice sector: the statistical tool

The principles of good governance applied in the justice sector, in principle, have a corollary of requiring the recipient country to obtain the resources necessary to know and analyze the activity of this sector. A first priority of a programme to support the justice sector could therefore consist in the establishment of a reliable statistical tool, even if it is rudimentary and operated manually at first.

Court statistics play a key role in analyzing the activities of the judiciary, allowing informed and accurate decisions. These decisions include, for example, the functioning of the judicial system (duration of handling of a case, backlog of cases, human resources), its organization or reorganization (the creation of specialized courts or the removal of certain courts), the penal policy of the state, but also the analysis and information with respect to the costs of the system.

The basic data (inventory at the beginning of the period, new cases, cases completed, inventory at the end of the period) should be collected then collated and synthesized by the central administration having a statistical service.

If the installation of judicial computer facilities is planned, software allowing each jurisdiction to manage the data and edit decisions should include a module allowing automatic extraction of data for statistical reporting.

Even before the data processing stage, manually handled statistics allow one to determine an approximation of the essential fact represented by the average duration of a case in a court (see box number 1).

51) See the REJUSCO programme in the DRC: prison construction without the Government having provided for its support measures, especially measures to improve the diet of prisoners led, in 2009, to movements of revolt of prisoners and the destruction of buildings.

52) Cameroon (2009)

### Evaluate the average duration of a case

The average duration of each type of case in a given court is an indicator of particular importance as this information helps identifying problems in the courts and gives the Ministry of Justice (or the Chief Justice in common law countries) the possibility of adjusting its budgetary policy and its management of human resources.

Finding the duration of a case is easily obtained by extracting the data contained in a computer system for managing court records. All the softwares used in courts include, or should include, a statistics module that allows, during the trial of the case, one to know to the nearest day the time elapsed since the reception of the case file.

Such a calculation is impossible in a court run manually, because each case judged would require a manual calculation of the duration of the procedure, a recording of this figure in a specific register and a totalling at the end of the year.

This indicator may however be approximated by calculating the “rate of flow of the inventory” that is easy to do by dividing the number of cases in the inventory at the end of the period by the number of cases completed during the period. This indicator allows the determination of the handling capacity of the court.

Thus, if for example two jurisdictions have an identical inventory of 10,000 cases at the end of the year but the first deals with 20,000 cases each year while the second deals with 5000, the calculation shows that the rate of flow of the inventory in the first court is six months ( $10,000/20,000 = 0.5$ ) while it is two years in the second ( $10,000/5000 = 2$ )

The need for reliable statistical instruments even concerns the prison sector. It is essential to know at regular and frequent intervals (monthly or quarterly at least) the number, gender and age of the detainees, the length of detention of each, the type of imprisonment applied and the ratio of those on remand to convicted persons. The transmission of this information to authorities responsible for the monitoring of the detention (local court, central administration) allows detection of abnormal or very long situations or allows the implementation of parole measures.

The activity of the police must also be known. Among the key indicators here, are the number of complaints, the number of offences without complaint (according to a survey, particularly for flagrant crimes), the number of people arrested and of those brought to trial. The comparison of these data will help to provide the clear-up rate, which measures the effectiveness of a police service.

#### 3.1.5 The importance of mainstreaming gender into justice sector reform

The integration of gender issues in the reform of the justice sector can only make the reform more thorough, robust and better suited to the needs of the different users. The gender issue is crucially important for any reform of the justice sector that aspires to meet the standards with respect to human rights, good governance and democracy.

To ensure that gender issues are appropriately integrated and form part of the stages of project preparation (dialogue, problem analysis, stakeholder analysis and target groups, definition of objectives and activities as well as the monitoring indicators), each project must have attached a gender analysis grid.

An example of this grid as applied to a justice sector project is proposed in Annex 5.

Gender is important in view of the reform of the justice sector to:

- ensure that states meet their responsibilities in accordance with international law
- address the needs of all segments of the community with respect to justice
- build confidence in the justice sector
- ensure a representative and legitimate justice sector
- reform discriminatory laws and promote the protection of human rights
- put an end to impunity for gender-based violence
- ensure equal access to justice
- strengthen monitoring and supervision of the justice sector

*(Extract: Place of Gender in the reform of the justice sector, Shelby Quast)*



### → Strengthen judiciary and prison inspection

In ACP countries, the statement is frequently made of the existence of corruption within the judiciary. More generally, the performance of the latter is often weak without it being possible to readily determine the proportion of individual failures compared to those of inadequate types of organization. Corruption may similarly operate in prisons where it is sometimes organized by staff with the support of inmates turned into auxiliaries.

While this situation obviously calls for investigations carried out with determination, one is at the same time obliged to note the extreme weakness of the inspection services, often marginalized and considered in terms of assignments as a dead end and for personnel noted for incompetence. Inspection services can play an important role in the improvement and harmonization of the current practices of courts, and can help to strengthen the independence of the judiciary, including:

- monitoring of the overall functioning of the courts in terms of management and functioning;
- identification of dysfunctions and proposal of solutions;
- suggestion of changes adapted to improve the performance of courts and judicial practice;
- carrying out investigations or disciplinary actions against judges in cases of suspected non-compliant behaviour, or violation of rules of their code of ethics;
- analysis of the causes of breaches of the independence and impartiality of judges and the formulation of measures to combat these.

In terms of detention, inspection plays a key role in improving the treatment of prisoners and the introduction of modern methods of prison management.

One of the strategic priorities in the fight against corruption and improvement of the functioning of the judiciary is therefore the strengthening of judicial and prison inspection services.

## 3.2 The modalities of EC support applied to the justice sector

After the European Consensus on Development<sup>53</sup> stated the principle of preference for the use of budget support where circumstances permit, more recent programmes in the ACP countries have been implemented via sector budget support in the justice sector as well as the security sector, also including the indicators related to the functioning of justice (e.g. South Africa e-Justice 2000, Jamaica Security Sector Reform Programme 2008, South Africa Access to Justice 2008, Rwanda Sector Budget Support for the Justice Reconciliation Law and Order Sector 2009). More rarely, it can also be general budget support including indicators related to the justice sector.

### 3.2.1 General budget support that includes indicators for the justice sector

The general budget support (GBS) is designed to support the Poverty Reduction Strategy in the country concerned, i.e. its development strategy as a whole and not a particular sector. In this context, if this strategy also provides for reforms in the justice sector, without necessarily having a specific policy or strategy for this sector, it may be agreed between the EC and the government concerned to include indicators to measure the progress made by the partner country in the justice sector according to the cooperation priorities agreed between the national authorities and the EC and the place for strengthening of the judiciary in the governance dialogue<sup>54</sup>. The political dialogue that takes place in this context with the government will not logically be a sectoral policy dialogue, but must take place in the forums covering the GBS. If developments related to the indicators included in GBS are discussed within this framework, one must however ensure that on the part of both the EC and the government, there is enough expertise to be able to discuss the content of the justice reforms.

#### GBS with justice indicators: Haiti (2009)

The programme is entitled "Programme of general budget support for the national strategy for growth and reduction of poverty". It involves a total of € 25 million, supplemented by € 2 million for technical support and review and audit missions. It covers fiscal years 2009-2011. The financing agreement was preceded by the signing of a "Framework for Partnership" between the government and the donors offering budget support, designed as a tool for enhanced coordination. The agreement provides for three annual instalments of 7 million for the first year and € 6 million for the two following years, as well as two variable instalments of € 3 million for each of the second and third years. A joint annual review is scheduled six months after each disbursement.

For variable instalments, the specific indicators are designed to measure progress related to the management of public finances and strengthening the judiciary. This last category of indicators represents 50% for the disbursement of the last variable instalment.

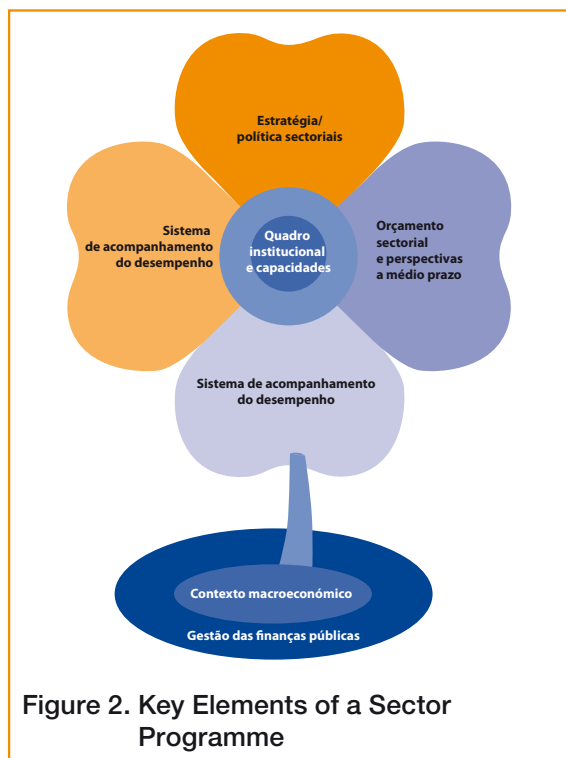
The indicators under this heading are the appointment of members of the Higher Judicial Council, the appointment of the board of directors of the judicial academy and the posting of all legal and regulatory texts and statutory acts of companies. Thus, for the action concerning the appointment of members of the Higher Judicial Council, the source of verification is the appointment of members in the Haitian Monitor. The reasons set down in detail state that the Council will aim to ensure the management and administration of the courts and ensure the independence of the judiciary. The criteria are divided into three grades of 1, 0.5 and 0 according to the date of the appointment of members. The risk is classified as average because of the resistance induced by the emergence of this new institutional actor.

53) Paragraphs 26 and 113, [http://ec.europa.eu/development/icenter/repository/eu\\_consensus\\_en.pdf](http://ec.europa.eu/development/icenter/repository/eu_consensus_en.pdf)

54) See governance action plans of the 10<sup>th</sup> EDF

### 3.2.2 Support for the justice sector

The methods of support for sectoral programmes were defined by the Commission in its Guidelines No. 2 “Support for sectoral programmes, covering the three financing methods: sectoral budget support, pooled funds and specific procedures of the European Commission”<sup>55</sup>.



**Figure 2. Key Elements of a Sector Programme**

#### → The key elements of a sector policy and strategy

- *Strategy*

First of the components, the first necessary petal, a policy of reform of the justice sector reform provides a framework encompassing sector stakeholders and sets out priorities for the future development of the sector as a whole, as well as intermediate and realistic steps to achieving them.

The policy is backed up by a strategy that must include a vision statement for the justice sector and strategic objectives related to the main pillars of reform (e.g. the independence and accountability of the justice system, access to justice, the enforcement of criminal sanctions), and the linking of the medium-term action plans developed for each pillar of the reform. The strategy may also mention the support programmes needed to achieve the objectives and serve as the reference point for donors.

It must necessarily:

- set a timetable for achieving the expected results,
- identify the institutions responsible for the implementation of actions,
- provide a framework for medium-term expenditure related to the budget,
- develop key indicators for assessing results.

The justice sector budget should integrate, for the duration of the strategic plan, the government's commitments agreed in the context of the sector policy dialogue and provide for the recruitment of the staff and operating funds needed.

In the justice sector, the following objectives could usefully comprise a strategy. Their hierarchy, their linking in time and space depend on specific situations, but one may say that in the short to medium term, a justice sector strategy should include the dimensions.

- *The institutional framework*

The institutional framework is of particular importance. Depending on the current situation determined, the establishment or strengthening of an institutional framework to guarantee respect for the rule of law (especially judicial independence) will be one of the major objectives of the support. It will also strengthen the capacities of different actors (justice professionals but also CSOs) through training that corresponds to one of the main objectives of measures in support of the justice sector.

When changing the legislative framework is accepted as constituting one of the objectives of the justice strategic plan, the definition of the related indicators or criteria for disbursements is a delicate matter (see below sub-section 3.3.3).

- *Sector coordination*

The justice sector gives rise to an often large number of support actions from various donors. This circumstance makes it even more necessary to have a precise coordination framework that must be determined both for the coordination of sectoral stakeholders as well as coordination between donors.

A coordination committee bringing together all stakeholders (ministries, professional organizations, CSOs, ...) should be established to determine and set strategic orientations on a regular basis. The sometimes formal meetings of such a body should lead to setting up smaller technical consultative committees depending on the nature of the sub-sectoral themes to be addressed.

One of the specificities of the justice sector is the distribution among different ministries and agencies, the responsibility for managing the sector, each institution being responsible for developing and implementing the budget in its area of responsibility. This fragmentation requires the establishment of efficient mechanisms of coordination within the sector. As explained above, in many ACP countries, the planning and assessment of financial and budgetary support for justice sector actions and law are weak and thus close coordination must be established between these institutions and the Ministry of Finance.

- *Sector budget*

The preparation of a sector budget and its medium-term perspective is another key area of assessment of a sectoral programme. For an overview of general aspects related to this issue, it is useful to refer to section 5.2. Guidelines for support of sectoral programmes by the European Commission.

55) EuropeAid, Tools and Methods Series, Guidelines No. 2, Sectoral Programme Support, July 2008

**1 – Institutional strengthening of the rule of law**

- independence of the judiciary (appointments and assignments without political interference, the judges' careers)
- fight against political interference in the imposition and enforcement of judgments

**2 – Knowledge of the activity of the justice sector**

- Establishment of a statistical service (framework for data collection in the courts, data storage, use by a statistical department at the Ministry of Justice, including dissemination to the courts so that they receive a meaningful return)

**3 – Strengthening of the capacity of justice sector actors**

- consideration of the establishment of schools for the training of magistrates, clerks, lawyers, prison officers, police
- organization for continuing education by professional organizations or in schools

**4 – Ethics**

- Code of Conduct
- strengthening inspection services (assignment of leading human resources, strengthening of material resources, detailed annual functioning inspection plan, missions to investigate complaints or reports)
- consistent implementation of disciplinary action in light of established facts
- communication activities on the outcome of the disciplinary action

**5 – Improvement of methods**

- audit and assessment of the functioning of the courts (case management, referrals to the hearing, schedule management)
- consideration of the improvement of methods (development of standards of service<sup>56</sup>)

**6 – Access to justice**

- improving information for citizens, including social groups who have difficulties in accessing justice (minorities, people living in rural areas, women, ...)
- development of mobile courts
- improvement of legal aid

**7 – Alternative dispute resolution approaches**

- evaluation of existing approaches
- process development

**8 – Legislative reform, revision of the texts, codification**

- assessing the existing situation
- legislative reform or re-writing texts especially implying harmonization with international standards

**9 – Dissemination of documentation and case law for professionals****10 – Prison sector**

- establishment of a statistical service
- revision of the texts on the functioning of institutions
- institutional management
- infrastructure (renovation and construction of buildings)
- feeding prisoners (including seeking the opportunity to create or develop prison farms)
- prison health (increased number of permanent nurses, procurement of basic medicines, construction of sanitary facilities)
- preventive detention (the possible mechanisms of control, detection of abnormal situations, the law limiting the duration of preventive detention, measures to expedite the trial of preventive detainees)
- rehabilitation of prisoners (creation of a body of prison educators, establishment or improvement of parole, preparation for release)

**11 – Juvenile justice**

- juveniles at risk (educational support facility, institutions, associations)
- juvenile offenders (juvenile justice, schools, separate facilities for juvenile offenders, reintegration)

**12 – Legal advice and rights of defence**

- geographical distribution of lawyers (support establishment outside the capital)
- simplification of the granting of legal aid

<sup>56</sup>) Standards or recommendations regarding the activity of judges (e.g. minimum number of judgments per month)

Too tenuous a link between the poverty reduction strategy, the general budget and the justice sector budget often has the direct consequence of the weakness of the justice sector itself. Indeed, stakeholders only rarely succeed in demonstrating the contribution of the justice sector to the poverty reduction strategy as the resources allocated by the state to this sector remain generally low. When the Medium-Term Expenditure Framework (MTEF) is related to a sectoral strategy, as such, it should include a statement of fiscal policy that should show the links between the budget, the MTEF and the sectoral and national level strategies. In order to strengthen the links between the justice sector budget, the national budget and the poverty reduction strategy, the Ministry of Justice (or Chief Justice) should better prepare the MTEF and its sub-sectors, develop a medium-to-long term strategy and strengthen its capacity to work by means of performance indicators related to the action plans and the poverty reduction strategy. It is also recommended that a link be created between monitoring of the poverty reduction strategy and the contribution of the justice reform to this strategy by involving representatives of the Ministry of Justice, the Superior Council of Magistracy, the tribunals, etc. in sectoral and thematic commissions implemented when monitoring the performance of the poverty reduction strategy.

It should be remembered that the justice sector budget should include for the duration of the strategic plan, the government's commitments agreed in the context of the political dialogue and provide for the recruitment of staff and the operating funds needed.

- *Collection of financial data and expenditure circuits*

In this regard, it is important to remember that the establishment of a system of statistical data collection, as well as its storage, must especially be used as a basis for the development of a budget in line with the needs of different sectoral institutions and the operational needs of the courts, and help to allocate resources rationally. The availability of statistics to the Ministry of Justice, courts and prisons in order to develop performance indicators related to their budget will also provide them with an opportunity to present a more credible case to the Ministry of Finance to defend their budgetary needs.

It is also worth recalling here the importance of establishing a transparent and secure circuit for the expenditure and income of the justice sector. This will enable better financial management of the administration of the justice sector and will facilitate the development of a transparent and reliable budget.

In preparing the budget and the medium-term perspective, one needs to establish a link between the costs or savings generated by certain laws, procedures and facilities in order to assess their impact on public finances and the stakeholders in general. For example,

on computerization of the management systems of the courts, it is necessary to specify in the state budget the costs of hardware maintenance and initial training and continuing development of personnel in the judiciary after the conclusion of the support programme. Another example concerns the development of a new criminal law establishing community services as an alternative penalty to imprisonment. Even if such a mechanism requires the recruitment of probation officers, such laws can result in savings for the department in charge of the prison, as well as revenue for the state. In some cases, a mini regulatory impact analysis (RIA) may be useful as a tool that submits the draft normative acts to an analysis of their economic consequences.

### **Case of South Africa: e-Justice**

The programme “*Support for the transformation of the justice system: the e-Justice programme*” (sectoral budget support) was implemented between 2000 and 2007 with a budget of € 25 million. It enabled the interconnection of the courts of the country, computerization of the justice services managing the funds for minors, for the Ministry and for disadvantaged women, the information management and assessment of the operation and criminal proceedings. Actions related to communications, training, questions about gender and changing management practices were also implemented.

This large and ambitious programme enabled a significant improvement in the transparency and reliability of the justice sector. However, it resulted in a major mid-term adjustment after finding a series of shortcomings in the conduct and management of the programme.

The assessors noted that a weakness in the checking of the results during implementation as well as overconfidence with respect to software developers and hardware vendors led to serious difficulties during the transition from paper management to computer management.

The mid-term review found an unsatisfactory situation for the disbursement of variable instalments and began a major reframing by providing a series of strict conditions for the release of the last two instalments. Thus, for example, there was closer monitoring of the steering committee through approval of its annual report and action plan, the reconstitution of the governance of the e-justice programme structure, the approval of a set of performance indicators and even technical assistance for one of the activities that was causing a problem or the approval of the audit of each of the two preceding financial years.

In assessing the key area related to the existence of a credible sectoral budget and its medium-term perspective to determine whether a viable sector programme is in place, it is recommended that one use external experts with the required skills. The profile requires financial competence in budget analysis and also a good understanding of the justice sector.

In the absence of a credible sectoral budget and possible sectoral budget support at a later stage, a “re-thinking project”<sup>57</sup> could consider strengthening the capacities of the stakeholders concerned, both at the Ministry of Finance as well as the Ministry of Justice, in order to strengthen the link between the budgetary financial aspects corresponding to the support actions for the justice sector and law, and that includes the development of appropriate performance indicators.

- *Monitoring performance*

The performance monitoring system, another key element of sectoral support, is analysed in section 3.3.

### 3.2.3 The three methods for financing a sector programme

#### → Sector budget support

Sectoral budget support is the preferred method of financing by the European Commission where eligibility criteria are met and the recipient country requests this.

The most important of these criteria is the quality of the policy and sectoral strategy developed by the government. For the justice sector, often subject to strong influence by

the executive that wishes to monitor the judicial production, it is important to verify the government’s commitment in the sectoral policy, checking especially whether the sectoral policy document has a standard character with commitments that may be purely cosmetic, or whether it reflects a real commitment to developing the justice sector strongly in order to achieve a genuine rule of law.

The quality of the process that led to its development, especially with respect to the actors that were involved or consulted on this point, will be an important indicator in this regard.

Another important criterion is the quality of the management of the public finances. For the justice sector, it is important to verify that the budget is complete and is applied in its entirety. The fact, for example, that in previous years appropriations have been frozen and then cancelled would not guarantee the implementation of a sectoral policy.

The various eligibility criteria only being fulfilled infrequently, the sectoral budget approach remains in the minority for now in justice sector support implemented by the Commission in ACP countries. Thus, of the 65 programmes implemented or decided between 2000 to 2009, 4 were in the form of sectoral budget support: South Africa (e-Justice, 2000 and 2004), Jamaica (2008), again South Africa (Access to Justice, 2008) and Rwanda (2009).

The programme of security system reform of 33M € implemented in Jamaica, aims to support the national security strategy adopted by the government in 2007, the main objectives of which are to strengthen the justice

### Complex co-financing

#### Democratic Republic of Congo, REJUSCO programme (2006)

The programme of restoration of justice in the east of the Democratic Republic of Congo (REJUSCO) follows a series of interventions by the European Commission and other donors since 2002 aimed at strengthening the justice sector in the RDC, particularly in the eastern provinces. The joint funding by the EC Programme (€ 7.9 million) and the co-financing of the Kingdom of Belgium (€ 3.7 million), the Netherlands (€ 1.1 million) and the United Kingdom (€ 2.9 million) has allowed the doubling of the budget for the programme and the undertaking of activities that could not be financed with resources of the EC, such as those related to military justice and courts, thus creating an added value, especially when one knows the harm caused by the militia and soldiers as well as the crimes committed with weapons in the east of the country.

However, despite its relevance and the quality of its interventions, the programme that had three specific objectives, namely: i) contribute to strengthening the functional capacities of the places of justice in the eastern provinces (North and South Kivu and the Ituri district), ii) contribute to strengthening the functioning of justice in these three locations in order to fight against impunity and to ensure fair trials, and iii) increase public confidence in the eastern provinces of its justice system by protecting (monitoring of the trials and detention sites) and educating the population about their rights and duties, could not complete the entire programme of activities because of its complexity, the multiplicity of procedures and the difficult environment that made it difficult to pursue the sectoral policy dialogue. Some of the difficulties encountered in assembling the financing should not recur following the amendment of the financial rules of the EU.

The mid-term review noted negative consequences in terms of institutional resistance, involvement of the Congolese government and reporting to it, giving the impression that REJUSCO is an initiative of donors.

57) In reference to Section 4.1.1 (“Rethinking projects”) Guidelines No. 2 (Supporting sector programmes) one needs to keep in mind the broader objectives of the sector approach even in cases where a project approach must be adopted.

58) Cf Guidance, § 4 : “When to consider delegated cooperation”

59) Cf Guidance, § 7 “The Commission delegates authority to other donors”



system and the rule of law, the reduction of violent and organized crime, as well as the eradication of corruption in the public sector. This programme therefore also has a component related to the justice sector. At the time of disbursement of the first fixed instalment and the first variable instalment, there was often found the purely formal completion of several requirements, including the need to supplement the information on each of the points in question. This same lack of information also led to several specific conditions specified for the disbursement of the first variable instalment to be considered as not being fulfilled, and clearly highlighted the difficulty with respect to the condition consistent with the registration of a bill. In fact, while in purely formal terms, the requirement for filing a bill for the creation of an anti-corruption prosecutor was completed, it became apparent that the chosen configuration (prosecutor's office established in the form of a parliamentary committee) infringed the principle of separation of powers and therefore did not comply with the principles of the rule of law. All the problems noted strongly emphasized the need for the EU Delegation to ensure close monitoring of sectoral reforms and to maintain an ongoing dialogue with the government throughout the implementation of a BSA, as well as the definition not only of indicators but also the sources of verification, and then not to be content with their superficial analysis.

#### → The joint funds and cofinancing partners

The new rules and financial instruments of the European Commission, within both the general budget and the 10th EDF, now encourage the Delegations of the EU to implement more extensive programmes in line with the policy of recipient country, implying partnership with other donors in the interest of greater aid effectiveness.

The fund is intended to receive contributions from the Commission and other donors, and, if necessary, from the government in order to fund activities defined by mutual agreement.

The conditions of implementation for joint co-financing are precisely specified<sup>60</sup>. Effectively they discourage this delegated cooperation in the absence of a benefit for the EU in terms of political visibility and enhancing the effectiveness of the aid.

Depending on circumstances, and the results of the analysis of the context, the EC may be the manager of the co-financed programme fund. Other donors then sign a transfer agreement with the EC. On the other hand, the Commission may in the context this time of a delegation agreement, entrust to a Member State or another donor country the responsibility for managing the co-financed programme. The choice of this approach is subject to specific rules for assessment and procedure<sup>60</sup>.

The joint funding may also be managed by the recipient state, though this requires the prior validation of its financial management system where it intends to use its own

procedures ("five pillars audit"). Finally, the EC may sign contribution agreements with international organizations.

#### **Co-financing with transfer agreement:**

##### **Democratic Republic of Congo, Uhaki Safi programme**

This programme, under consideration, would seek several objectives: i) improving the administrative and financial management and human resources management in the justice sector (courts, prison service, police), ii) identification of professional skill deficits, continuing education programmes, reactivation of internal checks; iii) reconciliation of justice and the individual through renovation and construction of judicial premises and prisons, mobile court hearings, awareness campaign with respect to the new district courts, legal clinics, development of legal assistance; iv) extension and strengthening of the programme "Gender and the fight against sexual violence"; v) establishment of a regulatory system of land conflicts in two areas along with NGOs, customary power, the administration and the judiciary. Co-financing is envisaged with the EC (€ 10m), Sweden (€ 6 million) and Belgium (€ 2 million) in the context of delegated cooperation. A single financing agreement would be signed for all donors, with the EC as the leader. Each donor will sign a transfer agreement to the EC for its overall contribution.

#### → The use of specific procedures of the Commission

When the sectoral programme has reached a certain level of maturity, but sector budget support is excluded and the joint fund is also rejected, the use of specific procedures of the Commission for projects should be considered for procurement and granting of subsidies.

As a temporary measure, financing preparatory activities for the implementation of sectoral budget support or to support the strengthening of capacity through a technical assistance process may be possible.

It may be the same when the criteria for sector budget support are not fulfilled or when the government is not interested.

This funding modality must enrol in the sectoral programme management system developed by the government and form a part of it, and should include objectives focused on ownership, harmonization and coherence that are reflected in the implementation and monitoring of this programme.

60) In reference to Section 4.1.1 ("re-thinking projects") Guidelines No. 2 (Supporting sector programmes), one should keep in mind the broader objectives of the sectoral approach even in cases where the project approach is adopted.



### 3.2.4 In the absence of a sectoral strategy: support in the form of a “re-thinking project”<sup>60</sup>

For various reasons, in some countries there may not be any political or sectoral strategy for the justice sector.

It is important in these circumstances that the EU delegations, through the political dialogue they conduct with the authorities of the country, seek to persuade the latter of the crucial importance for the country’s development and poverty reduction of having a functioning justice sector in line with the principles of the rule of law, with the goal of convincing the government to engage in developing a sectoral strategy for justice.

The lack of a sectoral strategy in the country should not however reduce ambitions and lead to the selection of only the traditional “project approach”. It is important, wherever possible, to adopt a “rethought project” approach that seeks to help the government, where feasible, to move towards a sectoral programme.

In this context, the re-thinking project may set several goals:

- *Advice and expert opinion: developing a sectoral strategy*

The purpose of the support will thus be first of all a general presentation of the sectoral approach to government in order to highlight the expected advantages and benefits. It will be accompanied, if necessary, by consideration of the strategy documents produced by the Ministry of Justice and other key stakeholders with comments that will allow the needed improvements to be seen in anticipation of a future sectoral strategy.

- *Strengthening of institutional capacities*

The frequent weakness of the central justice administration may require an accurate assessment of the Ministry’s structure and its allocation processes. If the assessment, which may be conducted within the context of a short-term expert audit, confirms the diagnosis and recommends significant changes, it is essential to convince the authorities to implement them insofar as the development and then the implementation of the sectoral policy is primarily the responsibility of this Ministry. In this sense, the structure of the coordination of the justice sector is the second key element for the preparation of a sectoral approach.

The establishment or strengthening of a reliable statistical system, even if limited to basic data, must be a priority, as noted above. It makes sense because no real sectoral policy can be developed in the absence of knowledge of the results of the activity of the units in this sector.

- *Strengthening CSO capacities*

The weakness of CSOs involved in the justice sector will be discussed below. It is therefore important that their abilities be strengthened once their identification has been made.

The participation of CSOs in the development of the sectoral strategy must be sought through consultation mechanisms following the basic principles and rules of good practices already identified<sup>61</sup>.

- *Infrastructures and equipment*

If the approach is in the context of a government request allowing ownership, with an anticipated budget of operating costs and placement of personnel resulting from these investments, any construction and renovations of buildings and purchases of equipment may be included in the revised project.

### 3.2.5 Civil society, an important player in the support for justice

#### → Added value through the involvement of civil society organizations in support of justice

Civil society organizations have an important role to play in the administration of justice. Sectoral reforms as such should include them as actors in the reform.

In this sector as in others, in fact, CSOs traditionally perform two functions. The “*supply of services*” (free legal advice and assistance to the parties at the mobile court hearings, information, food, training, etc.) in which they sometimes supplement, purely and simply, the provision of the public service when the state is unable to provide it. The other type of function is focused around activities of “*advocacy or monitoring*” (e.g. organize advocacy for the amendment of legislation in parliament, mobilize stakeholders with respect to the defence of a right or category of persons, comment on trials by publishing reports, monitor conditions of detention in prisons, etc.).

In the ACP countries, there are CSOs that perform these two functions. However, national CSOs in this sector are often very few and are sometimes frowned upon by those in power and even have to confront the defence of the privileges of professional bodies. For example, in many countries, the bars have limited the role of paralegals or legal clinics to only providing information as lawyers refuse to share their monopoly with others. But by refusing to share tasks in a regulated manner, they do not provide themselves with the means to control quality, often to the detriment of poorer individuals, women, children, and remote communities that can only call on paralegals.

#### → Mapping of civil society actors

During the identification and formulation of a programme to support the reform of the justice sector, one should pay particular attention to the identification of these actors and the mapping of their role (provision of services vs. advocacy), their mission and their strategic objectives, their relationships with the government and the strengths and weaknesses they demonstrate in the implementation of this mission. A clear vision of how they can be involved in a reform process and contribute to it is an important prerequisite for the integration of their role in a programme.

61) Guideline No. 2, § 3.6 “Role of different stakeholders”

The mapping of CSOs sometimes performed in ACP countries frequently reveals a swarm of associations, most of which were formed to obtain a grant for a project and have no actual existence. In the justice sector, CSOs whose activities are focused on legal information, legal assistance, monitoring conditions of detention, trial monitoring and reintegration of juveniles are often weak and poorly structured.

In identifying the programme, it is essential to apply part of the action to the identification of CSOs that are active and effective in the sector. From the beginning of the support programme, or ideally before it, it would be useful to strengthen their capacities considerably, especially by providing required training to enable them to participate meaningfully in a sectoral dialogue and coordination, and eventually in implementation of the reform support programme (e.g. through participation in a call for proposals).

→ **Ensure the presence of civil society organizations in the sectoral coordination and the steering of the programme**

The issue of representation of NSAs in the mechanisms of coordination and management is often a sensitive issue for a government and requires the establishment of a dialogue so that the proposed institutional arrangement is well understood and accepted.

In the development of sectoral policy, the CSOs identified should be involved in the workshops in order to define the objectives and implementation of the sectoral programme. They should then have a meaningful position within the actual steering committee and within the technical committees that will be put in place. The CSOs thus selected should also include international NGOs active in the justice sector in the country.

**Case of Cameroon: Better conditions of detention and rights of defence**

Phases I and II of the PACDET programme were intended to improve the conditions of detention of prisoners and reducing the time of detention. Among the activities carried out, the bar associations have signed agreements with the PACDET to provide counsel for the vulnerable people. Several CSO partners of PACDET participated in a programme of monitoring and humanisation of conditions of detention. There was a reduction in the number of inmates in correctional facilities covered by these programmes, better collaboration between CSOs and the state and management of prisoners by the latter.

In certain cases it is useful to complement this CSO presence in steering committees through the negotiation of indicators of the matrix of conditions with respect

to regular consultation with the NSAs. This is, for example, the case in the sectoral budget support programme “*Access to Justice*” in South Africa (see Box 5 below): 2 indicators of the 3 variable instalments of this sectoral programme are related to the organization of annual consultations between the government and civil society, the first with respect to human rights and constitutional rights (to be held in a province), the second with respect to a consultation between civil society and the departments of justice and police (in each province), the third on the organization of a forum for CSOs (in a province).

→ **Ensuring the participation of CSOs in the implementation of the programme**

Depending on the context, it is useful to promote the setting up of partnerships between department(s) concerned and the CSOs. This type of measure requires a prior detailed analysis to be carried out with respect to the added value of working with CSOs in order, firstly, not to undermine state authority in the implementation of activities that are fully the responsibility of the public authority and, secondly, to utilize fully the potential of CSOs.

The setting up of partnerships with CSOs may thus be an expected outcome of a support programme for reform and be translated into specific indicators. The “*Access to Justice*” programme in South Africa includes such an indicator on the expected increase in the number of CSOs that provide legal aid in rural areas and townships.

→ **Ensuring the participation of CSOs in advocacy and/or monitoring of the implementation and impact of a reform**

Regarding the operational support of NSA, several types of arrangements are possible: (a) support through a specific component of the sectoral programme or (b) by an independent programme designed to complement the sectoral budget programme. In both cases, as they concern sensitive activities, care should be taken to preserve the independence of action of the CSOs involved.

- *Component of support to NSAs in the context of a sectoral programme*

In the case of the “*Access to Justice*” programme, implemented in South Africa, a project approach for CSOs was developed (€ 5 million) as calls for proposals, besides the sector budget support (€ 20 million). To preserve the independence of action of NSAs, this component is managed centrally by the EU Delegation.<sup>62</sup>

- *Independent programme designed to complement the sectoral budget programme*

In Kenya, an NSA support facility (“*Democratic Governance Facility*”) was set up by donors to establish mechanisms for structured and operational support to allow their involvement in the reform supported by the sectoral support programme “*Governance, Justice, Law and Order Sector*” (GJLOS).

62) Alongside the action developed by the Ministry for collaboration with CSOs, it is intended to support the protest action and advocacy of CSOs in an independent manner, particularly those whose priorities may be different from those of the government. The call for proposals provides for the support and strengthening of CSOs in the areas of access to justice, knowledge by the poor and vulnerable people of their constitutional rights and the strengthening of political dialogue with the government and institutions including legislation. DTAs, 1.1)

63) Guideline No. 2, § 5.5.2 Indicators for assessing performance and the FCFS

To preserve the independence of the NSAs, donors wishing to support the NSAs have provided joint funding that is different from the funding put in place to support the ministries, departments and agencies of GJLOS. This facility had two main objectives: to facilitate the participation of NSAs in the sectoral dialogue forums of the GJLOS programme and to provide grants and strengthen the capacities of NSAs in the thematic priorities similar to those of the GJLOS programme. These themes were then supplemented to meet the new political context that followed the post-electoral crisis of 2007. The latter objective has become a priority now that the GJLOS programme has ended.

NSA activities are selected through calls for proposals or, for some of them, through operating grants. The facility does not support the NSA in their role as providers of services, but rather serves as a lever for achieving the objectives of long-term reform through advocacy, monitoring initiatives and public awareness with respect to governance (transparency, accountability and the fight against corruption), human rights, reform of the judicial, criminal and security system, etc.).

Regarding the practical modalities of capacity building in order to avoid unsuccessful calls for proposals that may be a major cause of delays in implementing the programme, it is desirable to limit the objectives by setting them in a realistic manner with respect to opportunities for CSOs.

Major preparatory work with respect to information by means of meetings held successively in different regions needs to be provided for CSOs before the launch of the calls for proposals.

Finally, specific commitments should be obtained from the government to ensure the sustainability of actions undertaken by the CSO by means of grants obtained following a call for proposals. Political dialogue on this point is particularly important.

### 3.3 INDICATORS

#### 3.3.1 Types and examples of indicators

In its Guidelines No. 2, the Commission<sup>63</sup> identified four types of indicators.

The first, concerning input indicators, measure the financial resources injected into the project and the administrative measures taken during the project, without making it the object of project activities.

Examples: expert opinions, availability of personnel and equipment for the project, creating a new administrative unit prior to project initiation.

In contrast the three other categories of indicators are used to monitor a project:

- **Direct output Indicators:** measure the immediate and concrete results of the resources used and the measures taken.

Examples: number of training courses provided, number of buildings constructed or renovated, equipment provided, texts developed and adopted by the government/tailed in parliament.

- **Outcome indicators:** measure the results measured with respect to the recipients, covering the results of the use of and satisfaction with the products and services.

Examples: number of inmates receiving legal aid, number of people accessing services delivered by the judiciary.

- **Impact indicators:** measure the consequences of outcomes based on programme objectives.

Examples: reducing the proportion of people in custody in relation to convicted prisoners, reducing the judicial backlog.

Knowing that the indicators should be developed as a function of the objectives and results given by the programmes, their qualifications in these categories may vary.

For example, the modernization of a training curriculum may be a direct implementation based on relevant expert advice resulting from the project, but can also be an outcome indicator when it is due to strengthening educational capacities as part of the activities of the project.

Another example is that the increase in the use of alternative dispute resolution is an outcome indicator if the alternative method was introduced by the project, while it is an impact indicator if the project aimed to strengthen the functioning of the alternative method by a series of activities such as awareness campaigns, special training for lawyers or other professionals, etc.

Below are given, as examples, possible indicators for certain justice sectors or sub-sectors under headings listed alphabetically, but in no case should these be regarded as exhaustive. Some organizations have developed a more complete series of indicators that can serve as an aid.<sup>64</sup>

#### Access to justice

- submission of a bill simplifying the granting of legal aid
- creation and then increase of the budget devoted to the remuneration of lawyers providing assistance in the context of legal aid
- increase in the percentage of mobile court hearings
- development of legal information leaflets by the Ministry of Justice

#### Improved methods

- performance of an audit for the assessment of methods of the functioning of courts
- organization of workshops on improving methods with all stakeholders of the justice sector
- the time required to process case files<sup>65</sup>

64) [www.undp.org/oslocentre/docs05/cross/Justice%20Indicators%20Background%20Paper.pdf](http://www.undp.org/oslocentre/docs05/cross/Justice%20Indicators%20Background%20Paper.pdf)

65) above, p. 62

### Professional ethics

- holding workshops bringing together successively all magistrates in order to develop a code of ethics
- new code of ethics approved and popularized
- in-depth inspection missions of courts (N ... year 2, N ... year 3)
- in-depth inspection missions to prisons (N ... year 2, N ... year 3)
- communication actions with respect to disciplinary procedures initiated (N ... year 2, N ... year 3) and solved

### Alternative dispute resolution

- increase in the percentage of cases handled by existing or newly created alternative methods

### Legislative reform

- compliance of legislation with international standards
- revision of codes that may have several objectives: systematization, harmonization, modernization, integration of customary justice
- creation of new codes (e.g. administrative, commercial)

### Institutional strengthening of the rule of law

- tabling in parliament of a bill guaranteeing the independence of judges with respect to political power
- submission to parliament of a bill with respect to the status of the magistracy

### Strengthening of the capacities of actors in the justice sector

- creation and effective implementation of schools for the initial training and ongoing education of justice sector actors (judges and prosecutors, clerks, lawyers, prison officers, police officers)<sup>66</sup>
- initial training provided N...
- further education provided N...

### Strengthening of resources

- computerization: hiring computer technicians at the Ministry of Justice
- computerization: increase in the budget line for procurement of computer supplies (+ N%)
- computerization: proportion of equipment of the courts by type of court

### Prison sector

- publication of a new decree on the functioning of prisons
- submission of a bill limiting the period of preventive detention (detention pending trial, tensions between the end of the investigation and the trial)
- submission of a bill or publication of a decree improving parole conditions
- percentage increase of agricultural land operated as prison farms
- number of new prison nurses
- number of new prison educators

- number of new teachers assigned to institutions for juveniles
- number and type of rehabilitation programmes for inmates
- number of inmates included in social rehabilitation programmes
- percentage of prison staff included in 'human rights' training courses
- the number of alternative sentences applied

### Statistical service

- creation of a department/bureau of statistics at the Ministry of Justice or the office of the Chief Justice
- allocation of at least one statistician in that direction
- development of a code of ethical principles submitted for the consideration by the general meetings of magistrates
- publication of the decree with respect to the code of ethics
- new appointments to strengthen the judiciary and prison inspection services
- percentage of courts and tribunals sending their annual statistical report of activities compared to the total number of courts: 80% (year 1), 100% (years 2 and 3)
- percentage of prisons sending their monthly statistics of prisoners: the number of accused and the number of convicted inmates, 80% (year 1), 100% (years 2 and 3); table with date of incarceration for all detainees and the date of the end of the sentence for those convicted, 80% (year 1), 100% (years 2 and 3)
- the publication by the statistical directorate of an annual report on the activities of all courts as of years 2 and 3 of the programme

It is also essential that each time the figures are broken down by gender, indicators for both genders should be provided.

#### 3.3.2 Specific indicators of disbursement of instalments in the case of budget support

The performance indicators selected as disbursement criteria are generally based on results. In the justice sector, such indicators may only be available in a limited way, as statistics and/or basic references may be missing or unreliable, or the specific type of indicator may be difficult to achieve over the period of the programme. It thus appears necessary to include some process indicators in the programme in order to achieve the performance indicator progressively, especially in such a way as to have a performance indicator in the relevant field in the event of possible future budget support in the same sector. In any event, it is necessary that these indicators are clearly defined and measurable in order to be a source of verification rather than a source of difficulties in interpreting them with the authorities of the recipient country.



## Disbursement indicators

### Example 1: South Africa, Access to Justice (2009-2012)

#### Alternative justice for the vulnerable:

- creation of 15 (year 1) then 30 (year 2) advisory community offices
- signing of 20 then 30 Service Level Agreements to strengthen the capacity of these offices
- creation of 250 then 280 Equality Courts (fight against discrimination)
- development of a national programme to combat discrimination
- 15% increase annually of the number of cases resolved through Alternative Dispute Resolution

#### Improved knowledge of constitutional rights by vulnerable and marginalized groups:

- 70,000 then 100,000 people affected by the programmes on constitutional rights
- 60 then 120 SLA signed with CSOs
- 15,000 then 30,000 refugees and migrants affected by the EU support programmes;
- 9 regional consultations and one national consultation with CSOs, the network of CSOs and the government on issues of human rights
- 1200 then 2400 executives of CSOs affected by capacity strengthening programmes
- 60% then 90% of CSOs having participated in public dialogue actions

### Example 2: Rwanda, Justice, Reconciliation, Law and Order Sector (2009-2013)

- percentage increase in the number of cases heard in civil, commercial and criminal cases (excluding genocide): 20% (year 1), 20% (year 2), based on figures compiled in 2008
- percentage increase in the number of cases before the courts by the national summons service: 20% (year 1), 20% (year 2)
- percentage of those convicted of genocide having served their CFI sentences: 60% (year 1), 75% (year 2) on a figure of 53% in 2008
- percentage decrease in overcrowding: 125% (year 1), 110% (year 2), on the basis of a percentage of 130% observed in 2008
- The assessment objectives achieved will determine the objectives to be set for the following two years (later sectoral budget support programme). For disbursement, the assessment sets four levels of achievement of objectives with the award of points. The final result determines the level of disbursement (thus, a final score of 0.75 will result in a disbursement of up to 75%).

### 3.3.3 Indicators to be avoided

The contracting party bound by the obligations of the financing agreement is the recipient government. When the final objective is the adoption of a law (e.g. statute of the magistracy, organization of the prison system, new penal code, etc.), the temptation may be great to accept the passing of the law a condition for disbursement of a variable instalment. This, however, means taking a big risk as the government may face resistance from parliament that, at least in a democracy, it does not control.

It is therefore recommended instead, in this case, to limit the indicator to the tabling of the bill before parliament, an action that is entirely that of the government. However, it is imperative that an assessment be performed by the EU Delegation on the content and cost of the bill introduced to ensure it will meet the objectives of the sectoral strategy supported by the EU.

Regarding disciplinary proceedings being taken against those involved in the justice sector, setting a

predetermined number of prosecutions would not really be appropriate.

The setting of a percentage of prosecutions compared to the number of inspection reports concluding that there are offences, also appears inappropriate as the temptation would exist to manipulate the conclusion of the reports in order to avoid the obligation to continue. The same reasoning applies to indicators that seek to measure, for example, the number of arrests of suspects or even the number of investigations and criminal prosecutions undertaken by the police and judicial authorities.

More broadly, given the peculiarity of the “material” making up the justice sector, the indicators cannot be exclusively quantitative, because it is important for the EU not only to enhance efficiency but also and especially to enhance the quality of justice, particularly in terms of principles of rule of law and human rights. Thus, when analyzing the existing status, one may, for example, be inclined to note a very long period to reach the judgement from the end of the investigation or prosecution

and the trial date and, as a result, to have a high percentage of preventive detention inmates compared to the total number of convicts. If these elements are signs of a malfunctioning criminal justice system that fails to deliver judgments in a satisfactory time frame, choosing a fixed period to reach the trial as an indicator by type of case or a mandatory percentage decrease in the number of detainees compared to the number of convicts could have significant negative effects as the judges would have an incentive to make the numbers by judging the defendants in an expeditious manner and in violation of their basic rights.<sup>67</sup>

### 3.4 Recommendations with respect to the aid methods

#### 3.4.1 The “re-thinking project” approach<sup>68</sup>

##### → Light technical assistance (TA)

According to the principles as outlined in the Guidelines No. 3 (“Towards more effective technical cooperation”), the use of a parallel unit is normally excluded, except in special situations that then need to be justified.

The solution of light technical assistance localized within the main ministry (presumably the Ministry of Justice) seems most appropriate. Daily work alongside officials from the justice sector facilitates the task of consulting and expert advice under the best conditions. It goes without saying, in addition, that this is likely to improve ownership of the results of the action by the recipients.

The question then arises on the local or international TA profile. If the reduction of transaction costs resulting from the use of a local TA is obvious, such as the ease of recruitment and the likelihood of knowledge of the law of the country and local circumstances, one must address the potential risks of too great a proximity to the recipients and a lack of independence of the local TA.

To these general considerations, one must add the specific nature of the mission entrusted to the TA in such a project that, when focused on the establishment of a sector strategy and coordination in the sector, requires the use of one or more TAs provided with the skills necessary to carry out these tasks.

##### → Better recruitment of the TA

The failures of some TA detected by monitoring reports and evaluation reports show the limits of recruiting based solely on an assessment of the proposal of the applicants contained in resumes. As recommended in Guidelines No. 3, it is essential to proceed first to a systematic interview of the candidates or technical assistants and, secondly, when these candidates have previously completed similar missions, to verify the adequacy of information provided in the CV and during the interview. The evaluation process should take due account of these elements.

- Reserve short-term expert support

Short-term expert support should be provided where appropriate, particularly for capacity strengthening activities that are often achieved through training courses. Similarly, the preliminary step in the identification of CSOs working in the justice sector is important and then possibly their training in handling technical response to a call for proposals can justify calling on short-term expert support. The TA should be able to use this flexibly, with the agreement of the NAO and the Delegation of the EU.

##### → Sufficient duration of the project

One must stress the absolute need for a sufficient period for the implementation of the project. In fact, the delays induced by EDF procedures mean that the project cannot be usefully implemented within a period limited to two years. A leadtime of three years is a minimum on this point. The need for adequate time is even more important now that the Commission often establishes programmes with very large budgets.

##### → Workshops

For the definition of sectoral policy guidelines in the context of the stakeholder consultation, the terms of reference should include the organization of multidisciplinary workshops involving practitioners in the sector, brought together by themes, and CSO representatives.

##### → Use of experience

In order to improve the functioning of courts, many projects have planned, correctly, the establishment of computer facilities for the judiciary. This very complex process requires careful implementation (see Box 6). As a large number of projects include the development of software for data processing and the management of court records, it would be useful to provide the possibility of obtaining and using a similar software package already existing in another country, with any necessary modifications. The project and its contracts should also provide for the possibility in the future of using the software developed in the context of the project by a third country where support for the justice sector will be financed by the Commission.

#### 3.4.2 Sectoral support

##### → A process of reform is for the long term

One must take into account the fact that sectoral support is part of a reform process that is for the long term. The solution then passes through the definition of priorities, depending on the context of the country, in order to advance in stages, dynamically. Sectoral policy dialogue is essential here, preferably in a coordinated manner with other donors in order to increase the chances of obtaining firm commitments from the government.

In some situations, dysfunctions in the justice sector (death penalty, justice on the orders of the executive, corrupt judges, use of violence in police stations, inhumane prison conditions) necessarily lead to questions

67) In Madagascar, an experiment was set up to expedite the trial of criminal cases in the pilot courts. This allowed a better organization of internal procedures but has sometimes led courts to refuse systematically to refer a case to a later date, while this would have been necessary for the hearing of a witness or the intervention of a victim.

68) In reference to Section 4.1.1 (“Rethinking Project”) of Guidelines No. 2 (Supporting sectoral programmes) one should keep in mind the broader objectives of the sectoral approach even in cases where the project approach must be adopted.



### Establishment of computer facilities for the judiciary

To computerize a court does not simply mean placing computers on the desks of the clerks. It is instead a long and complex process, fraught with pitfalls, that requires strong user adoption insofar as it implies the abandonment of earlier practices and routines and the establishment of an entirely new internal organization.

- If computerization is not limited to the provision of hardware, this must be the first step of the process. The computer is not only used as a sophisticated typewriter, but users (clerks as well as judges) should be familiar with the new tool.
- A computerization project must provide access to the databases of case law and law. This access to case law, the official journal and legal texts allows for better implementation of legislation.
- The software for management of the court records associated with a database that receives new civil and criminal cases as well as a word processor allowing editing at the same time as the automatic merging of documents with recorded data, the system remembering the “templates” of the various types of documents.
- The establishment of the facility involves the disappearance of many manual records, a situation of considerable anxiety for staff.
- It leads to a complete overhaul and a change from previous records’ management, along with a process of defining user requirements for the IT service provider if the software is developed in the country. Sufficient time must be allowed for this phase that is crucial.
- The software must be tested for a sufficient period, preferably in a small pilot court. It is important to resist the strong demand of recipients who want generally immediate computerization of the jurisdiction of the capital.
- Significant staff support should be established to input data from all ongoing cases. To limit the computerization to the input of new cases will oblige the clerks to use the old manual system and the new computer system in parallel. This workload discourages users and usually leads to the failure of the process.
- The software must include a module for automatic extraction of statistics of the activity.
- There is no need to provide “the computerization of records,” as we sometimes see appear in the terms of reference of certain projects. This concept has no meaning in fact as the search for precedents is performed by a simple query to the database system. As regards the older cases, inputting data for the previous cases is a daunting task and there is no need to consider this (it has not been done in any developed country).
- A technical architecture that will ultimately allow courts to communicate among themselves and with the Ministry of Justice (via an intranet) must be considered.
- The ability to receive data from the police and to exchange data with the penal institutions should be provided (compatible software, intranet connections).
- A team of computer technicians must first be established within the Ministry of Justice and be available anytime to meet the needs of particular users and act on system failures.
- An increased operating budget related to the high cost of maintenance and consumables should have been anticipated by the Ministry of Justice.

about the merits and on the extent of sector support, even though the eligibility criteria are met technically.

When violations of human rights are caused by a dysfunctional justice system or a lack of capacity of its staff, as is often the case, and also if all the conditions for sector budget support are met, the indicators of disbursement of instalments in these sensitive areas can be negotiated with the government and will demonstrate the vigilance of donors in this regard. The identification of these weaknesses may also lead to the development of a programme of action that may involve several steps, starting with the changes being considered as priorities.

However, faced with a situation where massive and serious violations are committed with government approval, either as a state policy, or because the state fails to prosecute perpetrators for such violations and fails to take responsibility to protect individuals as it should,

this method of financing must be rejected since it would amount to condoning such violations.

#### → Expenditures in favour of the services responsible for security

Queries that can be made with respect to the conservative character of certain expenses should not obstruct justice sector support. It should be emphasized that despite the repressive nature of the activity of some services in this sector, the purpose of the support to be implemented is, in reality, the protection of human rights.

Thus, as regards the police, strengthening of its capacities can incorporate training focused on human rights, or that includes this dimension or in other training courses. Similarly, support designed to make available police equipment and forensic techniques enables the police to focus their activity on the search for evidence and material proof, thereby significantly reducing the need

to obtain a confession and therefore reducing the risks of the use of violence against suspects.

Similarly, support for the prison sector has initially faced strong resistance. It appears, in fact, that support in this sector should allow the degrading living conditions of detainees to be addressed by renovating the prison buildings, putting in place a minimum of medical care and providing new ways of functioning of the institutions.

#### → In-depth sector policy dialogue

It must be stressed again here on the need for more dialogue for the development of sector policy. The deficiencies or inaccuracies in this process are likely to affect the quality of sector support implemented<sup>69</sup>. It thus seems appropriate to suggest that at the beginning of the identification of a possible SBS for the justice sector, comprehensive information and training should be provided to stakeholders with respect to procedures and conditions of the sector budget support, so that the sectoral policy dialogue can take place under optimum conditions.

Once this initial stage is complete, the procedures developed for monitoring and evaluation should be designed and completed.

#### → Legislative reforms and indicators

As the reform process in the context of support for the justice sector requires legislative reform, the issue of indicators for measuring the development of this part of the programme or component of the criteria for disbursement of variable instalments poses undeniable difficulties.

As previously noted, reference cannot be made to a vote on a bill as this depends on parliament and not on the government that signed the financing agreement. While it appears to make sense in these conditions to use as a criterion the filing of the bill before parliament, it is still required that the contents of this bill be reviewed to ensure compliance with the principles of rule of law.

In establishing these indicators, like the system adopted by the general budget support project with a justice component in Haiti (see above Box 2), each indicator should clearly state the source of the review, the motivation, the criterion and the risk. This obligation should not be perceived as a bureaucratic burden, but allows the programme designers to consider the relevance of the indicator selected.

69) The mid-term review for South Africa noted the existence of difficulties in the conduct of the sector programme 'Access to Justice' and was attributed to shortcomings of consensus between the parties during the conception of the activities

## 4. RESPONSES ADAPTED TO COUNTRIES IN A FRAGILE SITUATION

The definition used by the EC in its 2007 Communication with respect to fragile situations<sup>70</sup> is based on that adopted by the OECD/DAC in 2007<sup>71</sup>, according to which a fragile state is a state “whose state organs lack capacity and/or political will to assume the core functions to reducing poverty and promoting development or to ensure public safety and respect for human rights.”

The fragility is not measured only according to the magnitude of internal divisions, even ongoing civil wars in a country. A country in a precarious state is not necessarily poor or at war. However, the risk of violent internal conflicts erupting in poor countries is compounded in “orphan states”<sup>72</sup>.

States have a formal obligation<sup>73</sup> under the principle of “the responsibility to protect”, to protect populations against genocide, war crimes, ethnic cleansing and crimes against humanity, otherwise it is up to the international community to do so. In fact, although the United Nations Secretary-General acknowledges<sup>74</sup> the contribution of peacekeeping operations or the specialized courts created to fight against impunity, the fact remains that civilians continue to pay dearly for their mere presence in conflict zones, while in many peace talks, former belligerents are sitting at the negotiating table. Today the main victims of armed conflict are civilians especially the vulnerable such as women or children who become instruments of revenge or a bargaining chip between the belligerents.

The real challenge for civilians lies in the acceptance of peace agreements and reconciliation that are often the subject of negotiations between the parties at the expense of the obligation of states “to prosecute persons alleged to have committed or ordered to commit .... serious offences”<sup>75</sup>.

Several questions arise: should one support states in fragile situations that do not respect their institutions, their legal framework or who use the judiciary to further their own ends? Is it not up to the international community to watch over the fragile states, helping them to strengthen their legal and judicial systems, even when the foundations of the rule of law are unclear (the democratic process not yet finalized through elections, the territoriality of the state challenged, decay of the judiciary,

escape of elites and weak national capacities, national archives destroyed, the country’s budget not voted and certainly including the operation of the judiciary, etc.)? What about states that threaten international security by sheltering terrorists or threatening the stability of a region? In peace agreements, how can one obtain a fair balance between the inclusive dialogue to resolve the conflict and the fight against impunity for crimes committed? The line is narrow between the need firstly to include all belligerents in order to avoid sustaining a revolt, and secondly the need to satisfy at least the “right to know” of victims.

This chapter attempts to clarify these issues, taking into account the EU position on conflict prevention and the fight against impunity, particularly against women and girls<sup>76</sup>. An overview of the various European financial instruments used in response to situations of fragility is given below, supplemented by the presentation of tools for the analysis and response (transitional justice, restorative justice, etc.) that may be invoked to fight against impunity.

### 4.1 The european position on conflict prevention and the fight against impunity

The European Consensus<sup>77</sup> on development provides guidelines for a comprehensive response to fragility. It is part of a set of actions with the potential to prevent violent conflicts and to respond appropriately to emergency needs.

#### 4.1.1 Governance, rule of law and fragile situations

The strategy proposed by the Commission in its Communication<sup>78</sup> “Towards an EU response to situations of fragility” focuses on the openings offered by transitional periods to address gender issues or those related to minority rights, through legislative reviews or constitutional revisions, the rights of children, human rights, reform of justice and social inclusion.

In order to develop a coherent and appropriate strategy in response to states in a precarious situation, a diagnosis must be made of the institutions guaranteeing the rule of law, those involved in the justice sector and

70) “The EU response to situations of fragility” - Commit to sustainable development, stability and peace in difficult environments” COMM\_PDF\_COM\_2007\_0643\_F\_FR\_ACTE.pdf.

71) “Principles for international involvement in fragile states and precarious situations” - [www.oecd.org/dataoecd/61/64/38368761.PDF](http://www.oecd.org/dataoecd/61/64/38368761.PDF)

72) [www.institut-gouvernance.org/docs/note3.pdf](http://www.institut-gouvernance.org/docs/note3.pdf) “Orphan states”, states whose technical and financial support from the international community is weak or nonexistent

73) Resolution of the UN General Assembly, A/RES/60/1, Final Document of the 2005 World Summit, paragraph 138: “Each individual State has the responsibility of protecting its people from genocide, crimes war, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.”

74) Sixth report of the Secretary General of the United Nations on the Protection of Victims, 2007; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/573/59/PDF/N0757359.pdf?OpenElement>

75) Resolution of the UN General Assembly (A/59/2005), <http://www.un.org/fr/ruleoflaw/>

76) In this context, one should also consider the approach of the EU with respect to Security Sector Reform (SSR), which has already been presented in the first chapter.

77) Joint Statement of the Council and representatives of the governments of Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled “The European Consensus” [Official Journal C 46, 24.2.2006].

78) Ibid, footnote on page 70

security (both formal and informal) and the governance capacity of the state.

Law and justice are the channels through which the state regulates its authority, but the state does not have an exclusive monopoly. Non-state bodies can play a significant role in the creation of law (international, custom, etc) or in people's access to justice (paralegal, mediation services, legal interpretation, committees of users of the courts, ...).

In times of crisis or when emerging from crisis, each situation must be treated in a "differentiated, coordinated and holistic manner, combining diplomacy, humanitarian aid, development cooperation and security".<sup>79</sup>

To meet the challenges related to situations of fragility, the approach adopted by the EU endeavours to be flexible and dynamic while being firm on issues such as corruption, the powers vested in military courts, the death penalty, the application of full discharge, or any action contrary to the EU values.

#### **4.1.2 The LRRD "links between relief, rehabilitation and development"**

This approach is part of an integrated vision based on the principle of sustainable development, hence the need to link relief, crisis management, support for reconstruction and development cooperation in the long term. The strategic framework of this approach was, until recently, only the social sectors (health, education, etc.). But to meet the needs of the people, in a period of reconstruction, efforts have been made to involve issues of security, governance and institutional development.

As mentioned above, states have the obligation to combat all forms of discrimination and violence, particularly against women, girls and vulnerable people.

This is why the EU<sup>80</sup> insists that violence against women and girls be punished by law and that perpetrators be held responsible for their actions before the courts. States need to diligently investigate cases and ensure that the criminal justice system, especially the rules of procedure and evidence, functions in such a manner as to encourage abused women to come forward and testify. Fighting against impunity implies advocacy, communication and education for police, prosecutors, judges and medical professionals. Similarly, other activities should be considered, such as free legal aid, adequate protection of victims and witnesses, and particularly the creation of conditions for victims not to be economically dependent on the perpetrators.

## **4.2 The financial instruments and methods of implementation in fragile situations**

In response to needs and emergencies, the EC can use its various financial instruments (geographic, instrument of stability, thematic instruments especially EIDHR) to

enable it to respond quickly and flexibly to crises and situations of fragility. These tools can, of course, be supplemented by an instrument of humanitarian assistance and mechanisms available to the EU within the framework of the CFSP/ESDP, but that will not be discussed here. Finally, the possibility should also be mentioned of using the method of budget support in fragile situations.

### **4.2.1 The European Development Fund (EDF): application of flexible procedures based on circumstances (Articles 72 and 73 of the Cotonou Agreement)**

If the country is declared to be in a state of crisis, programmes financed by EDF funds are eligible during this period to the application of flexible procedures provided for in Articles 72 and 73 of the Cotonou Agreement and Articles 254-257 of the Lomé IV agreement. However, the use of flexible procedures can only be allowed during the period of "emergency" on a case by case basis, and after approval by the Head of the Delegation.

The flexibility of certain financing agreements allow for the funding of specific actions in institutional support, such as the Somali "*Somalia Recovery Programme*" or the Institutional Support Programme (ISP) in DR Congo. In the context of the ISP, several activities to support the reconstruction and establishment of transitional institutions were funded, such as providing expert advice to assist in the drafting of the Constitution of the Transition.

The Technical Cooperation Facility (TCF) responds to specific needs in technical assistance (studies, training, etc.).

### **4.2.2 The Instrument for Stability**

As already mentioned in the introduction, the Instrument for Stability (IfS), which was preceded by the Rapid Reaction Mechanism (RRM), can in turn respond to a particular crisis or emerging crisis. It contributes to stability by providing an effective response to help preserve, establish or restore the conditions essential for the effective implementation of development policies and co-operation of the Commission. This instrument can take advantage of political opportunities in sovereign sectors and win the confidence of stakeholders in order to prepare more structural interventions in the context of the geographical instruments. As such, it is important that the definition of assistance as part of the IfS, often taken at the initiative of the headquarters, should, however, be developed with a view to allowing a synergy with other instruments during preparation or subsequent deployment in the context of other long-term instruments such as EDF.

For example, the proposed restoration of the criminal justice system in Bunia, funded by the European Commission via the NGO RCN in the context of the Rapid Reaction Mechanism (RRM) in January 2004 allowed the resumption of judicial activity in the Ituri district.

<sup>79</sup>) Ibid, page 7.

<sup>80</sup>) "EU guidelines on violence against women and girls and combating all forms of discrimination against them" 2008 – [www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf)

This project, located in the centre of a zone of conflict in Eastern DRC, participated in the fight against impunity through the rehabilitation of the justice system, particularly through support for criminal justice. Implemented in the context of an emergency, not development, this justice left open the question of a more structural return to the rule of law. The results are shown in the number and nature of cases brought before the courts and a greater transparency of judicial and police activity. Upon completion of the project and taking into account the results and requirements related to the precarious situation of security in the district, the weakness of the existing criminal law, the lack of police resources for investigations, the lack of material and financial resources allocated to support the magistrates and judges, the EDF took over with the REJUSCO programme.

Similarly, the IfS has been used to fund activities to fight against impunity, such as:

- transitional justice: support in Senegal for the trial against Issen Habre
- support for the Truth and Reconciliation Commission in the Solomon Islands;
- support for the Special Court in Sierra Leone. In the latter case and to allow the court to continue its activities to the end, the EDF took over from the Instrument for Stability in the context of the project “Special Court for Sierra Leone – The Legacy Project”.

#### 4.2.3 The European Instrument for Democracy and Human Rights (EIDHR)

As the thematic instrument most suitable for interventions in the justice sector, the EIDHR is also very suitable for situations of fragility because it focuses on situations in which fundamental freedoms are threatened and

the security of persons is seriously compromised. It is the same when civil society and human rights are subjected to strong pressures and where political pluralism is reduced. A unique feature of the EIDHR is the ability to fund operations without the approval of the governments of partner countries. It promotes reconciliation activities (dialogue between political actors and between communities at the centre of conflict) or the fight against impunity. It is very useful in responding to urgent needs through small projects undertaken by CSOs. Again, it is recommended that a strategic approach be adopted to ensure complementarity and consistency between programmes funded in the context of the geographical instruments and those financed in the context of the thematic instruments.

#### 4.2.4 Budget support

The EC has repeatedly used budget support to meet the urgent financial needs of fragile and post-crisis states, not least of all to consolidate the key functions of government (public financial management) and to preserve social stability and security (payment of salaries of civil servants, judges, the pay for police and military, etc.). It aims to support a return to normal life and is based on continuous assessment of the macroeconomic situation and reforms, particularly the management of public finances.

When budget support (general or sectoral) is considered in order to support broader reforms in the sector, it is necessary to ask whether practices implemented in the sector conflict with EU values (human rights, democracy ...). Is this approach to aid appropriate in the support of the justice sector, for example, when knowing that the death penalty is still applied, or that torture is systematically practiced and accepted as evidence?

#### Case of the DRC: EIDHR complementarity with other Commission actions

The project “Fight against impunity by supporting the ICC”, implemented by *Lawyers Without Borders – Belgium*, was funded via the EIDHR for an amount of € 942,000 from March 2006 to March 2008, and was geographically focused in the provinces of the North and East of the DRC. The specific objectives of this project were: 1) strengthen the capacity of the Congolese to judge serious crimes in accordance with the principles of international law and reinforce the independence of lawyers in order to be able to protect and support victims of such crimes, 2) provide quality legal assistance to victims of international crimes by creating a network between NGOs and institutions involved in supporting victims, 3) provide free legal assistance to victims of serious crimes under international law before the ICC as well as to financially vulnerable victims and those accused of these crimes before the Congolese courts. The services are provided primarily by Congolese lawyers whose capabilities are enhanced via the project. This small project usefully complements the efforts of REJUSCO (Restoration of Justice in the Eastern Congo), a multi-donor project worth € 15 million and financed by the Netherlands, Belgium, the United Kingdom and the EC. The REJUSCO programme aims, inter alia, to strengthen the capacities of the Congolese courts of three provinces in Eastern DRC in terms of the prosecution and trial of those accused of serious crimes under international law. In recognition of the different role of Congolese courts and the ICC in the prosecution and trial of serious crimes under international law, the ICC is involved rather in the pursuit of the sponsors and organizers of these crimes, while the Congolese courts focus on the direct perpetrators; it was found that support for the ICC through EIDHR funding would be an additional and complementary tool of the REJUSCO programme in the fight against impunity.



While it is true that this issue is not specific to the approach adopted and it arises for all aid instruments, the fungibility of funds, however, makes the issue more relevant in the case of budget support.

An identification of weaknesses in the sector and their causes, allows the consideration of alternative courses of action:

- Consider budget support to support only a sub-sector of justice, and not the entire sector. For example, if capital punishment is applied, it would be contrary to the EU values to support the efficiency of the judicial system and thus increase the performance of judges or to support the entire justice sector. Budget support could then focus on a sub-sector of justice such as access to justice and improving the conditions of detention.
- Focus on indicators that, when subject to analysis, appear to be the priority reforms or changes and allow the development of a programme in stages. These indicators will allow the situation to continue to be monitored by keeping up the political pressure in the political dialogue.
- Establish indicators of compliance with these principles and values as a general condition (fixed instalments), allowing the suspension of the programme in the event of non-compliance with this general condition.

In any event, one should have a dynamic and flexible view of the sector and establish a programme of gradual and phased action, perhaps by providing technical assistance.

By accompanying the programme, the ongoing sectoral policy dialogue and joint action of the donors would seem essential to achieving the reforms deemed necessary. It is important to remember that, as with any budget support, the sectoral policy dialogue requires experienced human resources who master the sector well.

### **4.3 ANALYSIS AND RESPONSES TO SITUATIONS OF FRAGILITY**

To adequately respond to problems of development in fragile states, several agencies have proposed an analytical framework and strategies to strengthen fragile states and coordinate their actions.

#### **4.3.1 The 10 principles of the DAC**

The “analytical framework of the OECD-DAC”<sup>81</sup> has been used to develop the following table and implement the framework in the justice sector.

81) *Principles for International Engagement in Fragile States and Situations*, <http://www.oecd.org/dataoecd/61/44/38368761.pdf>

**Table 1. The 10 DAC principles for “International Engagement in Fragile States and Situations” applied to the justice sector**

<b>The 10 DAC principles</b>	<b>Applied to considerations in the justice sector</b>
<b>1. Take context as the starting point</b>	<ul style="list-style-type: none"> <li>– Perform an analysis of the context (post-conflict or transition, poor governance, protracted crisis, etc.) that takes into account the progress of diplomatic policies, the economy and the assessment of the security sector (army, police and judiciary).</li> <li>– Pay special attention to the independence of the judiciary from the belligerents, the position occupied by the Bar associations, the unions of magistrates and the CSOs, the ratification or not of the Treaty of Rome, informal or traditional justice (customary courts, traditional and religious leaders, etc.) and the capacity of judicial actors to play a mediating role during the process of reconciliation.</li> <li>– Develop a common strategy including all stakeholders, especially representatives of the judiciary, police, defence, civil society and national reformers who will lay the basis for dialogue with the population (e.g. inter-Congolese dialogue, sovereign national conference in Mali, etc.).</li> </ul>
<b>2. Do no harm</b>	<ul style="list-style-type: none"> <li>– Ensure that the international community implements fair measures (incentives or penalties) and does not create new tensions. For example, it is better to take the time to discuss with local authorities (and community meetings), land issues or the issue of borders and refugees, before making hasty decisions.</li> <li>– Find a balance between “incentives” for reconstruction and stabilisation of the state (e.g. support for the establishment of transitional institutions) and “sanctions” such as: the closing of borders, the imposition of economic sanctions or the prosecution of leaders as “war criminals”, etc.</li> </ul>
<b>3. Turn the strengthening of the state into the fundamental goal</b>	<ul style="list-style-type: none"> <li>– Strengthen the state by dealing, as a first step, with questions with respect to the construction of peace (disarmament, demilitarization, strengthening the police), the protection of civilians and the defence of victims (e.g. investigate crimes, psychological support for victims, witness and victim protection programmes, etc.)</li> <li>– Consolidate the state’s capacity to perform its core functions. The strengthening should begin by supporting the reform of the security sector including criminal justice and crime, while not forgetting the strengthening of judicial institutions and judges and the clerks who run them.</li> </ul>
<b>4. Give priority to prevention</b>	<ul style="list-style-type: none"> <li>– Prevent injustices and violations by a combination of measures, namely the achievement of outreach, education and communication to local people, aiming to explain the possible causes of the risk of conflict, recurrence, etc.</li> </ul>
<b>5. Recognize that there are links between policy, security and development goals</b>	<ul style="list-style-type: none"> <li>– Re-legitimise the state by providing, for example, a transitional constitution, a legal and regulatory framework (electoral law, nationality code, amnesty law, etc.), means to handle electoral disputes, new institutions guaranteeing the separation of powers or human rights.</li> <li>– Inform people (radio, lectures, TV commercials, etc.) with respect to issues of elections and the peace process.</li> <li>– Promote the work of local people and ex-combatants through community service (reconstruction of roads, villages, clinics, schools, etc.) in the context of development of these infrastructures</li> </ul>
<b>6. Promote the non-discriminatory basis of a stable and inclusive society.</b>	<ul style="list-style-type: none"> <li>– Protect the vulnerable, excluded and discriminated against such as women, children, people with disabilities, indigenous people from certain ethnic groups, religious groups, etc. By targeting vulnerable victims of violence, not only the violence itself is addressed, but also its escalation (revenge, mobs, etc.). Various activities may be considered for these groups, such as official recognition of indigenous communities, the establishment of registers of complaints of violence (in hospitals, clinics), education of health workers in partnership with the police and magistrates, the psychological support of women and children who are victims of violence, etc.</li> </ul>

The 10 DAC principles	Applied to considerations in the justice sector
7. Align oneself with local priorities in different ways depending on context	<ul style="list-style-type: none"> <li>– Be sure to look for anchor points between international actors, national institutions and grassroots priorities. Depending on available funds, and the poor condition of some judicial institutions (courts destroyed, judges decimated by the conflict, etc.), actions may be planned at the national level through mobile courts in conjunction with community justice. Alternative dispute resolution (mediation, conciliation, arbitration, etc.) by communities and their representatives (village elders, religious or traditional leaders) have the advantage of being accessible to people, but are not always accepted by the national bodies, hence the interest of using mobile courts based on the principles of common law.</li> </ul>
8. Agree on practical coordination mechanisms for the actions of international actors.	<ul style="list-style-type: none"> <li>– Establish mechanisms for coordination and collaboration between development partners and national and local authorities.</li> <li>– Provide mechanisms at various levels between donors and between them and national and local authorities.</li> </ul>
9. Act quickly but stay engaged long enough to enhance chances of success	<ul style="list-style-type: none"> <li>– Invite the development partners to adapt their intervention strategies to a sector such as justice, taking into account the urgency, the willingness of the state to rebuild its justice system and the needs expressed by the population. Donor agencies have a larger and larger range of instruments that allow them to adapt their aid. Emergency aid is the fastest way, but it may not be long term.</li> <li>– Maintain constant pressure on the authorities to respect “the duty of memory” but also support the government in rebuilding its justice sector. It is clear from experience that donor countries should be involved in the justice sector over long periods (minimum 10 years).</li> <li>– Encourage partners to: i) simplify the programming process, allowing them to use iterative, flexible and participatory approaches for the justice sector ii) make less restrictive rules and procedures in project implementation (e.g. use flexible procedures, Articles 72-73 of the Cotonou Agreement).</li> </ul>
10. Avoid creating pockets of exclusion	<ul style="list-style-type: none"> <li>– Mobilise funds pledged at international conferences for reconstruction. It is clear from experience that: i) too often aid pledged is slow in coming ii) some countries or regions benefit from an influx of aid while neighbouring countries are without any support, with the result that conflict is transported into neighbouring areas.</li> <li>– Take appropriate measures, especially in the context of activities funded through regional organizations or funds related to the regional indicative programmes (regional conferences on the destruction of arms, extradition of criminals, the return of refugees, stabilize borders and the right of return, local cross-border development, etc.)</li> </ul>

#### 4.3.2 Fight against impunity

The end of the crisis usually marks the end of fighting and violence, but tensions remain high and abuse can take place, hence the need to consider a crisis exit strategy at the outset of negotiations that takes into account the delicate issue of reconciliation and the fight against impunity in the plan for stabilization and reconstruction.

In its report<sup>82</sup>, entitled “*Selling Justice Short*”, Human Rights Watch takes a fresh look at the relationship between the peace process and the pressure from warlords to sit at the negotiating table, especially with respect to links between the amnesty, international criminal justice and the culture of impunity.

Based on the analysis of recent conflicts, the report identifies the following principles:

- Giving amnesty to war criminals and persons who have committed serious crimes<sup>83</sup> during the conflict is not a guarantee of success of the peace process. For example, in Sierra Leone, the general amnesty provisions failed three times and did not allow the achievement of a lasting peace agreement. In Angola, there have been six attempts.
- Ignoring the atrocities and conditioning the peace agreement on the basis of impunity for serious crimes is not a guarantee of lasting peace. In contrast, investigation and initiation of legal proceedings in some cases may

82) [www.hrw.org/en/node/84262/section/2](http://www.hrw.org/en/node/84262/section/2)

83) Crimes defined as falling under the category of violations of the Geneva Conventions, namely: genocide, crimes against humanity and other violations of international law of human rights which constitute crimes under international law or where international law requires states to punish such crimes as torture, enforced disappearances, extrajudicial executions and slavery.

offer results in a shorter time span and produce a greater deterrent effect. For example, the indictment brought against Milosevic by the Prosecutor of the International Criminal Court for the Former Yugoslavia facilitated the very early agreement on the terms of the international peace plan for Kosovo.

- Initiating judicial proceedings (lawsuits, investigations, evidence, trial, etc.) restores dignity to victims and recognition of their suffering. The judgments based on proven facts give victims a legitimacy that protects them against attempts at revisionism. The need to preserve evidence and to remember – the duty of memory – has a priceless educational value for people and for future generations. Observers believe that the mere fact of having brought Thomas Lubanga (DRC) before the International Criminal Court would have had an educational and deterrent effect on other warlords in the sub-region.
- Bringing international criminal justice into action promotes the development of innovative national mechanisms. For example, the arrest of Pinochet in the United Kingdom opened the door to the creation of national courts to hear the victims in Chile. Ad hoc tribunals and the International Criminal Court (ICC) have also contributed directly and indirectly to the improvement of justice mechanisms or the revision of national laws in countries where they are investigating crimes.
- Sacrificing justice in favour of reconciliation, even using transitional justice mechanisms, such as the creation of a commission of truth and reconciliation, is seen by some observers to be a regression in the recognition of victims' rights. The victims' expectations with respect to the law have changed over the past two decades, particularly after taking greater account of international criminal law.

Without limiting the generality of the foregoing, one must:

- Address the *needs of victims and witnesses*, but especially create a body of specialized investigators to preserve evidence in secure premises and create favourable conditions for their protection so that they are not worried after testifying.
- Hold ongoing discussions with local authorities (traditional, religious, village leaders, etc.) in order to better understand what happened and determine ways and means that are fast and suitable for every situation. Too often international aid arrives late and the evidence has vanished into the wilderness. This phase is essential for reconstruction, because to do nothing visible to the people may also be a source of private vengeance and an escalation of violence.
- Implement, depending on the context, several types of actions, ranging from transitional justice mechanisms (see paragraph 3.3 below), through mechanisms of mobile justice or traditional/local conflict resolution (e.g. Gacaca in Rwanda). The latter opened the way for reconciliation and forgiveness.

The contribution of CSOs is not negligible as *providers of services* (civic education, public awareness on issues related to access to justice, strengthening the capacities of judicial actors and community courts, legal and sometimes judicial aid, support for the establishment of mechanisms for conflict resolution, arbitration, reconciliation, mediation or support for the implementation of campaigns for transparency in the organization of litigation in the public interest, etc.) or as *agents monitoring state actions*, especially through advocacy that CSOs may undertake with respect to the legislative and executive powers, for the advancement of reforms (better citizen access to justice, abolition of death penalty, abolition of military courts, campaign for transparency in the judicial selection process, monitoring of budgets allocated to the justice sector and sector performance, etc.).

The contribution of Non-state actors should not overshadow efforts that must be undertaken to strengthen judicial governance in fragile states (capacity strengthening for judges, increasing salaries for judicial employees, judicial management, etc.).

The combination and complementarity of activities are designed to reduce pockets of resistance to change, to break taboos, remove fears of reprisal and to ensure that people have confidence in their justice.

#### 4.3.3 Transitional justice and restorative justice

##### → Transitional justice

Transitional justice is “the full range of various processes and mechanisms implemented by a society trying to cope with massive abuses committed in the past in order to determine responsibility, to render justice and to allow reconciliation.”<sup>84</sup> Therefore, organic, transitional justice is not based solely on the courts and should be considered as a logical complement to existing ones and be centred on four mechanisms<sup>85</sup> that link the themes of duty and memory reconciliation, judicial and extra judicial actions, such as:

- criminal prosecution by national, international or mixed courts;
- investigations to establish the truth about past abuses (or via the official national surveys such as truth commissions, or via international commissions of inquiry, the mechanisms of the United Nations or NGO efforts);
- reparations (compensatory, symbolic form of restitution or rehabilitation);
- institutional reforms (including reforms of the security system and judicial reforms, removal of abusers from positions of public service and training officials in human rights).

84) Report of the Secretary General of the United Nations before the Security Council, “Restoring the rule of law and administration of justice during the period of transition in societies experiencing conflict or emerging from conflict,” Doc. S/2004/616, August 2, 2004, p. 7 parag. 8.

85) [www.ictj.org](http://www.ictj.org)

**Table 2. Mechanisms of transitional justice**

<b>Mechanisms</b>	<b>Duties/skills</b>	<b>Comments: Strengths/weaknesses</b>
<b>International Criminal Court<sup>86</sup></b>	<i>The Rome Statute: Multilateral treaty and universal principles, adopted in 1998. The ICC complements national courts and may investigate and prosecute three (3) categories of criminal offenses: genocide, crimes against humanity and war crimes. It can only be called upon by a state having signed the Treaty of Rome. In contrast to the ad hoc tribunals, the ICC is independent of the United Nations.</i>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• Deterrent effect of the ICC on the settlement of conflicts</li> <li>• Credibility and independence of the ICC compared to states and the United Nations system</li> </ul> <p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Long and costly proceedings</li> <li>• Evidence difficult to assemble</li> <li>• Indictments too broad</li> <li>• Procedural system (Anglo-Saxon) based on testimony and its risks</li> <li>• Proceedings too remote from victims who can not always testify,</li> <li>• Inadequate collaboration with countries holding the evidence and refusing to deliver it to the ICC</li> </ul>
<b>Ad hoc tribunals</b>	<i>Tribunals established by the Security Council of the UN: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).</i>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• Guarantee the independence and impartiality of the courts (the presence of international staff)</li> <li>• Remove the criminals from their country to escape mob vengeance, etc.;</li> </ul> <p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Long and costly proceedings</li> <li>• Evidence difficult to assemble</li> </ul>
<b>Mixed tribunals</b>	<i>The emergence of mixed tribunals followed the lessons learned from the experience of two ad hoc tribunals. Generally, mixed tribunals are located in countries where abuses have been committed. They are composed of national and international judges who apply the national legislation in force. Example: the Special Court for Sierra Leone (2002), the Extraordinary Chambers in the Tribunals of Cambodia (2003). In Timor Leste and Kosovo, the UN administration placed judges and prosecutors within the national judicial system.</i>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>• Less expensive than the international tribunals</li> <li>• Strengthened capacity of national staff who benefit from the experience of international judges</li> <li>• Allows victims to testify and be recognized at the national level, their suffering</li> <li>• Educational values of trial (viewing in the media, etc.)</li> <li>• Make a place for the duty of memory in the re-founding of the state</li> </ul> <p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>• Risk of bias of national judges</li> <li>• Long and costly proceedings and evidence difficult to assemble</li> </ul>
<b>Investigations</b>		

86) [www.icc-cpi.int](http://www.icc-cpi.int)



Mechanisms	Duties/skills	Comments: Strengths/weaknesses
Truth commission <sup>87</sup>	<p><i>Characteristics of Truth Commissions: autonomous body of inquiry, approved by the state for a limited period; competent to investigate crimes and more serious crimes and abuses committed in particular during a given period; priority is given to victims who have suffered; results in a final report containing conclusions and recommendations that have value as historical documents: the “duty of memory”</i></p> <p><i>Some Commissions have had a significant impact, like that of South Africa (1994) and Morocco (2004). But others, on the other hand, have not been able to achieve their missions (credibility of members, in the case of the DRC or lack of political will in the case of Haiti, etc.)</i></p>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>Starts the process of national reconciliation</li> <li>Recognition of the right to truth and forgiveness</li> <li>Disincentive and educational effects</li> </ul> <p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>Linked to the mandate of each committee (fear of testifying of victims and witnesses, lack of time to find evidence, lack of cooperation from authorities and communities, lack of strategy to prosecute those who refuse to give evidence or perpetrators of serious crimes of international law, etc.)</li> <li>Lack of leadership of the civil society and thus its weak capacity to mobilize victims, witnesses and defendants.</li> </ul>
Other types of investigation	<p><i>Investigation by: National institutions of human rights, national commissions of investigation, multilateral bodies for monitoring or investigation of human rights or non-state actors, etc.</i></p>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>National ownership.</li> </ul> <p><b>Weaknesses</b></p> <ul style="list-style-type: none"> <li>Less effective as subject to political whim</li> </ul>
Reparations <sup>88</sup>		
Compensatory, symbolic, restitution of goods, etc.	<p><i>Rights of victims to claim reparations for gross violations of international law on human rights and international humanitarian law</i></p>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>Educational value</li> <li>Recognition of suffering</li> <li>Compensation</li> </ul> <p><b>Weaknesses</b></p> <p><i>Difficulties in:</i></p> <ul style="list-style-type: none"> <li>Gathering evidence</li> <li>Establishing objective basis for compensation (based on the damage caused or the needs of victims or a combination of both)</li> <li>Prioritizing damage covered (economic, physical and/or psychological), etc.</li> </ul>
Institutional reforms		
Identification-census <sup>89</sup>	<p><i>The programme aims to identify and list personnel working in the security sector to account for them and know them better.</i></p>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>Establishes a map of actors working in the sector</li> <li>Preventive measure that can have a deterrent effect on the ex-combatants;</li> </ul> <p><b>Weaknesses</b></p> <p><i>Imperfect system because it does not assess the competence or integrity of a person.</i></p>
Vetting <sup>90</sup>	<p><i>Vetting involves three steps: registration, evaluation and certification of personnel working in the army, police and judiciary. The objective is to remove security sector officials who have committed crimes or other abuses</i></p>	<p><b>Strengths</b></p> <ul style="list-style-type: none"> <li>Mapping of the security sector with the coercive measures</li> <li>Fight against impunity</li> </ul> <p><b>Weaknesses</b></p> <p><i>Strong political will is necessary to conduct this type of process right to the end.</i></p>

87) “The instruments of the rule of law in societies emerging from conflict - The truth commissions”, High Commission of the United Nations for Human Rights, 2006, [http://www.ohchr.org/english/about/publications/docs/ruleoflaw-TruthCommissions\\_fr.pdf](http://www.ohchr.org/english/about/publications/docs/ruleoflaw-TruthCommissions_fr.pdf)

88) Resolution 60/147 adopted by the General Assembly 16 December 2005

89) Rule of law tools for post-conflict states- Monitoring legal system-OHCHR 2006

90) Rule of law tools for post-conflict states- Vetting an operational framework-OHCHR 2006

### → Restorative justice

Unlike the traditional justice system that uses the sanction (including fines or jail) as a means of punishment to protect society, restorative justice is based on solving problems and on the right of offenders and victims to speak. The goal of this type of justice is to allow the reintegration of offenders and victims within their community; the community having the responsibility of deciding what type of pact it wants to arrange with the perpetrators of certain crimes, taking into account the needs and wishes of victims. Restorative justice involves all sorts of mechanisms such as mediation led by a professional lawyer, conciliation by religious authorities, traditional leaders or community elders (indigenous communities). The goal is the resolution of the conflict while allowing the rapid reintegration of the offender into society at the lowest cost. The concept of restorative justice has resulted in numerous research projects<sup>91</sup>, particularly in

common law countries that would like to see community service as an alternative to incarceration or that with conflict resolution as the base, mediation by community or religious judges, becomes the rule for minor disputes.

To conclude this chapter, the responses to situations in states affected by conflict or post conflict situations use various analytical tools, strategies, mechanisms that should wherever possible be integrated in an overall response for strengthening the justice sector, which results, in the long term, in the development and adoption of a sectoral policy of strengthening the judiciary, including an action plan covering a period of at least 10 years and an investment plan. Particular attention should be paid to the choice of organizations working on conflict areas. These organizations and their personnel must have a good “conflict-sensitivity”<sup>92</sup> with respect to issues related to conflict, the peace process, rehabilitation of the rule of law and the fight against impunity.

### Case of Rwanda: A multi-dimensional approach

#### 8<sup>th</sup> EDF project “Support for the rule of law and initiatives to promote human rights and national reconciliation in Rwanda”

The project “Support for the rule of law and initiatives to promote human rights and national reconciliation” contributed to strengthening the justice sector (Supreme Court, Prosecutor General, Ministry of Justice, National Police) and especially the national service of Gacaca courts, the National Commission for Unity and Reconciliation, the National Commission on Human Rights, the National Electoral Commission and the Office of the Ombudsman. Each of these institutions has contributed in its own way and in its specific area of intervention to the establishment and consolidation of the rule of law and national reconciliation in Rwanda.

To help meet the immense challenge posed by the backlog of genocide-related litigation and massacres of 1994 and inspired by the Gacaca, the traditional framework of conflict resolution, the Rwandan legislature established the Gacaca courts. These courts were responsible for the collection of information, the categorization of the defendants and the trial of those accused of genocide with the exception of those in the first category.

The multi-dimensional approach of this project strengthened the state justice system, while giving local Gacaca courts the means to fully play their role as judge and court of arbitration. The meetings and consultation with stakeholders, including the National Unity and Reconciliation, the National Commission on Human Rights and civil society organizations active in the sector, facilitated the monitoring of the trial and alerted the authorities and the international community to the risks of variations of the Gacaca courts and the need to amend the law so as to continue the process of “community justice” right to the end.

91) <http://www.restorativejustice.org/university-classroom/02world/africa3/africa>

92) <http://www.conflictsensitivity.org/>

## 5. CONCLUSION

Because it is a branch of state power, justice is in a sector in which donor intervention is delicate while ownership by the recipients of reform is sensitive and variable.

Because its function is to ensure personal security and respect for the rights of citizens and the security of economic investment, its proper functioning, however, is critical to the development of a country.

To the resolution of this paradox are added, in the ACP countries in particular, structural problems related to endemic poverty and, often, the shocks of political destabilisation, both of which lead, among other things, to rural exodus and urbanization with their attendant consequences. They are particularly dense in the justice sector. The breakdown of community ties destroys normative references, reduces collective control of behaviour and removes the possibility of using traditional methods of conflict resolution. However, most of these states are former colonies that created and left states with “two branches” (bifurcated states) in the justice sector. One, formal, urban and codified, for a minority; the other informal, rural and Non-uniform for the majority. Consequently, the guiding principle of the North, more generally that of the donors, according to which justice is a state monopoly, is very impractical. Not only legal systems remain mixed, but the risk is great that people feel alienated from a state judiciary when it appears to them to be neither accessible nor credible, nor respectful of human rights. The majority of residents often cannot but be suspicious or feel alienated by the state judiciary.

Any intervention in this sector must take into account this specificity by retaining several guidelines, including:

- As this is a change not only of texts but also of behaviour, accept that reform can only succeed over time, thus give it time;
- As this is a process of homogenization of practices, develop an inclusive and respectful approach to those in force and build people's confidence, specially by relying on community and local actors;
- As this is a broad sector and involves a multiplicity of authorities, that in addition are nominally independent, proceed in stages, possibly by targeting sub-sectors, without ever losing sight of the fact that this is a complex system that must embrace joint and harmonious development to ensure robustness and reliability.

## ANNEX 1. GLOSSARY <sup>93</sup>

<b>Accused</b>	Person suspected of having committed a crime and brought before a criminal court
<b>Accused</b>	Person prosecuted but not yet judged.
<b>Administrative law</b>	Legislation and procedures that regulate public administrations and the courts that rule in disputes between an individual and the state or a public authority
<b>Adversarial procedure</b>	Criminal procedure in which the parties (prosecution and defence) are in charge of the investigation and then the trial process. The role assigned to the judge is that of an impartial arbitrator. A procedure used in common law systems
<b>Alternatives to imprisonment</b>	Measures decided by the court to avoid imprisonment in less serious cases where the convicted person may be subject to: Community Service (the convict works free for a community or an association of public interest, for a period fixed by the court); deprivation of certain rights (e.g. suspension or cancellation of driver's license)
<b>Amnesty</b>	Act that removes the penalty or cancels prosecution for certain categories of offences. It is often passed for political reasons, to encourage a process of reconciliation
<b>Appeal</b>	Law that allows a person affected by a decision to have his case retried by other judges (appellate court). This law is general except for very small cases
<b>Arbitration</b>	Process used to settle a case outside of court (usually in large commercial cases): the parties agree on the name(s) of one or more arbitrators, reputable professionals, that they pay jointly and declare their acceptance in advance of the decision of the arbitrator(s).
<b>Arrest warrant</b>	Order given by a judge or court proceedings for the immediate arrest of a person
<b>Attorney general</b>	Name given under civil law to the attorney who supports the prosecution in a criminal court
<b>Auxiliaries of the judiciary</b>	Legal practitioners (lawyers, bailiffs, notaries) who contribute to the functioning of justice
<b>Bailiff</b>	Judicial auxiliary instructed to serve to the parties, procedural deeds (citations) and court decisions. In some countries the bailiff is responsible for enforcement of judgments in the form of seizures of bank accounts or seizure of property and the forced sale of these
<b>Bar association</b>	Name given to the group formed by lawyers. There may be a national Bar association for the whole country or a bar per region (at the Court of Appeal) or one at each court
<b>Bond (bail)</b>	Decision taken by a judge with respect to the accused (see this word), leaving him at liberty in exchange for the deposit of a fixed sum in order to guarantee his presence during all stages of the proceedings. The amount is refunded if the individual shows up. This avoids pre-trial detention
<b>Case law</b>	All decisions of the courts ruling on a particular subject. In common law, one speaks of precedents that have a binding effect on the judge in a case of similar nature. In civil law, the judge has no obligation to comply with case law but often takes it into account as a general goal of legal certainty
<b>Cassation</b>	In civil law countries, a process undertaken by a national court (Court of Cassation) leading to verify the correct application of law by lower courts. Beyond the search for any procedural flaw, the decisions of the Supreme Court help to give rules of interpretation to the lower courts with respect to the application of the law when it is unclear or inadequate. If the decision is quashed, the case is referred for trial on its merits in a lower court at the same level. This function of harmonization of law is fulfilled in the systems of common law by higher courts.

93) **Note.** This glossary is not intended to be a summary of proceedings or a legal dictionary, but has been established to provide key concepts commonly used in identification and/or that give rise to confusion among the legal systems in force.

<b>Caught in the act (procedure)</b>	A crime is obvious when it is in the process of being committed. In this case, under civil law, the police have more powers than in a normal investigation and, if the case is simple, the prosecutor may decide on a judgement procedure immediately. If a sentence of imprisonment is imposed, it is executed immediately.
<b>Civil action</b>	Proceedings brought by a private person (individual or corporation) against another to enforce any right or to enforce an obligation
<b>Civil law</b>	Legislation, procedures and the courts in charge of settling disputes between individuals
<b>Civil party</b>	Name given to the victim who applied to the court for compensation for the damage suffered. As a party to the proceedings, he has certain rights: knowledge of the file, right of appeal against a dismissal or an acquittal (see these words). This judicial status of the victim does not exist under common law
<b>Class action (or group action)</b>	Procedure allowing a person to benefit a group with compensation for damage recognized by a court, such as a defective appliance sold in thousands of units, if the manufacturer is sentenced to compensate the damage, the judgement will benefit all other purchasers of the unit, without requiring them to undertake further individual lawsuits. This procedure, ruthlessly efficient, is very favourable to consumers. Manufacturers are strongly opposed to its creation in countries where it does not exist. It differs from class actions that may, under certain conditions, be filed by associations on behalf of their members. A procedure born in the United States, the EU plans to impose it on all member states that do not have it.
<b>Clerk of the court</b>	Administrative services of a court responsible for managing files and editing decisions. It is performed by clerks.
<b>Commercial law</b>	Legislation, procedures and the civil courts specialized in disputes between traders (sole traders or commercial companies)
<b>Committal order</b>	Order given to a prison by a judge, a court or a prosecutor to imprison a person
<b>Community service</b>	See alternatives to imprisonment
<b>Complaint</b>	Act whereby a person who considers himself a victim of an offence informs the prosecutor directly or the police to ask the judiciary for the criminal conviction of the perpetrator
<b>Conciliation</b>	Method of settlement of certain civil litigation exercised either directly by the judge or by a third party, judicial conciliator. The reconciliation may occur without any trial or when legal proceedings have already begun. The reconciliation aims to seek an amicable agreement between people in dispute.
<b>Confession</b>	<p>Declaration by which a person admits to having committed an offence. In civil law countries, the confession is often the “queen of proofs”, a fact that can lead the police to use violence to obtain it.</p> <p>In common law systems, the confession has a direct bearing on the trial: when the accused pleads guilty, the trial is in the form of a brief reading of the charges and a discussion of the sentence. In addition, the latter is often already established in the context of plea bargaining, i.e. negotiation between the prosecution and defence with respect to the severity of the offence that will be acknowledged and the sentence. If the accused pleads not guilty, the trial, which can be very long, takes place before a judge and jury.</p>
<b>Constitutional law</b>	Legislation, procedures and the court charged with verifying compliance of a law with the constitution of the country.
<b>Convicted person</b>	Person declared guilty by a court and against whom a penalty has been imposed



<b>Conviction</b>	In criminal cases: judicial decision declaring a person guilty of an offence and imposing a sentence. In civil or commercial matters: court decision that may impose different obligations: order a person to pay a sum of money as damages, to perform any act or refrain from doing so
<b>Court costs</b>	All costs to be paid to the state at the end of a trial by the convicted person or by the losing party
<b>Court decision</b>	<p>A written document containing the summary of the case, the solution adopted by the court (court, tribunal), and the reasons that led to its adoption.</p> <p>A judgement is the decision by the courts</p> <p>A ruling is by the higher courts (Courts of Appeal, Court of Cassation, the Supreme Court)</p> <p>An order may be made by various courts; it is temporary (it allows the rights to be preserved, etc.) until the judge rules on the merits of the case</p> <p>The principle of publicity is attached to judicial decisions.</p>
<b>Criminal law</b>	Legislation, procedures and the courts that decide on the guilt of a person accused by the prosecutor and impose a penalty on the convicted person
<b>Criminal mediation</b>	Conciliation process implemented before the criminal trial initiated by the prosecutor; generally intended to allow compensation for the victim by the offender, who may then not be prosecuted
<b>Crown</b>	See public prosecutor
<b>Crown (prosecution)</b>	All persons responsible for initiating criminal proceedings against persons suspected of having committed a crime and then sustaining the charge before the court. In civil law, the Crown is often composed of magistrates with the same training as judges, with possible transition from one body to another. In common law, there may be a body of officials to manage prosecutions (Crown Prosecution Service in England), the charge being sustained at the hearing by a Crown Counsel, or elected lawyers (district attorneys in the U.S.)
<b>Custody</b>	Right given to the police to retain in its premises for a limited time a person suspected of having committed an offence
<b>Damage</b>	Damage caused to a person, voluntarily or involuntarily
<b>Decree</b>	General rule decided by the government. Unlike law, which can only come from parliament, the decree is the responsibility of the government alone
<b>Degree of jurisdiction</b>	<p>Place of jurisdiction in the proceedings:</p> <p>first degree: tribunal reviewing the case at the beginning of the process</p> <p>second degree: court of appeal that judges the case again if a party has appealed the tribunal decision</p>
<b>Enforcement procedures</b>	Procedures enabling the enforced implementation of judgments
<b>Executive judge</b>	Judge responsible for deciding on disputes concerning enforcement of judgments in civil or commercial matters (for example, the challenge of a seizure)
<b>Exhibits</b>	Objects placed under seal and constituting evidence in criminal matters. They are generally retained by the court.

<b>Detention regime</b>	After conviction, modifying the conditions of execution of sentence of imprisonment: outdoor worksites (the prisoner works outside prison under supervision), semi-parole (the offender goes out during the day and returns to prison in the evening and at the end of the week), temporary leave (one or several days to restore family links or look for work), parole (exit before the end of sentences for offenders offering reintegration guarantees). These measures are decided by a specialized judge (judge for the application of penalties) or sometimes by the Minister of Justice (a common situation for parole).
<b>Habeas corpus</b>	English text going back to 1679, the origin of the right of individual security, that has its roots in the struggle against arbitrary princely actions such as those particularly exercised by use of a “warrant” and, in short, avoiding any judicial intervention into the deprivation of liberty (prisons, hospitals, etc.).
<b>Hearing</b>	Session during which a court takes cognisance of the parties’ arguments, instructs the proceedings and hears the people involved: prosecutor, parties, lawyers, witnesses, experts
<b>Home detention</b>	Decision by a judge who orders a person not to leave their home. It may involve a foreigner pending deportation or be substituted for a sentence of imprisonment for an elderly or sick convicted person
<b>Imprisonment</b>	Deprivation of freedom imposed in criminal cases
<b>Indictment</b>	Submissions by the Crown to request the judge to apply the law in criminal matters and impose a sentence
<b>Inquisitorial procedure</b>	Criminal procedure where the prosecutor (and the investigation judge) has control of the investigation and where the judge directs the trial, the parties may then only ask questions. A procedure used in a civil law systems
<b>Investigation magistrate</b>	In some countries (France and some ACP countries), the magistrate leading the investigation in the most complex criminal cases. This magistrate brings together elements considered relevant to the truth, directs questioning, confrontations and hearings, and prepares the file. He can charge a person (let him the latter know he is charged), order or request his preventive detention. At the end of his statement, and after consulting with the prosecutor, he decides whether to send the case to the trial court or discontinue proceedings (decision of “case dismissed”, see this word)
<b>Judge/magistrate</b>	Judge: Legal professional responsible for the imposition of court decisions Magistrate: in civil law, often the generic term for judges and prosecutors. In common law, a judge may appoint Non-professionals to be in charge of deciding on the numerous small criminal and civil cases (English system)
<b>Judgement</b>	Name given to a Court order: Court of Appeal, Criminal Court, Court of Cassation, or Supreme Court (as opposed to “ruling” which means a court order issued by a court, court of lower rank). See also “Court Decision”
<b>Judgement</b>	See “judicial decision” and “ruling”
<b>Judicial mediation</b>	Mediation implemented during a trial following the proposal of the judge or on the request of one of the parties

<b>Judicial/legal aid</b>	Device for the needy or those with moderate incomes to obtain the free assistance of a lawyer to file a lawsuit and be assisted by counsel at trial. The cost is borne by the attorney, the Bar or the state according to the systems used by the law
<b>Juvenile justice</b>	All the courts (judges for juveniles, juvenile courts) responsible for taking protective measures for children at risk and deciding on crimes committed by minors
<b>Law</b>	Rule of law of general application, applying to all without exception. It is voted by parliament, signed by the head of state and published. [Here is the translation into English should try to distinguish: Acts, Statutes and Bills]
<b>Lawsuit</b>	Proceedings before a court for recognition of a right. (civil action: see above; criminal action: action taken by the victim before a criminal court against the suspect for damages)
<b>Lawyer</b>	Legal professional who informs his clients of their rights and obligations, advises and monitors actions brought to justice, assists and represents clients during the proceedings. In civil law systems, the term lawyer covers all of these activities (advice and advocacy). In common law systems, the term lawyer is also a general designation, although more commonly it refers to counsel. The barrister is the pleading lawyer. The solicitor is the editor of deeds (equivalent to a notary or attorney in civil law)
<b>Legal avenues of redress</b>	Means made available to parties for a re-examination by a court: <ul style="list-style-type: none"> <li>- opposition, before the same judges, for a judged person when he had not been correctly convened (civil law)</li> <li>- appeal, to retry the case by a higher court (all systems)</li> <li>- further appeal, to verify the correctness of the decision of the Court of Appeal (civil law)</li> <li>- appeal to the Supreme Court, by leave of the latter, in cases raising a question of principle (common law)</li> </ul>
<b>Legal help/assistance</b>	Help for the needy or those with modest incomes to consult a lawyer or an association to obtain information on their rights
<b>Litigation</b>	All the disputes relating to the same subject or within a single jurisdiction or a single set of courts
<b>Mediator</b>	Independent person responsible for seeking amicable solutions to disputes between the parties
<b>Military justice</b>	All the special courts, composed in whole or part by the military, that have to decide on the guilt of military personnel suspected of having committed a crime or those suspected of a crime committed against a soldier.
<b>Mobile hearing</b>	Hearing held by the judge outside the court. This process allows justice to be rendered in remote areas that do not have courts, often for people in extreme poverty who cannot travel to the court
<b>No case to answer</b>	Decision taken by the judge when, at the end of the accusation, he states that he believes there is “no case to answer” (hence the term) in order to summon the accused to appear before a court because of insufficient charges
<b>No bis in idem</b>	Principle that no person shall be tried twice for the same offence
<b>Notification</b>	Delivery or sending of a deed or a decision
<b>Pardon</b>	Right given to the chief of a state or the governor of the state in some Federal systems to amend a criminal conviction or to remove its effects. The sentence continues but its implementation is changed.

<b>Parole</b>	See “detention regime”
<b>Parties to the case</b>	Name given to the one and the other person involved in a civil or commercial case
<b>Penalty enforcement judge</b>	Judge in charge of taking measures for the implementation of sentences (see this expression) in prison and to organize the monitoring of those convicted on probation (see this word)
<b>Personal action</b>	Civil action concerning individuals (e.g. divorce, child custody, paternity dispute)
<b>Pleading</b>	All arguments developed in the hearing by counsel for the defence of his client’s interests
<b>Police record</b>	Document assembling information on convictions. The record may be national or exist with each court (a common situation in developing countries), it assembles the sentences for persons born in the district of the court. In civil law systems, a bulletin of the police records is requested by the prosecutors or judges for those accused in order to ascertain their possible criminal record including adapting the sentence accordingly. In common law systems, on the other hand, it is forbidden to communicate the criminal record of the accused to the jury in order to avoid influencing the latter at the time of conviction
<b>President of the bar (Queen’s Counsel)</b>	Chief counsel, elected by the lawyers. He/she represents the profession to the authorities. He/she settles disputes among colleagues and may initiate disciplinary proceedings. He/she chairs the Council of the Order, the official organ of the profession
<b>Presumption of innocence</b>	Any person suspected of having committed an offence, or so charged, is considered innocent of the facts alleged against him, as he has not been convicted by the court competent to judge him
<b>Preventive/provisional detention</b>	Before the trial, measure of incarceration decided by a judge with respect to a person prosecuted for a crime or misdemeanour. It conforms to criteria defined by law (risk of flight, risk of pressure on witnesses, risk of a new offence).
<b>Private law</b>	All rules concerning the actions and the lives of individuals or private legal entities (companies, associations).
<b>Probation</b>	Also called suspended sentence: imprisonment that is suspended, under the terms of which the prisoner is subject to obligations (e.g. compensate the victim) and is under the control of a service subordinate to the sentence enforcement judge
<b>Proof/evidence</b>	Documents, testimonies, confessions, expert opinion, physical evidence that allow the reality of a fact or a legal act to be established.
<b>Property action</b>	Civil action concerning a right on a building (e.g. property claims, challenging the boundaries of land)
<b>Prosecutor</b>	Legal professional leading the criminal investigations and indictment.
<b>Public action</b>	Public prosecutor’s power to initiate proceedings against a person suspected of having committed an offence
<b>Public law</b>	Set of rules for the organization and functioning of the state, local government (cities, regions, chiefdoms, etc.) and the administration as well as their relations with private persons.
<b>Purview</b>	Final part of a judgement or decision that defines the solution to the dispute and has to be enforced. Differs from the “reasons”.
<b>Reasons</b>	Replies given by the judge to the pleas raised by the parties and that support the “purview”. The expression of the reasons is a precondition for the legality of the decision and should be available after the pronouncement of the judgement in court within a specified time allowing parties to appeal. Regarded as a fundamental freedom of the individual, the reasons protect against arbitrary decisions by the judge and corruption.

<b>Referred proceedings</b>	Civil or commercial procedure (civil law systems) in which one “refers” (hence the name) to the presiding judge for an emergency measure: preservation of evidence (expert opinion), wrongful termination of an illegal action (e.g. expulsion of squatters), down payment on a debt where it is not seriously disputed. Rapid procedure, in which the decision may be implemented even the same day (referred “hour by hour”)
<b>Replacement</b>	
<b>Res judicata</b>	Authority attached to a judicial decision when no appeal is possible
<b>Restorative Justice</b>	Concept: Restorative justice is an alternative to the normal processes of criminal justice that focuses on repairing the harm caused by the crime. It often takes the form of a meeting between the victim and the offender and may involve other members of the community, for the joint determination of remedies by the offender to compensate the damage.
<b>Retributive justice</b>	Concept: retributive or enforcement justice seeks to restore order by imposing precisely proportioned suffering. The purpose of the punishment is the deterrence of the offender himself and the general population.
<b>Roll</b>	List of cases pending before a court
<b>Seals</b>	Seals (document that bears a seal) are affixed to demonstrate the closure of the venue (the scene of the crime, a room in which an inventory of the property must be carried out) or on discovery of evidence during a criminal investigation (the indices are then placed in a sealed pouch)
<b>Security measure</b>	Measure taken by a judge when a person has a dangerous character (e.g. the obligation to undergo treatment, electronic surveillance, suspension of driver's licence)
<b>Solicitor (attorney)</b>	Professional at law responsible for written deeds in civil or commercial proceedings, in addition to the barrister.
<b>Stay of proceedings</b>	Measure decided by a court that puts its decision on hold when it depends on another pending case
<b>Summons</b>	Notice issued at the request of the prosecutor, to an accused, victim or witness by a judicial officer requiring them to appear at the hearing.
<b>Superior Council of Magistracy (SCM)</b>	Body for the appointment and discipline of judges and that may have a different name (e.g. UK: Commission for the appointments of the judiciary). It is chaired depending on the country by the President of the Republic, the Minister of Justice or the senior magistrate of the country.
<b>Supervised probation</b>	Measure decided by the juvenile court with respect to a minor declared a delinquent or provisionally during the investigation stage or definitively by the trial court, it has two dimensions: supervision and educational activities.
<b>Suspect</b>	Person suspected of having committed an offence
<b>Suspension (of prison sentence)</b>	Where a person is sentenced to a suspended sentence, the implementation thereof is suspended for a period fixed by law (e.g. 5 years). If during this time, the convicted person does not commit a new offence, then the sentence is void and will never be implemented. If within that time, he commits a new offence, the suspension is waived and the sentence is implemented, in addition to that which is imposed for the new offence.
<b>Warrant order</b>	Order given by a judge or a tribunal to conduct a person immediately before him for questioning



## ANNEX 2. APPLICATION OF ANALYSIS MODEL FOR SECTORAL GOVERNANCE IN THE JUSTICE SECTOR

The analytical model was applied to the justice sector of an imaginary country located in the ACP (Micromegas). This example presents a schematic of:

- each step of the process of the governance analysis (See Chapter 2, Section 2.1)
- the priorities and actions taken by the EC following the analysis;
- the first results of the process.

### Context

Micromegas has been plagued by conflict, having upset the geopolitical balance of the region. During the last decade and with the assistance of the international community several major events have enabled Micromegas to hold elections, amend the constitution and lay the foundations for the rule of law, especially by raising judicial authority to the rank of judicial power and allowing parliament and external control institutions to function. The Cooperation Strategy and the National Indicative Programme are implemented within the context of restoring peace. Following the mid-term review, the amounts of the donors A and B were respectively increased.

The sectoral policy and action plan for justice (5 years) approved in 2007, presents a list of actions with the following objectives: improved access to justice, improved judicial governance (management, training, infrastructure, equipment, etc.), the fight against corruption and impunity, the security of investments, especially revision of the legal and regulatory framework for business.

The stakeholders are the Ministry of Justice, the Superior Council of Magistracy, the Law Society and civil society organizations. Significant efforts are to be considered in the direction of parliament that must analyze and adopt several draft laws and proposals.

Women, children and persons with disabilities have been identified as priority target groups.

The EC has identified the improvement of judicial governance as a major objective of its action in the justice sector, while ensuring the promotion of access to justice for vulnerable people. To do this, it intends to involve CSOs both in the provision of services as well as the monitoring of government activities. But the authorities do not support the granting of subsidies to CSOs. The EC wishes nonetheless that some funds be earmarked for CSOs. To this end, the EC calls on the mission to formulate its future programme:

- to organize round tables promoting dialogue between, on the one hand, CSOs active in the sector and, on the other, between the latter and government authorities;
- to take stock of achievements since the approval of the action plan that will include consultation with key donors active in the justice sector, and
- the need to use political dialogue.

### Step 1: Analysis of the context of the governance of the justice sector

Taking into account the strategic priorities outlined in the PRSP and the requirements listed in government documents, including the sectoral policy and the action plan for the justice sector, the governance profile and the studies carried out by development partners active in the country and in the sector and United Nations documents and reports from organizations (Human Rights Watch, Transparency International, etc.), the EC highlighted:

- a lack of political will to set up the new institutions provided for in the constitution,
- a disorganized judiciary
- Non-existent operating budgets
- a high level of corruption,
- aging infrastructures and an outdated legal and regulatory framework.

### Example of steps leading to a mapping of the context of sectorial governance of Justice (Micromegas)

Level	Factors/driving forces	Indicators and sources of verification
Judiciaire?	A disorganised judiciary	Lack of leadership of senior judges in the country. Impact on the establishment of a Higher Judicial Council able to take responsibility.
	Strong demand by the justice stakeholders (e.g. Law Society, Judges Union, etc.) to create a strong judiciary power	<ul style="list-style-type: none"> <li>• Strikes by magistrates.</li> <li>• Preparation of a draft law amending the status of judges.</li> <li>• Strong mobilisation of lawyers alongside the unions of magistrates,</li> </ul>
National	An omnipresent Ministry of Justice (MJ)	<ul style="list-style-type: none"> <li>• MJ: budget manager (operation and investment) for the sector, and</li> <li>• Manager of agents working in the sector (clerks, secretaries, administrators, etc.).</li> </ul>
	Lack of political will to curb corruption	<ul style="list-style-type: none"> <li>• Corruption proven but not sanctioned within the three powers</li> </ul>
	Aging public civil service, low-paid and poorly trained	<ul style="list-style-type: none"> <li>• The reform of the civil service failed: fear of social movements, constraints imposed by international financial institutions and weak commitment of the government to take action (forced retirement, reorganization of the executives in the Ministries, etc.).</li> </ul>
	Weakness of civil society organizations	The civil society is not able to play its role of counter-force due to lack of resources and willingness to organize a coalition
Regional	Weaknesses of external control institutions	<ul style="list-style-type: none"> <li>• The parliamentary committees blame delays in the review of legislation with respect to revising the law (e.g. judiciary, criminal law, criminal procedure, etc.)</li> <li>• The Court of Accounts does not have sufficient resources to operate</li> </ul>
	Pockets of conflict at the borders with two neighbouring states	Number of complaints: assault, rape, weapons proliferation, inability of courts of justice in these areas, etc.
International	The country has ratified numerous treaties, international conventions (women's rights, children's rights, etc.)	<ul style="list-style-type: none"> <li>• Limited harmonization of national legal frameworks relating to international treaties, conventions and protocols</li> </ul>

### Step 2: Mapping of actors – interests, power and incentives

### Step 3: Analysis of relations of governance and accountability

- *What mechanisms of governance allow the exercise of authority and power in this sector?* Recent studies conducted by international organizations indicate a lack of leadership of the Superior Council of Magistracy (SCM), which always feels under the control of the executive even though the new Constitution establishes an independent power. Corruption is endemic in the sector, uncontrolled and unchecked. Poor image of the sector both among the actors as well as the people.
- *What do we know about the rules of the game when establishing the governance for this sector?* The lack of transparency in the processes (recruitment, rotation of judges) and the low independence of the power of the judiciary limits the development of the SCM. The CSOs are weak.

- *In the sector, is the public action rather predictable (in accordance with formal policies) or discretionary?* Studies show that the justice sector is under the control of the executive, without an accessible judicial system, individuals have recourse to the police and traditional leaders to do them justice.
- *What are the accountability mechanisms that apply to the sector?* The responsibility mechanisms are diffuse. There is no mechanism of accountability. Culture of impunity and lack of accountability.
- *What institutional capacities does the government have for governance and accountability to allow effective management of the sector?* The sector has well-trained but aging judges. The succession is not assured; this is the same for staff working in the sector (clerks, police, prison guards, etc.).

### Summary of the analyses – trends in sectoral governance

	Key features	Key strengths/opportunities	Key weaknesses/threats	Main trends
<b>Broader context (beyond the sector)</b>	<ul style="list-style-type: none"> <li>Lack of transparency in the political system with the executive controlling the judiciary</li> </ul>	<ul style="list-style-type: none"> <li>Better access to justice by the population in the investigations that led to the PRSP</li> </ul>	<ul style="list-style-type: none"> <li>Weakness of parliament</li> <li>Corruption is endemic</li> </ul>	Opportunities for reform following strong pressure from the population
<b>Actors, interests, incentives</b>	<ul style="list-style-type: none"> <li>Justice sector disorganised</li> </ul>	<ul style="list-style-type: none"> <li>Mobilisation of certain groups (judges, lawyers, etc.) in favour of the independence of the judiciary</li> </ul>	Inertia of the SCM	Internal regulations of the SCM and Code of Ethics submitted for approval at the next General Meeting of the SCM
<b>Governance relations</b>	Relations of patronage between the body of magistrates and the Ministry of Justice	Sectoral support (World Bank) provided an expenditure framework is set up in the medium-term	Weakness of control institutions	Willingness expressed to call for international aid to carry out the activities of the justice sector action plan

### Step 4: Summary – Analysis of the ability of the justice sector to reform its governance – From Analysis to Action

Priorities	Actions of the EC
Improved governance of the judiciary (management, training, infrastructure, equipment, etc.)	Support the training school for criminal justice professionals Strengthen SCM Support the government in developing a framework for medium-term expenditure
Access to justice: providing services to vulnerable people (free legal assistance, mediation by traditional leaders, etc.)	Grants to CSOs, and the Bar; capacity building of CSOs. But at the request of the government, CSOs will need to inform themselves and become involved when necessary in carrying out certain activities.
Fight against corruption and impunity	Political dialogue to set up an Ombudsman of the Republic with respect to activities associated with information, education and communication



## ANNEX 3. USEFUL REFERENCES ON JUDICIAL AND SECURITY DEVELOPMENTS

### 1. International organizations and specialized bodies

#### **Consultative Council of European Judges (CCEJ):**

The Consultative Council of European Judges is an advisory body of the Council of Europe on issues related to the independence, impartiality and competence of judges. [www.coe.int/t/dg1/legalcooperation/judicial-professions/ccje/](http://www.coe.int/t/dg1/legalcooperation/judicial-professions/ccje/)

#### **European Commission for the Efficiency of Justice (CEPEJ):**

The aim of the CEPEJ is the improvement of the efficiency and functioning of justice in the member States, and the development of the implementation of the instruments adopted by the Council of Europe to this end.

[www.coe.int/t/dg1/legalcooperation/cepej/](http://www.coe.int/t/dg1/legalcooperation/cepej/)

#### **The International Center for Transitional Justice (ICTJ):**

The International Center for Transitional Justice (ICTJ) assists countries pursuing accountability for past mass atrocity or human rights abuse. The Center works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

[www.ictj.org](http://www.ictj.org)

#### **International Commission of Jurists:**

The International Commission of Jurists is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. The ICJ provides legal expertise at both the international and national levels to ensure that developments in international law adhere to human rights principles and that international standards are implemented at the national level.

[www.icj.org](http://www.icj.org)

#### **International Council on Human Rights Policy:**

The International Council on Human Rights Policy provides a forum for applied research, reflection and forward thinking on matters of international human rights policy. In a complex world in which interests and priorities compete across the globe, the Council identifies issues that impede efforts to protect and promote human rights and proposes approaches and strategies that will advance that purpose.

[www.international-council.org](http://www.international-council.org)

#### **Open Society Institute:**

The Open Society Institute (OSI), a private operating and grant making foundation, aims to shape public policy to promote democratic governance, human rights, and economic, legal, and social reform. On a local level, OSI implements a range of initiatives to support the rule of law, education, public health, and independent media. At the same time, OSI works to build alliances across borders and continents on issues such as combating corruption and rights abuses.

[www.soros.org](http://www.soros.org)

#### **United Nations Office on Drugs and Crime (UNODC):**

The UN Office on Drugs and Crime (UNODC) formulates and promotes internationally recognized principles in such areas as independence of the judiciary, protection of victims, alternatives to imprisonment, treatment of prisoners, police use of force, mutual legal assistance and extradition. More than 100 countries worldwide have relied on these standards in writing their national laws and policies in crime prevention and criminal justice, leading to a common foundation for fighting international crime while respecting human rights and the needs of individuals.

[www.unodc.org/unodc/](http://www.unodc.org/unodc/)

#### **United Nations Development Programme (UNDP) – Democratic Governance:**

UNDP's core services to support national processes of democratic transitions, focus on: (1) Policy advice and technical support; (2) Strengthening capacity of institutions and individuals (3) Advocacy, communications, and public information; (4) Promoting and brokering dialogue; and (5) Knowledge networking and sharing of good practices. [www.undp.org/governance/about.htm](http://www.undp.org/governance/about.htm)

#### **United Nations Economic and Social Council (ECOSOC)**

ECOSOC was established under the United Nations Charter as the principal organ to coordinate economic, social, and related work of the 14 UN specialized agencies, functional commissions and five regional commissions. The Council also receives reports from 11 UN funds and programmes. The Economic and Social Council (ECOSOC) serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to Member States and the United Nations system. It is



responsible for: promoting higher standards of living, full employment, and economic and social progress; identifying solutions to international economic, social and health problems; facilitating international cultural and educational cooperation; and encouraging universal respect for human rights and fundamental freedoms.

[www.un.org/ecosoc](http://www.un.org/ecosoc)

#### **Vera Institute of Justice:**

The Vera Institute of Justice combines expertise in research, demonstration projects, and technical assistance to help leaders in government and civil society improve the systems people rely on for justice and safety.

[www.vera.org](http://www.vera.org)

#### **World Bank:**

This website's objective is to share legal knowledge for development.

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,menuPK:445640~pagePK:149018~piPK:149093~theSitePK:445634,00.html>

Justice for the Poor (J4P) is a global research and development program aimed at informing, designing and supporting pro-poor approaches to justice reform. It is an approach to justice reform which sees justice from the perspective of the poor and marginalized and is grounded in social and cultural contexts. It recognizes the importance of demand in building equitable justice systems and understands justice as a cross-sectoral issue.

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,menuPK:3282947~pagePK:149018~piPK:149093~theSitePK:3282787,00.html>

## **2. Human rights**

#### **African Commission on Human and Peoples' Rights**

Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (OAU), the African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent. The Commission has its headquarters in Banjul, The Gambia.

[www.achpr.org](http://www.achpr.org)

#### **African International Courts and Tribunals, including the African Court on Human and Peoples' Rights**

The **African Court on Human and Peoples' Rights** is a regional court that rules on African Union states' compliance with the African Charter on Human and Peoples' Rights. The Court is located in Arusha, Tanzania.

[www.aict-ctia.org/courts\\_conti/achpr/achpr\\_home.html](http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html)

#### **African Human Rights library**

<http://library.stanford.edu/depts/ssrg/africa/hurights.html>

#### **Council of Europe (CoE):**

Founded in 1949, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals.

[www.coe.int](http://www.coe.int)

#### **European Court of Human Rights**

The European Court of Human Rights in Strasbourg is a regional judicial body, established under the European Convention on Human Rights of 1950 to monitor respect of human rights by states. All 47 member states of the Council of Europe are parties to the Convention. Applications against Contracting Parties for human rights violations can be brought before the Court by other states, other parties or individuals.

[www.echr.coe.int/echr/Homepage\\_EN](http://www.echr.coe.int/echr/Homepage_EN)

#### **European Union and Human Rights – documents page at the Europa external site**

Includes links to EU publications, including European Commission communications and reports, EIDHR documents, link to EU Guidelines on Human Rights and International Humanitarian Law by the Council of the European Union (2009)

[http://ec.europa.eu/external\\_relations/human\\_rights/docs/index\\_en.htm](http://ec.europa.eu/external_relations/human_rights/docs/index_en.htm)

#### **EU Human Rights Guidelines**

[www.consilium.europa.eu/showPage.aspx?id=1681&lang=EN](http://www.consilium.europa.eu/showPage.aspx?id=1681&lang=EN)

**Implementation of the Commission Communication on the EU's Role in Promoting Human Rights and Democratisation in Third Countries.** Commission staff working document. SEC(2004) 1041, Brussels, 30.7.2004.

[http://ec.europa.eu/external\\_relations/human\\_rights/docs/sec01\\_1041.pdf](http://ec.europa.eu/external_relations/human_rights/docs/sec01_1041.pdf)

### **EU Policy against Torture and ill-Treatment. Prevention of Torture and Rehabilitation of Victims.**

Background paper by RELEX, January 2009.

[http://ec.europa.eu/external\\_relations/human\\_rights/torture/docs/background\\_en.pdf](http://ec.europa.eu/external_relations/human_rights/torture/docs/background_en.pdf)

### **Studies and evaluations on human rights, including EIDHR evaluations**

[http://ec.europa.eu/europeaid/what/human-rights/studies\\_evaluations\\_en.htm](http://ec.europa.eu/europeaid/what/human-rights/studies_evaluations_en.htm)

### **Impact indicators for European Instrument for Democracy and Human Rights (2005)**

The present document is a tool tailored to EIDHR priorities which suggests some possible country level indicators, and advises on the optimal way of generating indicators for each project individually. It is intended for EC task managers and project operators.

[http://ec.europa.eu/europeaid/what/human-rights/documents/impact\\_indicators\\_channel\\_en.pdf](http://ec.europa.eu/europeaid/what/human-rights/documents/impact_indicators_channel_en.pdf)

### **The Danish Institute for Human Rights: Human Rights Indicators at Programme and Project Level**

– Guidelines for Defining Indicators, Monitoring and Evaluation (2006)

[www.humanrights.dk/files/pdf/indikatorMANUALweb-PDF.pdf](http://www.humanrights.dk/files/pdf/indikatorMANUALweb-PDF.pdf)

### **Inter-American Commission on Human Rights**

The Inter-American Commission on Human Rights is an autonomous organ of the Organization of American States (OAS), part of the inter-American system for the promotion and protection of human rights. The IACHR is a permanent body, with headquarters in Washington, D.C., United States, and it meets in regular and special sessions several times a year to examine allegations of human rights violations in the hemisphere.

[www.cidh.org/DefaultE.htm](http://www.cidh.org/DefaultE.htm)

### **Inter-American Court of Human Rights**

The Inter-American Court of Human Rights is an autonomous judicial institution based in the city of San José, Costa Rica, part of the human rights protection system of the Organization of American States (OAS), which serves to uphold and promote basic rights and freedoms in the Americas.

[www.corteidh.or.cr/index.cfm?CFID=437419&CFTOKEN=32756028](http://www.corteidh.or.cr/index.cfm?CFID=437419&CFTOKEN=32756028)

### **UN Human rights page**

This page includes links to UN bodies, thematic issues, international courts and tribunals, instruments and declarations as well as conferences on human rights.

This page assembles a vast collection of links for campaigns, discussion fora, education, general websites on human rights, thematic issues, International organizations, human rights law, NGOs, publications, reports, and resources

[www.un.org/en/rights/](http://www.un.org/en/rights/)

### **UN Office of the High Commissioner for Human rights**

This page presents the mandate and work of the OHCHR and provides a wide range of publications on human rights issues.

[www.ohchr.org/EN/Pages/WelcomePage.aspx](http://www.ohchr.org/EN/Pages/WelcomePage.aspx)

### **International law website by OHCHR**

This website collects the documents on international law such as the charter of United Nations, the international bill of human rights and the core international human rights instruments and their monitoring bodies.

<http://www2.ohchr.org/english/law/>

### **UN human rights monitoring mechanisms**

This link describes the human rights monitoring mechanisms in the United Nations system and provides the latest documents issued by these bodies.

[www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx)

**Human rights web** – This page contains names of human rights organizations at international and regional/national level, other organizations doing substantial amounts of human rights work, and resources (such as libraries and internet-based information).

[www.hrweb.org/resource.html](http://www.hrweb.org/resource.html)

## **3. Key tools, guidelines, reference documents**

### **CEPEJ: Checklist for promoting the quality of justice and the courts** (July 2008)

[www.courtexcellence.com/pdf/2\\_2008\\_CEPEJ\\_checklistQualite\\_en.pdf](http://www.courtexcellence.com/pdf/2_2008_CEPEJ_checklistQualite_en.pdf)

### **Creating a Global Rule of Law Meeting Point** by Hans Corell

This paper argues that the rule of law status should be assessed more systematically, focus more on legal technical assistance through focused projects, and that proposals for legislation must be discussed in detail with politicians, administrators and other at the local or national level.

[www.havc.se/res/SelectedMaterial/20080129hiil2007annualhiilconference.pdf](http://www.havc.se/res/SelectedMaterial/20080129hiil2007annualhiilconference.pdf)

**DFID: Safety, Security and Accessible Justice: Putting Policy into Practice** (2002)  
[www.dfid.gov.uk/Documents/publications/safesecu-reaccjustice.pdf](http://www.dfid.gov.uk/Documents/publications/safesecu-reaccjustice.pdf)

**DFID: non-state Justice and Security Systems.**  
 Briefing note. (2004)

[www.dfid.gov.uk/Documents/publications/non-state-justice.pdf](http://www.dfid.gov.uk/Documents/publications/non-state-justice.pdf)

**Geneva Centre for the Democratic Control of Armed Forces (DCAF): publications**

[www.dcaf.ch/publications/kms/index.cfm?nav1=5](http://www.dcaf.ch/publications/kms/index.cfm?nav1=5)

**Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework. A guide for USAID democracy and governance officers** (August 2008).

This guide provides a conceptual framework for analyzing challenges to the rule of law, as well as guidelines for conducting a justice sector assessment and for designing and prioritizing program interventions.

[www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ROL\\_Strategic\\_Framework\\_Sept\\_08.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf)

**Human Rights Watch: Selling Justice Short: Why Accountability Matters for Peace** (July 2009)

[www.ssrnetwork.net/document\\_library/detail/4980/selling-justice-short-why-accountability-matters-for-peace](http://www.ssrnetwork.net/document_library/detail/4980/selling-justice-short-why-accountability-matters-for-peace)

**International Center for Transitional Justice (ICTJ)**

[www.ictj.org](http://www.ictj.org)

**International Commission of Jurists (ICJ): International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors** (2007)

[www.unhcr.org/refworld/type,HANDBOOK,ICJ,JURISTS,,4a7837af2,0.html](http://www.unhcr.org/refworld/type,HANDBOOK,ICJ,JURISTS,,4a7837af2,0.html)

**International Commission of Jurists (ICJ): publications**

[www.icj.org/article\\_top.php3?id\\_article=4527&lang=en](http://www.icj.org/article_top.php3?id_article=4527&lang=en)

**International Institute for Democracy and Electoral Assistance (IDEA): Traditional Justice and Reconciliation after Violent Conflict – Learning from African Experiences** (2008)

[www.idea.int/publications/traditional\\_justice/fr.cfm?renderforprint=1](http://www.idea.int/publications/traditional_justice/fr.cfm?renderforprint=1)

**OIF (Organisation Internationale de la Francophonie: The reform of security and justice in French-speaking Africa.** (2010)

This study consists of several sections noting the security systems' reform experiences in French-speaking Africa and especially their links with traditional security and justice systems.

**OECD/DAC: Enhancing the Delivery of Justice and Security** (2007)

This study analyzes the challenge of ensuring short-term service delivery while supporting the long-term goal of developing a functioning and sustainable security and justice system. It proposes a multi-layered, context-specific approach to security and justice programmes which recognizes that unorthodox solutions may be necessary to respond to the challenges of fragile states.

[www.oecd.org/dataoecd/27/13/38434642.pdf](http://www.oecd.org/dataoecd/27/13/38434642.pdf)

**OECD/DAC: Handbook on SSR: Supporting Security and Justice** (2007)

[www.oecd.org/document/6/0,3343,en\\_2649\\_33693550\\_37417926\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/6/0,3343,en_2649_33693550_37417926_1_1_1_1,00.html)

**OHCHR: Rule-of-Law tools for post-conflict states: Mapping the justice sector** (2006)

These tools are meant to provide UN field missions and transitional administrations with the fundamental information required to target interventions in the justice sector. The annexes include suggested guidelines for working with law enforcement officials/police officers, on work related to prisons and detention centres, and for investigating allegations of cruel, inhuman or degrading treatment.

[www.ohchr.org/Documents/Publications/RuleoflawMappingen.pdf](http://www.ohchr.org/Documents/Publications/RuleoflawMappingen.pdf)

**Peacebuilding Initiative, Rule of Law section**

The Rule of Law section provides an in-depth overview of justice and rule of law issues in post-conflict peacebuilding contexts in the following sub-sections: Judicial and Legal Reform/(Re)construction, Access to Justice, Human Rights Promotion and Protection, Transitional Justice and Traditional & Informal Justice system.

[www.peacebuildinginitiative.org/index.cfm?pageId=1777](http://www.peacebuildinginitiative.org/index.cfm?pageId=1777)

**Penal Reform International: Access to Justice in sub-Saharan Africa – the role of traditional and informal justice system**

[www.penalreform.org/files/rep-2001-access-to-justice-africa-en.pdf](http://www.penalreform.org/files/rep-2001-access-to-justice-africa-en.pdf)

**Saferworld: Evaluating for Security and Justice** (December 2009)

Saferworld's report proposes a draft set of evaluation criteria and guide questions for evaluators, reviews the available material that is relevant to the M&E of SSR, and

discusses the potential demand for a more detailed guidance product on this issue. Using this report as a base, Saferworld is working with the OECD DAC International Network on Conflict and Fragility (INCAF) to develop a toolkit on the monitoring and evaluation of security and justice programmes.

[www.saferworld.org.uk/publications.php/415/evaluating\\_for\\_security\\_and\\_justice](http://www.saferworld.org.uk/publications.php/415/evaluating_for_security_and_justice)

**Scheye, Eric: Justice and Security as Public and Private Goods and Services.** State-provided service, contracting out, and non-state networks. (OECD/DAC June 2009)

The International Network on Conflict and Fragility (INCAF).

[www.oecd.org/dataoecd/43/8/43599221.pdf](http://www.oecd.org/dataoecd/43/8/43599221.pdf)

**Scheye, Eric: Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of non-State/Local Justice and Security Networks** (Clingendael, July 2009)

[www.clingendael.nl/publications/2009/20090707\\_cru\\_local\\_justice\\_scheye.pdf](http://www.clingendael.nl/publications/2009/20090707_cru_local_justice_scheye.pdf)

**The Spanish Agency for international development cooperation: The Handbook for judicial diagnosis** (2004)

<http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/HandbookJudicialDiagnosis.pdf>

**Transitional justice and security sector reform** (Laura Davis, June 2009)

[www.initiativeforpeacebuilding.eu/pdf/Transitional\\_Justice\\_and\\_Security\\_System\\_Reform.pdf](http://www.initiativeforpeacebuilding.eu/pdf/Transitional_Justice_and_Security_System_Reform.pdf)

**Transparency International**

[www.transparency.org/global\\_priorities/other\\_thematic\\_issues/judiciary](http://www.transparency.org/global_priorities/other_thematic_issues/judiciary)

**Transparency International: Combatting Corruption in judicial systems; Advocacy toolkit**

[www.transparency.org/publications/gcr/gcr\\_2007#summary](http://www.transparency.org/publications/gcr/gcr_2007#summary)

**The United Nations and the Rule of Law**

[www.un.org/en/ruleoflaw/index.shtml](http://www.un.org/en/ruleoflaw/index.shtml)

**UNROL: United Nations Rule of Law Website and Document Repository**

[www.unrol.org](http://www.unrol.org)

**UN: Basic Principles on the Independence of the Judiciary (1985)**

<http://www2.ohchr.org/english/law/indjudiciary.htm>

**UN: Guidelines on the Role of Prosecutors (1990)**

<http://www2.ohchr.org/english/law/prosecutors.htm>

**UN: Basic Principles on the Role of Lawyers (1990)**

<http://www2.ohchr.org/english/law/lawyers.htm>

**UN: Standard Minimum Rules for the Treatment of Prisoners**

[www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_01.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_01.pdf)

**UN: Rules for the Protection of Juveniles Deprived of their Liberty**

[http://www2.ohchr.org/english/law/res45\\_113.htm](http://www2.ohchr.org/english/law/res45_113.htm)

**UN: Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)**

[www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_02.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_02.pdf)

**UN: Standard Minimum Rules for non-custodial Measures (the Tokyo Rules)**

[www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_03.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_03.pdf)

**UN: Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment**

[www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_04.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_04.pdf)

**UN: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions**

<http://www2.ohchr.org/english/law/executions.htm>

**UN: Capital punishment**

[www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_01\\_05.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_01_05.pdf)

**UN: Good governance, the independence of the judiciary and the integrity of criminal justice personnel: 47. Code of Conduct for Law Enforcement Officials**

[www.unodc.org/pdf/compendium/compendium\\_2006\\_part\\_04\\_01.pdf](http://www.unodc.org/pdf/compendium/compendium_2006_part_04_01.pdf)

### **UN Common Approach to Justice for Children (2008)**

[www.unrol.org/doc.aspx?n=UNCommonApproachJfCFinal.doc](http://www.unrol.org/doc.aspx?n=UNCommonApproachJfCFinal.doc)

English, French, Spanish, Russian

### **UNICEF: Justice for Children: Detention as the Last Resort. Innovative Initiatives in the East Asia and the Pacific Region**

[www.unicef.org/protection/files/Justice\\_for\\_Children\\_Detention.pdf](http://www.unicef.org/protection/files/Justice_for_Children_Detention.pdf)

### **UNDP: Access to Justice: Practice Note (2004)**

[www.unrol.org/files/Access%20to%20Justice\\_Practice%20Note.pdf](http://www.unrol.org/files/Access%20to%20Justice_Practice%20Note.pdf)

### **UNDP: Gender Equality and Justice Programming: Equitable Access to Justice for Women (July 2009)**

[www.undp.org/governance/publications.htm](http://www.undp.org/governance/publications.htm)

### **UNDP/Oslo Governance Centre: Doing Justice: How informal justice systems can contribute (December 2006)**

This paper is for practitioners working on access to justice. Informal justice systems are the cornerstone of dispute resolution and access to justice for the majority of populations, especially for the poor and disadvantaged in many countries, where informal justice systems usually resolve between 80 and 90 percent of disputes. The author makes the case for closer donor engagement with these systems and presents recommendations for how to connect with informal justice systems.

[www.undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf](http://www.undp.org/oslocentre/docs07/DoingJusticeEwaWojkowska130307.pdf)

### **UNDP: Programming for Justice: Access for All. A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice. (2005)**

[www.undp.org/governance/docs/Justice\\_Guides\\_ProgrammingForJustice-AccessForAll.pdf](http://www.undp.org/governance/docs/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf)

### **UNDP: Strengthening the Rule of Law in Conflict- and Post-Conflict Situations.**

### **A Global UNDP Programme for Justice and Security 2008-2011**

This Global Programme outlines UNDP's services to rule of law programming in conflict- and post-conflict

situations within its Crisis Prevention & Recovery mandate. It is a „living document“ and will continuously be reviewed and updated on the basis of best practices and lessons learned from the field.

[www.undp.org/cpr/documents/jssr/rule\\_of\\_law\\_final.pdf](http://www.undp.org/cpr/documents/jssr/rule_of_law_final.pdf)

### **UNDP/UNICEF/UNIFEM: Study on informal justice system (2010)**

Forthcoming study led by the Danish institute for human rights on different modalities of linkages between informal and State Justice systems, with case studies.

### **UNHCR: Suggested Reading on the Rule of Law and Transitional Justice**

[www.unhcr.org/4a2cc2e26.html](http://www.unhcr.org/4a2cc2e26.html)

### **UNODC: Handbook on restorative justice programmes (2006)**

[www.unodc.org/pdf/criminal\\_justice/06-56290\\_Ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf)

### **UNODC: Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice**

The Compendium of United Nations standards and norms in crime prevention and criminal justice contains internationally recognized normative principles and standards in crime prevention and criminal justice developed by the international community.

[www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html](http://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html)

### **UNODC: The Bangalore Principles of Judicial Conduct (2002)**

[www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf)

### **UNODC: Criminal Justice Toolkit**

Using the UN standards and norms as a basis, UNODC has developed a detailed set of guidelines for conducting assessments of criminal justice systems as a whole (courts, police services, intelligence, prison system, etc.) with the aim of developing technical assistance programmes.

[www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html](http://www.unodc.org/unodc/en/justice-and-prison-reform/Criminal-Justice-Toolkit.html)



**UNODC page with the list of tools:**

[www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuside](http://www.unodc.org/unodc/en/justice-and-prison-reform/tools.html?ref=menuside)

**UNODC: Manual for the Measurement of Juvenile Justice Indicators** (2006)

[www.unodc.org/pdf/criminal\\_justice/06-55616\\_ebook.pdf](http://www.unodc.org/pdf/criminal_justice/06-55616_ebook.pdf)

**USAID: Guide to Rule of Law Country Analysis** (2008)

[www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ROL\\_Strategic\\_Framework\\_Sept\\_08.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf)

**U4***Monitoring Judicial integrity*

[www.cmi.no/publications/file/3483-monitoring-judicial-integrity.pdf](http://www.cmi.no/publications/file/3483-monitoring-judicial-integrity.pdf)

*UNCAC and judicial corruption*

[www.cmi.no/publications/file/3457-the-uncac-and-judicial-corruption.pdf](http://www.cmi.no/publications/file/3457-the-uncac-and-judicial-corruption.pdf)

**Vera Institute of Justice: Developing Indicators to Measure the Rule of Law: A Global Approach.**

A report to the World Justice Project. (July 2008)

The Vera Institute of Justice partnered with three fellow Altus Global Alliance members to develop a set of 60 rule of law indicators and test them in four cities: Chandigarh, India; Lagos, Nigeria; Santiago, Chile; and New York City, U.S. This pilot project complements the World Justice Project's Rule of Law Index by gauging how people experience the rule of law. It shows that a single set of indicators can be flexible enough to be used in extremely diverse jurisdictions, and yet concrete enough to be meaningful to local policy makers, justice system professionals, and members of civil society.

[www.vera.org/download?file=1807/Developing%2BIndicators%2Bto%2BMeasure%2Bthe%2BRule%2Bof%2BLaw%2B%2528Online%2Bversion%25292.pdf](http://www.vera.org/download?file=1807/Developing%2BIndicators%2Bto%2BMeasure%2Bthe%2BRule%2Bof%2BLaw%2B%2528Online%2Bversion%25292.pdf)

**Webber, David: Good Budgeting, Better Justice: Modern Budget Practices for the Judicial Sector**

(World Bank, 2007)

[http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/LDWP3\\_BudgetPractices.pdf](http://siteresources.worldbank.org/INTLAWJUSTICE/Resources/LDWP3_BudgetPractices.pdf)

**World Bank: Initiatives in Legal and Judicial Reform** (2004)

This paper looks at the World Bank-financed legal and judicial reform activities, resting on three pillars: 1) law reform, 2) institution and capacity building, and 3) knowledge creation, sharing and implementation.

[http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/01/000012009\\_20040301142827/Rendered/PDF/250820040Edition.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2004/03/01/000012009_20040301142827/Rendered/PDF/250820040Edition.pdf)

**World Justice Project: The Rule of Law Index**

The Rule of Law Index is a quantitative assessment tool designed by the World Justice Project to measure the extent to which countries around the world adhere to the rule of law. The Index provides detailed information which enables policymakers and other users to assess a nation's adherence to the rule of law in practice, identify a nation's strengths and weaknesses in comparison to similarly situated countries, and track changes over time.

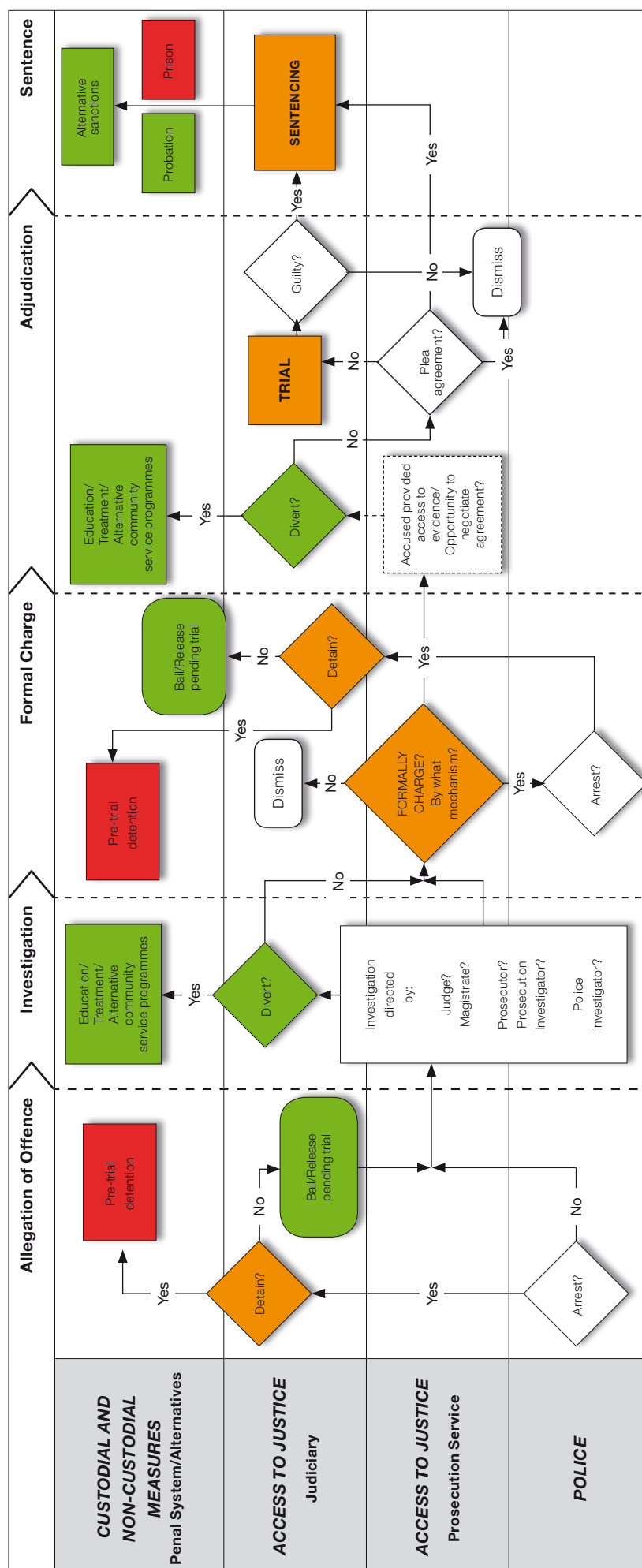
[www.worldjusticeproject.org/rule-of-law-index/](http://www.worldjusticeproject.org/rule-of-law-index/)

**World Justice Project: The Rule of Law Index Version 2.0. Diagram by factors.**

[www.worldjusticeproject.org/sites/default/files/The%20Rule%20of%20Law%20Index%20Version%202.0.pdf](http://www.worldjusticeproject.org/sites/default/files/The%20Rule%20of%20Law%20Index%20Version%202.0.pdf)

# ANNEX 4. CRIMINAL CHAIN

## DECISION POINTS IN THE CRIMINAL JUSTICE PROCESS



Source: UNODC, Criminal justice assessment toolkit, Policing n°5, Annex C, Flow chart: Decision points in the criminal justice process, page 57.

## ANNEX 5. GENDER EQUALITY SCREENING CHECKLISTS

### A – Gender Equality Screening Checklist to be used at project identification stage (GESCI)

The Government of XYlandia is developing a Justice Reform bringing together all the institutions of the sector and improving access to justice. The Judiciary in XYlandia is largely independent but only 10% of the XYlandia population is reported to have access to the formal justice, with the majority relying on the informal justice system (traditional authorities and religious leaders) for resolving dispute. Another challenge the Department of Justice is facing is to reach vulnerable and marginalised groups, particularly those in rural areas. In addition the level awareness of rights and access to justice in these areas is relatively low. The EU has decided to support to the GoXYlandia's efforts to improve access to justice.

#### Have gender equality issues relevant to the project been identified?

Yes ☒ No ☐

- *Comments:*

The main gender issues relevant to the project are the following ones:

The focus of the project is on the legal services which enable the substantive Law to be invoked. From a gender perspective, women in XYlandia experience more difficult to access legal services because they are more vulnerable to low income (they do not have financial resources to take the matter to court, they find difficult and expensive to travel to courtrooms, often only located in cities). Also they have not been participants in the legal system and consequently they are more likely to find its manner and style alien. With regard to knowledge, whilst in urban areas both women and men have low knowledge of their rights to get redress for criminal and civil wrongs, in the rural areas where there are high levels of illiteracy amongst women, these one are found particularly unaware of their rights. Justice is difficult to access for both women and men who have experienced sexual violence. Most victims never report the accident because of fear of stigma, because police, prosecutors and judges consider domestic/sexual violence as a "private" matter. There is also a lack of security for victims. Gender based violence remain unpunished by the informal justice as well as the gender based crimes are outside the "jurisdiction" of traditional mechanisms.

#### Are the gender equality issues identified supported by reference to partner government's/EU policy commitments to gender equality?

Yes ☒ No ☐

- *Comments:*

Yes they are. The GoXYlandia has ratified CEDAW and it is committed to address gender inequalities as outlined in the XYlandia Growth and Development Strategy. GoXYlandia has a gender policy in place which focuses on the fight against gender based violence. The EU has a strong commitment to promote gender equality and women's empowerment and fight against gender based violence (European Consensus on Development, the EU communication on gender equality and women's empowerment in development cooperation and the EU Guidelines on violence against women and girls and combating all forms of discrimination against them).

#### Are statistics for project identification disaggregated by sex?

Yes ☐ No ☒

- *Comments:*

Not systematically as in many cases data broken down by sex are not available as in the cases of the number of women and men working in the judicial organisations, or the users of the legal services.

*The project will address the issue of lack of baseline surveys and data.*

**Has qualitative information on gender equality issues been used in the project identification stage?**Yes ☒ No ☐• *Comments:*

Some reports of CSOs working in both monitoring trials, sentences providing legal aid have been a valuable input. The CEDAW Report and the shadow CEDAW Report have also provided useful information. Anthropological work carried out by the local University on traditional justice has provided interesting insight.

**Does the preliminary stakeholders' analysis clearly identify women and men stakeholders and their respective roles?**Yes ☐ No ☐• *Comments:*

Yes, it does. The stakeholders are

A/ individuals (men and women) as potential end users of the justice system

B/ Formal justice institutions/administrations

C/ Informal justice providers

D/ NGO working in the justice sector

From the preliminary stakeholder analysis is clear that both men and women living in rural areas are especially disadvantaged in accessing justice. Women result being more illiterate than men, relegated to the domestic sphere with minimal contacts in the public sphere, less exposed to valuable contacts, information. Also men have control of household incomes. Both women and men lack confidence in, or understanding of, the judicial system.

Formal justice institutions: Women are under represented in the justice ..... officers are not gender sensitive.

Informal justice:

NGOs: there are many CSOs offering services to facilitate access to justice some of them work on gender based violence.

**Does the problem analysis provide information on the problems specific to men and women or common to men and women?**Yes ☐ No ☐• *Comments:*

Yes it does. Problem analysis shows that both women and men living in the rural and remote areas encounter barriers to access to justice at three levels: physical, financial and technical:

- Physical access
- Access in financial terms
- Access in technical terms

Also problem analysis shows that the issue of gender based violence is not properly addressed. GoXY has a law and policy on zero tolerance on gender based violence but this policy has not been translated into gender responsive procedures and practice within the justice system. Courts lack infrastructure, capacity and expertise to prosecute gender based violence: there are no effective witness and victim protection programmes, staff specially trained to give support to victims; properly equipped forensic labs and trained personnel, and the involvement of women's organisations and social and health workers in providing assistance to victims. Dispute involving sexual or gender based crimes are outside of the traditional justice mechanisms.

**Have both women and men been part of the consultative process?**Yes ☒ No ☐• *Comments:*

Yes they have been. Women's organisations have been actively involved in the consultative process. Focus groups exclusively composed respectively of women and men took place on the issue of GBV.

**Is there a requirement for more-in depth gender analysis to be undertaken?**Yes ☒ No ☐• *Comments:*

Yes there is. As gender issues and gender equality are particularly relevant within this project an in depth gender analysis will be carried out at formulation phase.

**Has the requirement for more in-depth gender analysis been reflected in the ToR prepared for the formulation phase?**Yes ☒ No ☐• *Comments:*

The formulation phase will focus on an assessment of the institutional capacity to deliver justice services in a gender sensitive manner and determine the likely costs on including gender equality objectives in the project and the likely costs to stakeholders (funds, time, skills).

**B – Gender Equality Screening Checklist (GESCF) to be used at the project formulation phase****Has a full scale gender analysis been done during the formulation stage?**Yes ☒ No ☐• *Comments:*

Yes. The full gender analysis has provided an in depth insight of all gender related barriers in accessing justice and have allowed to identify strategic entry points and activities to integrate into the justice reform with a special focus on access to justice and judicial procedures and practice to address gender based violence.

**Have gender equality issues relevant to the project been identified?**Yes ☒ No ☐• *Comments:*

Yes. To address the main gender related barriers in accessing justice in rural and remote areas and in access to justice and judicial procedures and practice to address gender based violence the following measures have been proposed:

Legal services: improve physical access to justice in rural areas by the setting up of travelling courts; increase the number of women in all justice delivery agencies, reserve specific quotas for women in the recruitment of judiciary police officers, the human rights Commission in, cooperation with CSOs will develop civic education programme especially for vulnerable women and men to improve awareness of rights and how to assert those rights. Para-legal personnel will be put in place to build legal literacy, including teaching people how to access the judicial system. Paralegals will work with traditional leaders in rural areas to help traditional leaders to understand the practical impact of law reforms and international obligations, especially when they are in conflict with traditional laws and practices. Civil society and NGOs establishing a link between the justice system and communities and offering services to facilitated access to justice will be supported.



**Are the gender equality issues identified supported by reference to the partner government's/EU policy commitments to gender equality?**

Yes ☒ No ☐

• *Comments:*

Yes they are. The GoXY has ratified CEDAW and it is committed to address gender inequalities as outlined in the XYlandia Growth and Development Strategy. GOXYlandia has a Gender National Policy in place which focuses on the fight against gender based violence. The EU has a strong commitment to promote gender equality and women's empowerment and fight against gender based violence (European Consensus on Development, the EU communication on gender equality and women's empowerment in development cooperation and the EU Guidelines on violence against women and girls and combating all forms of discrimination against them).

**Are the statistics used for the project formulation disaggregated by sex?**

Yes ☒ No ☐

• *Comments:*

Partially, as often data broken down by sex are not available. The project foresees that the Ministry of Justice in collaboration with the Ministry of Gender would establish a working group to develop monitoring indicators for gender and access to justice and improve availability of data broken down by sex.

**Have qualitative information on gender equality issues been used in the project formulation phase?**

Yes ☒ No ☐

• *Comments:*

Some reports of CSOs working in both monitoring trials, sentences and providing legal aid have been a valuable input. The CEDAW Report and the shadow CEDAW Report have also provided useful information. Anthropological work carried out by the local University on traditional justice has provided interesting insight.

**Has the logframe been engendered?**

Yes ☒ No ☐

• *Comments:*

Yes. Amongst the objectives the project wants to achieve appear the removal of the gender related barriers in accessing to justice, the indicators are broken down by sex and gender sensitive indicators are included as well.

**Do the management systems established by the project respect the principle of gender equality and equal opportunities?**

Yes ☒ No ☐

• *Comments:*

Gender balance will be encouraged in the management structures of the project as well as in the technical assistance supported by the project.

**Have all factors potentially affecting the sustainability of gender equality actions been thoroughly addressed?**

Yes ☐ No ☒

• *Comments:*

Yes they have been explored. However the project is not able to address some strategic needs for women. The project will facilitate women's access to justice BUT whilst the law itself is discriminatory against women, this issue cannot be tackled as the reform of the law is out of the scope of this project.

The improvement of the monitoring system from a gender perspective will allow lasting results.

European Commission

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