Chapter 2.

Justice and Security as Public and Private Goods and Services

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Abstract

This chapter outlines the options for security and justice service delivery by non-state actors in the post-colonial state. The report is divided into four sections. The report outlines challenges and options and offers recommendations to the development community, by which it can support the post-colonial fragile state to strengthen the delivery of justice and security to all its citizens.

Executive summary

Justice and security are fundamental public goods, no different from access to potable water, basic healthcare and primary education. As with all public goods and services, their distribution and delivery ought to be accountable, affordable, accessible and appropriate for all citizens and residents of a country. Unfortunately, the post-colonial fragile state is often unable and/or unwilling to provide and adequately distribute or deliver justice and security to its people.

There are three basic means by which justice and security can be provided; these often occur in various hybrid combinations:

i) the state delivers the public good and service through its institutions and agencies;

ii) the state contracts out delivery to service providers; and

ii) non-state networks provide services either in law or in practice.

Because of the weaknesses of the post-colonial fragile state, however, security and justice are frequently provided privately in three basic ways:

i) via state institutions and agencies, where the organisation and/or individuals within the organisation charge fees for their services;
This paper discusses the multi-layered methods by which justice and security are distributed and delivered. The aim is to formulate pragmatic recommendations to help the donor development community strengthen its support for improved service delivery in the short to intermediate-term and further its efforts to fortify local capacity in building the state.

One of the crucial elements of the analysis is that in the provision of public goods and services, the post-colonial fragile state does not resemble the “Westphalian” concept of the state (with its separations of state and civil society, public and private goods). Yet much development assistance is based on such an assumption. The reality of the post-colonial fragile state is manifest by the relationship between the state and the non-state/local justice and security networks. It is also central to the way in which security provision has been privatised and to the state’s limitations to contracting out service delivery.

Based on this understanding of the post-colonial fragile state, this paper offers four specific programme areas suitable for direct donor support. Each recommendation aims to augment the state’s overall capacities, even if it does not explicitly strengthen the day-to-day delivery of justice and security by the institutions and agencies of the state. Instead, the suggestions mainly focus on the state’s ability to regulate, monitor, and audit the standards and principles – accountability, affordability, accessibility, and appropriateness – by which justice and security are provided, irrespective of how they are delivered. The recommendations also strengthen the state’s ability to regulate and audit the delivery of security by private security companies so that services may be contracted out in the future.

The four recommended programme areas are:

i) Strengthening service delivery by state and non-state providers.

ii) Enhancing legislative development to clarify the relationship between the state and the non-state/local justice and security networks.

ii) Supporting mechanisms by which decisions made by the networks can be appealed against in the state system.

iv) Building performance measurement systems within state institutions and agencies; these can evolve into policy and planning units upon which long-term state building in justice and security can be founded.

Introduction: setting the scene

Justice and security are fundamental public goods and services, no different from access to potable water, basic healthcare and primary education. Their distribution and delivery ought to be accountable, affordable, accessible and appropriate to and for all citizens and residents of a country. The post-colonial fragile state, unfortunately, is often unable and/or unwilling to provide an adequate level or equitable distribution of justice and security, or other public goods and services, to its populace. This situation does not arise only from conflict, the violence and injustice associated with conflict, or the inevitable increase in criminality that occurs after the conflict ends. For the state, the
challenge runs much deeper – on an annual basis, non-conflict violence and criminality far exceed those caused by civil strife (see OECD, 2009b). The issue is not who delivers the public goods and services, as there is a number of ways that justice and security can be provided. Instead, the obligation of any state is to ensure that its distribution and delivery meet certain standards and principles – accountability, affordability, accessibility and appropriateness.

There are three basic means by which justice and security as a public good and service can be provided, none of which are mutually exclusive. Most often they exist in various complex combinations:¹⁴

i) the state delivers justice and security through its institutions and agencies;

ii) the state contracts out delivery to service providers (Box 2.1); and

iii) non-state networks provide services, either “in law” or “in practice”. The difference between “in law” and “in practice” rests on whether the provision of service by non-state actors is juridically legitimate. The two categories are not mutually exclusive, as service provision that is in law is also in practice. The reverse, however, is not always true.

Because of the political sensitivity of justice and security, not to mention their often tenuous legitimacy, the post-colonial fragile state (Box 2.1) may be reluctant and/or averse to permit or recognise other actors’ participation in their distribution and delivery. One of the foci of this paper is the balance and relationships among these methods of distribution and delivery of justice and security in the post-colonial fragile state, and how donors can support their provision.

At the same time, however, because the fragile state is unable to provide an adequate level or equitable distribution of public goods and services, the delivery of security has often been privatised.¹⁵ There are three basic means by which security can be provided as a private good and service. None of these is mutually exclusive and most often they exist in various complex combinations:

i) state institutions and agencies, as the organisation and/or the individuals within the organisation, charge fees for their services;

ii) private security companies offer security as a product/commodity; and

iii) criminal groups deliver security as part of their criminal enterprise.

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**Box 2.1 Definitions**

**Contracting out**: The OECD defines contracting out as the “transfer of competences and/or authority for a given period of time based on a contractual arrangement between the delegating authority (the government) and a third party (the contractor)” (OECD, 2009a). As with any contract, there must be an exchange of obligations, liabilities, and value. The exchange of value may or may not be monetary, though, most often, it is. Public-private partnerships may be one method of contracting out the distribution and delivery of public goods and services, if there is a contractual arrangement. However, such a relationship may be better understood as “private sector participation”, (see World Economic Forum, 2005, p. 23).

**Post-colonial fragile state**: We use the term post-colonial fragile state to specify the unique characteristics of first, a post-colonial state and, second, a fragile one. As these characteristics do not necessarily overlap, the use of the term is descriptive to refer to both sets of attributes.
The distinction between justice and security as public versus private goods and services is a crucial one. In the former instance it is a good and service intended to be available to all, for the benefit of all, and from which no one is excluded. In the latter case, it is either a product/commodity sold for the benefit of the seller to be privately consumed by those who can afford it, or else it is a service provided after payment is demanded/extorted.

This difference between public and private goods and services is vital in the discussion of the multi-layered structure of the post-colonial fragile state, its institutions and agencies, and the relationships among the various types of justice and security service delivery. Without distinguishing between the two types of goods and services, it is difficult to comprehend:

- the role and function of non-state/local justice and security networks;
- the relationship between the state and private security providers;\(^{16}\) and
- the ability of the state to contract out justice and security services that it may not itself provide.

This paper is divided into four sections. First I briefly analyse the post-colonial state, its nature and structural arrangements, as background to the role of non-state/local justice and security networks, not only for the delivery of justice and safety as a public good and service in the short to medium-term, but as an integral component of state building. Coming to terms with the structure and nature of the fragile state is also vital for understanding how security has been privatised, which is the second section of this paper. In the third section I discuss how the post-colonial fragile state can and cannot effectively contract out justice and security provision in the short to medium-term. In the final section I present four recommendations by which the development community can support the post-colonial fragile state to strengthen the delivery of justice and security to all its citizens and residents.

The structure of the post-colonial state: the role and function of non-state/local justice and security networks

The post-colonial state as a non-Westphalian state

An OECD report on state building in fragile situations notes that “state building policy in any given fragile state must be grounded first and foremost in a specific, historically informed assessment of the state of the state” (OECD, 2008: 23, italics in the original). A careful assessment suggests that most fragile states do not resemble the Westphalian concept of the state, with its separations of state and civil society,\(^{17}\) public and private goods (Anderson, 2007; Lewis, 1992; Sandbrook, 1998). As one scholar notes, the Westphalian state “hardly exists in reality beyond the OECD world. Many of the countries in the ‘rest’ of the world are political entities that do not resemble the model western state” (Boege et al., 2009). Another scholar claims that, in much of Africa, there:

...has hardly [been] ...any point in time [when the state] had a monopoly of legitimate force... [The] security sector has... typically manifested both formal and informal tracks. Even in states which are ostensibly stable, statutory institutions have been unable to provide security to all categories of its citizens at affordable levels, with supplementary roles being played by an array of traditional security actors.... The Westphalian assumption that monopoly over the means of legitimate coercion lies with the state and its institutions meets a veritable challenge in the face of the wide support and legitimacy enjoyed by non state security institutions (Ebo, 2007).\(^{18}\)
A third argues that many post-colonial states never established “effective institutions… [but] have more often been instruments of predation and extraction… [and that] the evidence is overwhelming that most… collapsed states at no point in the postcolonial era remotely resembled the ideal type of the modern Western polity,” with a separation of power between the executive, legislative, and judicial authorities (Englebert and Tull, 2008). The reasons are many, but one interesting explanation focuses on the role of taxation and its consequences:

A major problem with many of the post-colonial states in Africa lies with how revenue is collected. The major part of all revenues is not in the form of direct taxation but indirect taxation, such as import duties, exports of natural resources and developmental aid. Often the direct taxation that does take place does not fall on the propertied and power-holding classes but on the marginalised rural populations. This development has contributed to the nature of some African states as decoupled, or even predatory, ‘regimes.’ This character does not hinge so much on the lack of material or organisational capacities or economic resources as it does on the structure of state-society relations” (Egnell and Haldén, 2009; see also Herbst, 2000; Buzan and Wæver, 2004).

In fact, the vast majority of the 40 fragile and conflict-affected environments can best be described factually as post-colonial states. Attempts to implement a state building agenda grounded in a western reading of the state are misguided and prone to ineffectiveness. Critics have alleged that the basic assumptions of the “state fragility discourse and state building policies are orientated towards the western-style Weberian/Westphalian state,” which does not resemble the post-colonial one (Boege et al., 2009). The result is self-explanatory or, as an internal UN Rule of Law assessment acknowledged, while “the international community has invested massive resources in promoting democracy and the rule of law in post-conflict and post-authoritarian states… the appropriateness and effectiveness of past efforts to strengthen the rule of law are discouraging” (Benomar, 2007). Recent World Bank studies have come to the same conclusion, noting that “the numerous rule of law assistance programs in post-conflict or fragile countries have so far resulted in few lasting consequences. Some individual programs have had a modicum of success…, but even then most have not built institutions that might outlast the donor presence” (Samuels, 2006; see also, Decker, Sage, and Stefanova, 2005; Shaw, 2000).

For donor support to be effective, what is required is an accurate analysis of the nature and structure of the post-colonial fragile state as it is, rather than as one may wish it to be.

**Authority and structure of the “second state”**

The post-colonial state is defined by the “rule of the intermediaries”: a series of networks and polities that substitute and compensate for the lack of authority of the central, legally-constituted state and its inability to deliver essential public goods and services (von Trotha, 2000). In the post-colonial state, state agencies are not the primary vehicles for the distribution of public goods and services. Non-state systems and institutions effectively function as a “second state”, and assume the role of providing most public goods and services.

These networks and polities relieve “the state of part of the administrative burden of extending [its] authority and delivery benefits to a large and scattered population,” which may include health, education, electricity, economic opportunity, justice and safety, and which the state is largely unable to provide in the short to intermediate term (Bratton, 1989; see also Kassimir, 2001; Vaughan, 2000; Keulder, 1998; Ayoade and Agbaje, 1989; van Rouweroy van Nieuwland and Ray, 1996; van Rouweroy van Nieuwland and van Dijk 1999). A governance system in which non-state structures are as important as the state and, perhaps, “much more culturally embedded … is even further removed from the
“Westphalian model” (Egnell and Haldén, 2009; see also Jörgel and Utas, 2007). The distance is all the greater when the state, largely depending upon these networks for the distribution and delivery of public goods and services, has contributed “to a resurgence of customary rule, albeit in (partly) new forms and with new functions” (Boege et al., 2009). This has been the case, for instance, in Mozambique and Malawi, among others (Buur and Kyed, 2006a and 2006b).

One of the keys to understanding the post-colonial state is that it derives its legitimacy, in part, from how it integrates the networks and systems of the “second state” into a multi-layered structure. These networks are imbued with authority and represent the interests of those to whom they provide public goods and services (Englebert, 2000; Sklar, 2003). In these states:

...customary law, traditional societal structures (extended families, clans, tribes, religious brotherhoods, village communities) and traditional authorities (such as village elders, headmen, clan chiefs, healers, bigmen, religious leaders, etc.) determine the everyday social reality of large parts of the population..., particularly in rural and remote peripheral areas. On many occasions, therefore, the only way to make state institutions work is through utilising kin-based and other traditional networks. Thus the state’s ‘outposts’ are mediated by ‘informal’ indigenous societal institutions which follow their own logic and rules within the (incomplete) state structures (Boege, et al., 2009).21

A give-and-take relationship, one that is continually negotiated and revised, exists between the state and the networks that distribute and deliver much of the state’s public goods and services. These networks “encompass organisations and actors such as secret societies, businessmen, chiefs, the military, warlords etc.” (Egnell and Haldén, 2009). They may also include customary courts, village councils, market/trade associations and religious affiliations. Offering ways for individuals and groups to pursue their livelihoods and acquire authority, the networks’ “channels and vehicles of power are not bounded, permanent nor grounded in territory or other kinds of fixed membership. Indeed it has been pointed out how ‘fluctuating’, ‘changing’, ‘intangible’ and ‘fluid’ these highly important networks are” (Egnell and Haldén, 2009).

This give-and-take is not equivalent to contracting out the distribution and delivery of goods and services. The relationship between the state and non-state networks is between polities, and it ebbs and flows according to the circulation and dynamics of power balances. Furthermore, the relationships among the differing layers of authority are an integral part of the social contract that establishes the state. These flows of power define the concepts and terms of political authority, such as separation of powers and civil society; the structure of the state; the survival functions of the state; what expectations society has of the state; and the state’s degree of resilience.

Within the warp and weft of politics and power in the post-colonial state, these networks shape how public goods and services are distributed and delivered and, thus, they cannot be overlooked or slighted. Nor can they be equated to private security companies. The networks of the “second state” are polities, representing and advancing the broad range of interests of those who adhere to them, from politics to justice, healthcare, education and cultural coherence. The networks, therefore, provide public goods and services to all who belong to their communities, as well as to those who may travel through their geographic territories.

Non-state/local justice and security networks in the post-colonial state

A consensus has emerged within the development community that non-state/local justice and security networks are, often, more effective, accountable,22 efficient, legitimate, and accessible service providers of justice and safety than are the agencies and institutions of the post-colonial state (Box
2.2). These networks, therefore, are indispensable for the short and medium-term distribution and delivery of justice and safety. It is important to underscore that these networks are also associational groups, part and parcel of civil society.

Box 2.2 Examples of the value of non-state networks

In Tanzania, non-state/local justice and security networks have helped reduce crime (Bisimba, 2002). In some areas of the Philippines, a state-sponsored “local justice system (for lower order disputes) has increased access to justice and ‘unclogged’ state court dockets” (Franco, 2008). In Burundi, “the informal system is... perceived in a positive light in that the services are, in principle, free of charge. The bashingantahe are [also] in general of use to the courts during the process of implementing judgments, particularly for land cases” as they know who possesses the rights to the land (Dexter, 2005; see also CARE, 2002). In Indonesia, “in most cases, access to the legal process is beyond reach. The public, the poor and marginalized people in particular, are frequently unable to access their right to justice within the formal legal structure” (Indonesian Legal Aid Foundation, 2007). In the case of Sierra Leone, there is only a “single legal aid organisation in the country, the Lawyers Center for Legal Assistance, [which] serves only Freetown and the city of Makeni. In Ecuador, as of 2002 there were only thirty-four public defenders for the whole country. The three and a half million population in Quito and Guayaquil was served only by four public defenders” (Decker, Sage and Stefanova, 2005).

The OECD has itself recognised the vitality of non-state/local justice and security networks, stating that “a growing interest in and willingness to work with local institutions of governance – such as shuras in Afghanistan – is also welcome. Traditional systems, which may not be recognisable in western states, may still perform the same functions and generate the same outputs as formal state institutions. Respect and willingness to accommodate such systems [...] can be helpful in restoring governance” (OECD-DAC 2008; see also OECD, 2006).24

In many instances these networks are patronised not just because they are more affordable, efficient, and effective than their state counterparts, but because they are the legitimate foundation upon which the community is based:

It is the community that provides the nexus of order, security and basic social services. People have confidence in their community and its leaders, but they have no trust in the government and state performance. ‘The state’ is perceived as an alien external force, far away not only physically (in the capital city), but also psychologically. Individuals are loyal to “their” group (whatever that may be), not the state... Legitimacy rests with the leaders of that group, not with the state authorities – or only with state authorities insofar as they are at the same time leaders in a traditional societal context (Boege, et al., 2009).

The networks also distribute and deliver justice and security in ways that coincide and are compatible with the norms, cultural legacies and written/spoken language(s) of the people who need and rely on their services (The World Bank, 2006). “Most citizens regard the official organisations as imposed, irrelevant, and different in forms and procedures from the citizens’ traditional outlooks, convictions, practices, and beliefs” (Okafo, 2007). For example, in the Great Lakes region of Africa, the “manner in which the laws and procedures are practiced in formal court systems as well as the languages used are incomprehensible to most poor communities and therefore, in many ways, irrelevant to their needs” (Nabudere, 2002). A similar inaccessibility exists in Indonesia, where “poor people often experience injustice because of an institutional reliance on formal dispute resolution procedures which are plagued by the use of an inaccessible language” (Indonesia, Legal Empowerment).
Furthermore, these networks are frequently the preferred method of service delivery. Non-state/local justice networks “often enjoy high levels of popularity in local communities they police informally” (Wisler and Onwudiw, 2007; and see Meagher, 2006; Okerafoezeke, 2006). In Afghanistan, for example, “in 85% of [the] cases, people prefer to take their problems to a village or tribal council, local notables, or a cleric, while only 15% would bring a dispute into the formal system” (USIP, 2006). Similarly, in southern Sudan, customary courts are more trusted than state ones, as well as being more transparent and accountable (UNDP, 2006). It should be noted, however, that in post-conflict settings it seems that a minimal state police service is the population’s preferred method of service delivery in the immediate aftermath of conflict, even though it provides very little actual security. In Kosovo, for example, the Kosovo Police Service was initially viewed in a very positive light by the population. In the first years of its existence, 56% of people judged the police to be “excellent” or “good”; over time, however, this declined dramatically to 37% (SSDAT Kosovo Review, 2008). Similar phenomena occurred in Sierra Leone (Mehler, 2009) and in Timor-Leste, where up to 85% of individuals surveyed claimed to be confident in the quality of their East Timorese police service (Asia Foundation, 2008). At the same time, however, only 12% of the public had had contact with the police over the previous year and 47% of those who had contact felt that their interaction was conducted with minimal respect and professionalism (Asia Foundation, 2008). Even more to the point, the sense of insecurity among the population has been increasing steadily; 75% of the population prefers to rely on their non-state/local justice and security networks; and 85% of the police have indicated that they are active participants in those networks. It seems to be the case, therefore, that the initial “positive attitude of the people towards state security providers has to be interpreted as ‘wishful thinking’” and ethnic/national pride rather than as satisfaction in the actual performance of the public good and service delivered (Boege, et al., 2009; Scheye, 2008).

A trusted and legitimate non-state/local justice and security network is, by definition, a locally-owned justice and security provider as the repository of the users’ beliefs, norms and values. Because these networks are often the preferred provider, they answer the two central questions of local ownership

Box 2.3. When decisions are not locally-owned

The recent experience of UN involvement in Timor-Leste is an excellent example of (i) the divergence between government and national ownership; and (ii) the difference between a state being legally-constituted and its being perceived as legitimate by its citizenry. For example, the UN accepted the decision by a small élite to adopt Portuguese as the language to be used in the state system, even though only a tiny percentage of the population spoke the language. This adherence to “government ownership” was disastrous. The UN also accepted government ownership of how to structure and develop the justice and security sector. Consequently, a dysfunctional and collapsed state-centric system was adopted despite widespread popular adherence to non-state/local justice and security networks even among state employees. In both instances, though government ownership was legally constituted, the decision was neither nationally owned nor legitimate. The Timor-Leste example belies the oft-voiced claim that donor support to non-state/local justice and security networks undermines a government’s legitimacy. In the Timor-Leste instance, the reverse might have been true. Blending the non-state networks’ authority with that of the government might have given the government true legitimacy. Failing to do so helped propel further civil strife.

To complicate the ownership issue further, a network’s leadership may be held accountable and can be replaced by its own adherents, as occurs, for example, in southern Sudan and Yemen. This may take place when the leadership does not adequately represent its membership’s interests or does not distribute and delivery adequate levels of public goods and services. From this perspective, the adherents of a network represent an important local ownership constituency in a political sense, rather than merely as beneficiaries of the distribution and delivery of a public good and service.
on a day-to-day basis within the neighbourhoods, on the roads, and in the marketplaces – “for whom?” and “by whom?”.

Finally, since local ownership is about “national ... rather than government ownership” (Nathan, 2007), it cannot be reduced to the will and wishes of the political and/or national élite (Box 2.3). Therefore, the non-state/local justice and security networks are a vital reservoir of national ownership as well (Baker, 2005). None of these local ownership characteristics can be underestimated. In this sense, of the four categories of local owners – national government and élite; local government and élite; justice and security providers; and customers of those providers – “non-state/local justice networks are the predominant local owner in terms of concrete, practical service delivery on the ground; but ought to be one of the principal players in understanding what local ownership might imply for” donor-supported programming (Scheye, 2008).

There is one important caveat, however, in this discussion of the indispensability of non-state/local justice and security networks. As previously argued, these networks are part of the “second state”; legitimate polities representing the needs and interests of those to whom they provide public goods and services. Nevertheless, the distinction between state service providers and these networks is, frequently, tenuous and ambiguous (Kimathi, 2005; Roy, 2004). The weave of the post-colonial state’s multi-layered structure suggests that “commercial, religious, gerontocratic and other social realms... have merged private and community spheres with the exercise of state authority” (Reno, 2009). From Timor-Leste to southern Sudan, Jamaica to Nepal, non-state/local justice and security networks are associated, however obscurely, with state systems, often in “law” and, more often, “in practice”. It is as inaccurate, therefore, to characterise one set of justice and safety providers as “state” and the other as “non-state,” when they overlap.

Given these symbiotic relationships, and the blending of roles and functions, one should view justice and safety providers as located along a continuum. Most service delivery takes place in the middle of the range between the opposing ideal types of “state” and “non-state” service provision. Consequently, there may be little conflict between the long-term objective of strengthening state capacities and the short to medium-term challenge of improving the delivery of justice and safety to all residents and citizens. Furthermore, donor support to the networks of the “second state” does not necessarily undermine the legitimacy of the state. The state’s legitimacy depends on the existence of the networks; as integral elements of civil society and distributors of public goods and services, the networks define the state, establish the social contract and set the expectations of citizens and residents.

**Political challenges to supporting non-state networks**

However, the relationship between the state and the networks is not tension-free. Tensions do exist, but they are mainly political. They involve competition for power and authority and often have little or nothing to do with questions of legitimacy, even when the political élite may cast the power struggle in terms of legitimacy. This power struggle between deeply enmeshed partners is of paramount importance in the state’s drive to ensure that the networks’ distribution and delivery of justice and security is affordable, accountable, accessible, and appropriate.

The first set of tensions revolves around the political élite’s desire to centralise power in a national government in order to consolidate its power, domestically and internationally. The most significant part of this challenge lies in the relationship between the political and national élites and the diffuse leadership and adherents of the networks. This tension can be mitigated, but it requires ongoing negotiation and re-negotiation of the social contract between and among national élites, civil society (of which the networks of the second state are an integral component), and local élites (often represented by the leadership of the networks). Other than supporting such dialogues – an intricate, sensitive and risky political activity requiring constant recalibration of the dynamic political balances
of power (Ball, Scheye, and Van de Goor, 2008) – the development community has little direct role to play in pursuing and negotiating the state’s social contract.

Somaliland may be one example of an apparently successful social contract, which explicitly incorporates elements of the networks into the governance system (Seifert 2007; Trotha 2005; Hoehne 2006a, 2006b; Menkhaus 2006). “While the Somali state [has] collapsed, the segmentary order has endured through all the storms of history, in ever new variations, by ‘modernising’ itself again and again” (Trotha, 2009). Blending customary, Islamic and western legal norms and practices, state building and peace building have largely been successful in Somaliland “due to the involvement of traditional actors and customary institutions that are rooted in the traditional clan based Somali society” (Boege et al., 2009). It is an “experiment... in governance [which is]... a hybrid of Somali and Western democratic styles” (Bradbury 2003). The government “does not hold the monopoly of violence and […] security in Somaliland is dealt with in a decentralised manner and is largely guaranteed by local politicians and elders” (Hagmann and Hoehne, 2007). While the nascent institutions of a “modern state” exist – an elected parliament and president – the fact that the leadership of the second state “endorsed [the] state institutions... and the meaningful inclusion of these authorities within state structures decisively contributes to the legitimacy of the state in the eyes of the people” (Boege et al., 2009). This hybrid form of Somaliland’s minimal state may be the “best hope for state revival... [and state building.] in which a central government with limited power and capacity relies on a diverse range of local authorities to execute core functions of government and mediate relations between local communities and the state” (Menkhaus, 2006).

A second political challenge is to determine which non-state actor or network in the post-colonial state is appropriate for donor support (Box 2.4). It ought to be recognised that, in many circumstances, groups that initially appear to lie outside the realm of the acceptable are in conflict with the governments of their countries. As these troubles persist, the governments of the affected states may enter into negotiations and dialogue with such individuals and groups in an attempt to resolve the strife, as has occurred or is still happening in Colombia, Pakistan, Uganda, Iraq, Burundi and Afghanistan. The integration of Hutu génocidaires in Rwanda through the gacca process, and political accommodations despite the genocide they committed, is an excellent case in point (Gourevitch, 2009). In this sense, there are “no satisfying answers to” and certainly no a priori solutions to the question of whether donors should engage with the networks established by armed non-state actors (Schneckener, 2006). If donors are to more consistently adhere to the dictum of local ownership, the

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**Box 2.4. Donors and the second state**

Various political challenges reside wholly within the donor community. Donors frequently view the non-state networks as unaccountable, readily “instrumentalised” by political élites, and in violation of human rights, particularly women's rights. Each of these critiques rings true and has merit. In the post-colonial minimal state, however, the criticisms are equally applicable to state agencies, particularly as many state justice and security institutions function more like private corporations than agencies that deliver a public good and service. For example, in the Philippines, there is little doubt that the networks are élite-biased, but similar challenges confront state-provided justice, and years of judicial reform have been unable to ameliorate this issue (Franco, 2008). A second prominent challenge is the assumption that the operations of the networks are more difficult to develop and strengthen than those of their state counterparts. However, this is empirically unfounded. For example, consider the record of justice and security development in Guatemala, where after “eight years of reform... the criminal justice system produced convictions in only 2 per cent of all homicide cases” (UN, 2007). It is more reasonable to believe that the two systems are comparably difficult to support and that a meticulous analysis of local politics, cultural values, and capacities is the only method to determine which is more resistant to change.
political judgement of the partner country ought to be accorded greater import than the donor’s own human rights norms in such cases. Human rights criteria, then, would be only one amongst many indicators for the development community and, in situations as in Rwanda and Timor-Leste after the 2006 crisis, not necessarily the principal benchmark.

Nevertheless, for the development community there are at least two structured methods with which to evaluate the political risk of engaging with non-state actors. The first classifies the position of an armed non-state group within the structure of the multi-layered governance system based upon the group’s dynamics and activities. The group can be plotted along three axes: greed vs. grievance; non-territorial vs. territorial aspirations; status quo vs. change (Schneckener, 2006). Groups located closer to the greed, non-territorial and status quo ends of the spectrum may be less susceptible to reform, in that their behaviour is less political and more tinged with criminal intent. These types of groups behave more like armed criminal enterprises and consequently may be inappropriate for donor support, even if they provide a modicum of justice and security to the populations under their de facto control.

The second methodology suggests that differences in an armed group’s previous and existing political connections and relationships define whether it is a “protector” or “predator” organisation (Reno, 2007; Reno, 2008). “The behaviour of protector militias is contingent upon the presence of social space that is insulated from interference from capital-based patronage networks,” but integrated into local institutions, their politicians, and community norms (Reno, 2007). Predatory groups, in contrast, have close links to capital-based patronage structures. The argument further claims that protector groups and their networks “are heirs of state builders everywhere” (Reno, 2007), intimating that such networks could and should receive assistance. In other words, in order to pursue and further their state building agenda, donors should, in the short to medium-term, support the performance of such protector networks. In this sense, the current and future legitimacy of the state depends upon donor support to non-state networks, assistance that would be explicitly undertaken for political reasons.

The ability of donors to support non-state networks is limited but achievable if conducted appropriately. For instance, developmental personnel, having gained technical expertise in justice and security development, may not be sufficiently versed or experienced in unravelling the webs of political relationships within the post-colonial state, particularly when confronted by an underlying notion of the state that does not resemble their Westphalian preconceptions. Furthermore, to disentangle the relationships may also require extensive knowledge of how power is distributed and circulates at the micro level within the second state. That may be beyond the capacity of outsiders who rotate in and out on two to three year development cycles. But understanding that circulation may be of prime importance given the role that social efficacy and capital play in the delivery of public goods, community-driven development, and social cohesion. Finally, donors may need to modify their funding mechanisms to mirror those of community-driven development programmes and channel monies through local NGOs to the non-state/local justice and security networks who deliver the preponderance of justice and security in the post-colonial state.

**Privatisation of security in the post-colonial fragile state**

As already discussed, under fragile conditions, the post-colonial state lacks capacity, willingness, and/or legitimacy to deliver basic public goods and services like justice and security to its citizens and residents in an affordable, accessible, appropriate, and accountable manner (Box 2.5). These states suffer under severe financial, human resource, administrative, capital and legal infrastructure deficits, which have, among other consequences, inhibited the separation of powers. Consequently, the
capacities and structures necessary for state institutions and agencies to distribute and deliver justice and security are often lacking. One of the results is a privatisation of service delivery by private security providers and state institutions and agencies.

**Box 2.5. The security and justice challenges in fragile states**

The inability of fragile states to provide affordable justice and security services is well-known. “For example, in Brazil, processing costs for labour disputes are reported to be ten times higher than the value of the case. The cost of litigation proceedings is often compounded by the requirement that parties be represented by lawyers. In Ecuador... pro se representation is not permitted regardless of whether parties can afford legal services. In Honduras, legal fees to obtain a monthly alimony of HNL 100 in a child support case could amount to as much as HNL 2000 – the equivalent of almost two years of alimony” (Decker, Sage and Stefanova, 2005).

In Indonesia, the police “are overstretched, understaffed and under-resourced. Anecdotal evidence... confirms assertions... that up to 70% of police funds/resources come from extra-budgetary sources. Lack of operational and capital investment resources places severe constraints on the overall performance of the police” (Nordic Consulting Group, 2004).

In 2006 in Sierra Leone there was a total of 100 lawyers, only 10 of whom practised outside the capital Freetown (Maru, 2006). According to the Inter-American Development Bank, most Haitian judges and their assistants lacked the education required for their posts. Only 8% of judges and 5% of their assistants were licensed attorneys, while two thirds did not have any formal legal training, their only training being “on the job” (IADB, 2000).

**Private security providers in the fragile state**

The deficit in the distribution and delivery of justice and security stimulates the formation of private security companies to protect those able to pay, as if security were a product/commodity for sale like any other. As the World Bank notes: “when government[s are] not strong enough to protect property rights... private organisations selling 'protection services' fill the void” (The World Bank, 2005). The extent of the market for private security has grown exponentially; estimates are that the “global private security market is valued at USD 165 billion” (Abrahamsen and Williams, 2008). In the Dominican Republic, for instance, almost 50% of the nearly 100 private security firms registered in 2000 had been founded since the mid-1990s (Diaz, 2001). The same has occurred in much of Africa (Abrahamsen and Williams, 2007).

It is important to recognise, however, that this buying and selling of security effectively relegates it to a business model between two distinct entities (a buyer and a seller), albeit of a dangerous product/commodity. This suggests that these providers do not deliver security as a public good and service; nor is it consumed as such. For both parties, security is a private good to be delivered and consumed, whether it is the protection of a bank, its employees and customers or a neighbourhood, its residents, and the guests of those residents. Security is made available to those who can afford to pay for its delivery. Those who cannot are excluded. Individuals and groups who do not pay for service may still benefit from its delivery, but as free-riders, such as the housekeeper of a wealthy protected couple, or the stores on either side of a bank whose guards patrol outside.

Noting that this delivery of security is a private good distinguishes these providers from non-state/local justice and security networks, even though they both deliver security. The private security provider sells a product/commodity. It advances the interests of its proprietors, most often by
increasing its delivery of security to ever larger numbers of customers and/or by raising the price of its service. Customers can hold their private provider accountable by demanding a certain level of service. If they do not receive what they deem to be an adequate service, they may purchase security from another private company or, alternatively, demand service from the post-colonial state, although it is unlikely to be able to provide it.

The relationship of the post-colonial fragile state to these two types of security providers is also very different, although its overall obligation is to ensure that justice and security are provided in a way that is affordable, accessible, appropriate and accountable. As suggested, the state's relationship with the non-state/local justice and security networks is, largely, a political tug-of-war over power, authority and control. The stance of the post-colonial fragile state in relation to private security companies, however, is comparable to its relationship with any other private corporation or enterprise. It is primarily limited to regulating, monitoring and auditing its adherence to the law. In the case of security, the product/community is inherently dangerous, which suggests that the law(s) and regulations governing its distribution and delivery by private providers ought to be tightly drafted and strictly enforced. Unfortunately, this is precisely what the fragile state is largely unable to do.

The fragile state often lacks the capacity to regulate and audit the activities and performance of the private security companies. Its ability to measure and evaluate its own justice and security performance is exceedingly limited and its capability to do that for private providers is even less institutionalised. The legal frameworks for registering, licensing and monitoring the provision of security may, at best, be incomplete. Even if the legal regimes are robust, the institutions and agencies of the state frequently do not have the managerial systems in place to implement the framework. Furthermore, there are not sufficient numbers of trained personnel to undertake the necessary oversight.

The fragile state's lack of the requisite capabilities to regulate, monitor, and audit the performance of private corporations poses a profound challenge. The consequence is that private corporations supply security largely outside the purview of the state. Regimes of "soft regulation" may be a palliative, but their effectiveness depends upon moral persuasion and voluntary adherence. Transnational private security companies may respect some of the strictures of soft regulation, but such regulation is unlikely to alter the behaviour of the more localised privatised security providers that exist around the world.

**The privatised post-colonial fragile state**

The proliferation of private security companies, along with the vitality of the non-state networks, are only two salient features of the post-colonial fragile state. Another characteristic is that in many of these countries, state-delivered justice and security has, effectively, been privatised. The institutions and agencies of the state do not, primarily, provide public goods and services. Instead, they deliver a service for a fee. For instance, it would be naïve to qualify many of the actions and behaviours of large parts of the Zimbabwean and Guatemalan police services, or the Yemeni and Venezuelan judiciaries, as, first and foremost, those of public agencies. Often too, the principal service provided by state institutions is to preserve the political élite's political, economic and social prerogatives. More to the point, the primary activity of some of these state institutions is to deliver a product/commodity to those individuals, groups, organisations and neighbourhoods that are able to pay for it. Just as a private security company charges its customers on a pre-arranged schedule (weekly, monthly, bi-annually), a police officer, prosecutor, or court clerk will, in many cases, perform his/her official state duties only after receiving payment from the person or group requesting the service. For example, in Ecuador, police routinely demand payment from individuals, organisations and neighbourhoods for their regular policing services, while in Mexico's Federal District, 70% of the
service’s workforce is allegedly assigned to provide security to private interests (Ungar, 2007). In Nigeria, some members of the paramilitary Mobile Police have been permanently assigned to work with private security companies, are paid supplemental salaries by the companies, and have been integrated into the day-to-day activities of those companies, even though they continue – legally – to remain under the authority and command of their own officers (Abrahamsen and Williams, 2006). These situations do not constitute the distribution and delivery of a public good and service, but are more akin to private business arrangements. The product/commodity, however, is justice and security.

In many circumstances, therefore, state-delivered justice and security has been privatised. The issue is not about a fragile state being unable to distribute and deliver adequate levels of justice and security. It is about the privatisation of a public institution. When a state institution primarily acts as a purveyor of a private good and service, the agency itself can be said to have been privatised, along with its state personnel. The actions of the institution benefit those who manage and control the organisation and its activities are, then, comparable to those of a private security company, even though the agency legally remains an integral part of the state.

In such situations, even if the fragile state possesses the capacity to contract out justice and security service provision (which it does not), it is unlikely that the mandated state institutions will do so effectively and efficiently. Private security companies are their competitors. They compete over market share, the costs of doing business, and the benefits their proprietors accumulate. Privatised state agencies would be able to skew the regulations and procedures of contracting out, so as to benefit their presumptive managers and owners. More likely, the proprietors of largely privatised public institutions would seek to establish mutually productive business relationships with the owners of private security companies so as to create monopolies or oligopolies. Contracting out would not be a mechanism by which the state could further the affordable, accountable, appropriate, and accessible distribution and delivery of justice and security. It would be a means by which the private marketplace for justice and security could be captured and exploited for private gain.

**The unholy alliance**

When there is collusion between state institutions and private security companies, the borderline may have been crossed between the state acting as a legitimate, legally constituted entity, and elements of the post-colonial fragile state acting as a criminal enterprise. This is more than a question of the privatisation of state institutions and agencies. It is about an unholy alliance – explicitly or implicitly – among political and business élites, criminal enterprises, and the state’s justice and security services. In such cases, it may be argued that the post-colonial fragile state functions more as a criminal enterprise than as a political entity distributing and delivering public goods and services. Evidence of such unholy alliances has appeared in Afghanistan, Bosnia and Herzegovina, Guatemala, Guinea-Bissau, Haiti, Iraq, Jamaica, Papua New Guinea, Zimbabwe and elsewhere (Cockayne and Lupel, 2009).

It needs to be admitted, however, that “in many conflict-affected situations, governmental entities and criminal organisations are also hard to distinguish [one from another] because they come to play similar functions, providing similar services” (Cockayne and Lupel, 2009). In some instances, the resulting coalition of actors has even acquired a modicum of legitimacy, as they satisfy “the needs and interests of extensive constituencies straddling the state-society boundary” (ibid). These relationships are not the same as the multi-layered relationship between the state and non-state networks, where in the latter public goods and services are more widely distributed. To distinguish between the two situations, a new typology needs to be developed. This should focus on the degree to which the activities and *de facto* functions of state justice and security institutions and agencies have been privatised to perpetuate the power of the existing partnership of élites.
Contracting out justice and security as public goods and services

Contracting out in the post-colonial fragile state

Throughout the world, there are numerous instances of discrete justice and security functions being contracted out. It should be noted, however, that only public goods and services can be contracted out. By definition, the state cannot contract out a private good and service.

The operation of forensic laboratories; the protection of publicly-owned natural resources and other public facilities; police administration; legal aid; and the maintenance of court houses, police stations, and prisons have all been contracted out. In each of these situations, contracts outline mutually-agreed obligations and responsibilities for the respective parties – the state is legally and fiduciary responsible for managing the contract and the corporation or NGO, who fulfils the contract’s covenants. This relationship is based upon reciprocal obligation, mutual accountability, and shared responsibility and liability for the design and execution of the terms of the contract. Additionally, in order for a public good and service to be contracted out, considerations (value) must be exchanged between the state and the contractor.

Contracting out, however, is not limited to contractual arrangements with private corporations or NGOs. In many countries, bar associations license, regulate, and oversee the activities of the legal profession. Although bar associations are a private or semi-private organisation, they are not-for-profit corporations and do not necessarily operate under specific contractual obligations. Nevertheless, states have contracted them to distribute and deliver a specific public good and service. Private law faculties can also be considered in the same light.

International actors also provide contracted out justice and security distribution and delivery. As well as the executive functions exercised by UN transitional administrations in Kosovo and Timor-Leste or international war crimes courts, Cambodia’s acceptance of UN participation on its national war crimes tribunal can be seen as an example of a judicial function that has been partially contracted out. The same applies, for example, to Sierra Leone’s acquiescence to a Commonwealth police officer serving as the interim head of its police service; the International Commission Against Impunity in Guatemala, which supported Guatemalan prosecutions; and the process by which the United Nations has been vetting and certifying in Timor-Leste since 2006. However, such international participation in the distribution and delivery of justice and security may be the exception to the rule, as it effectively undermines the fundamental development principle of “local ownership”, and raises political sensitivities over notions of sovereignty. At best, it is an interim and provisional method of delivering justice and security, one that minimal states accede to only when they cannot distribute and deliver justice and security themselves, and then only under specific expedient political circumstances. The decision of the Timorese Court of Appeals to declare the agreement between the United Nations and the Timorese government unconstitutional suggests the limits to contracting out to international actors.

Despite the numerous ways in which the state can theoretically “contract out” justice and security, the ability of the post-colonial fragile state to do so is extremely limited. Just as the state is, largely, unable to effectively and efficiently regulate, monitor and audit the performance of private security companies, it is incapable of contracting out justice and security. All the limitations and deficits that impede the post-colonial fragile state’s ability to regulate private security providers exist for contracting out.

Two further capacity issues hamper the post-colonial state’s ability to contract out. First, to be able to contract out effectively and efficiently, the post-colonial state must have an established justice
and security strategy. This is neither a wish list nor a checklist; rather it is a detailed plan with stated needs, achievable objectives, specific policies and concrete timelines. To construct such a strategy, the state must first know which services it provides well, which it does not deliver adequately, which it seeks to provide but does not currently do so, and which it can appropriately contract out. But the ability to undertake such analyses is beyond the capability of the post-colonial fragile state, let alone to amalgamate them into a detailed, implementable plan.

Second, contracting out depends upon the state’s capacity to draft unambiguous, precise legal covenants that lay out what services are to be contracted out, how those services are to be provided by the contractor, and the mechanisms by which the state will manage the contract. These are highly technical legal and managerial skills and are difficult to master. Even if a post-colonial state could put out a contract, it will often lack the expertise to manage it. Contract management is absent in many development agencies (which routinely contract out services), thus it is highly unlikely that it exists within a post-colonial fragile state. If there are such skilled individuals, it is likely that will have been poached by the development community.

There are, however, exceptions. In Cape Town, South Africa, a private security company Securicor has been tasked with securing the public spaces of the Cape Town Central City Improvement District (CCID) (Abrahamsen and Williams, 2008). The CCID was created by the Cape Town Partnership, which is an NGO established and controlled by the city council and the business community. Securicor’s personnel patrol the CCID, working with the police. Securicor’s vehicular patrols are “are linked to the City Police control room by radio. [In addition], the supervision of Cape Town’s 170 closed-circuit television cameras is undertaken by Securicor officers in cooperation with the City Police” (ibid). It should be noted, however, that the CCID and its parent, the Cape Town Partnership, are hybrid entities. They straddle the space between a local state entity and a public-private partnership. Still, the activities of Securicor within this hybrid entity can be viewed as a type of contracting out.

Public-private partnerships

As suggested by the Cape Town example, public-private partnerships may offer an alternative to contracting out, as defined in a strict legal sense. They are a hybrid method, but, nevertheless, these partnerships can contribute to long-term state building and improve the distribution and delivery of justice and security. One example is the Citizen-Police Liaison Committee in Karachi, Pakistan (Masur, 2002). The Karachi business community, having been given access to police stations, has supported the police by developing and managing databases and conducting crime analyses. It should be noted, however, that the services provided by the committee to the police “have not been explicitly delegated or contracted out to it by the state. This is not a case of conventional ‘contracting out’” (Masur, 2002). Instead it is a partnership that began by the state attempting to establish a community policing programme, but which then evolved into a significantly different undertaking. For the committee to be successful, the police rules and regulations needed to be amended to allow private citizens to perform policing functions in a state agency without a contract or a detailed specification of the services they were to provide.

A similar case exists in Colombia, where the administration of a local court was enhanced (Said and Varela, 2002). As with the Karachi example, the original impetus came from the state. In this instance, the originators of the partnership were the court’s judges. A local business association conducted research that highlighted the challenges faced by the court. With the municipal government and courts, the association helped design an initiative to improve performance by introducing more contemporary court administration processes and techniques. Once again, laws and regulations had to be modified. Unlike the Karachi example, however, private citizens did not perform public
functions in the Itagüí courts. Instead, they limited their involvement to supporting the court’s staff in initiating and implementing the court modernisation project.

While public-private partnerships can productively and effectively augment the distribution and delivery of justice and security, these arrangements are not methods of contracting out. Furthermore, the ability of donors to pursue partnerships in the post-colonial fragile state is limited, for as the cases above suggest, effective partnerships may require the responsible government actors to sow the seeds in the receptive soil of civil society. In this sense, donors may be able to support the replication of effective partnerships, but not their initial conception.

**Donor support for security and justice service delivery: practical programming recommendations**

Donors want to know what concrete activities they can undertake to support the initial distribution and delivery of justice and security given the post-colonial fragile state’s multi-layered structure and its minimal capacities, competencies and commitments. A minimally competent state is essential for the long-term success of state building, one that “at least [regulates] alternative sources of authority and service delivery” (Call, 2008). Helping to construct such a minimally competent state is a daunting task.

The underlying question is how to reconcile the immediate need for service delivery in the post-colonial state with the long-term objective of developing local capacity to build the state. This paper offers four specific programme areas suitable for direct donor support, each of which augments the state’s overall capacities, even if they do not explicitly strengthen the day-to-day delivery of justice and security by the institutions and agencies of the state. Instead, the suggested programme areas primarily focus on and support the state’s ability to regulate, monitor and audit the standards and principles – accountability, affordability, accessibility and appropriateness – by which the public goods and services of justice and security are provided by whomever delivers them. The recommended programme areas also strengthen the state’s ability to regulate, monitor and audit the delivery of security as a product by private security companies so that services may be contracted out in the future. The four specific programme areas are as follows:

i) strengthen service delivery by state and non-state providers;

ii) enhance legislative development that clarifies the relationship between the state and the second state;

iii) support mechanisms by which decisions taken by the non-state networks can be appealed absorbed in the state system; and

iv) help build performance measurement systems within state institutions and agencies, which can evolve into policy and planning units.

None of these recommended programme areas involves the contracting out of justice and security distribution and delivery. Instead, they are vehicles through which the post-colonial fragile states can strengthen their capacities so that they can contract out justice and security services in the future.

It should also be noted that one of the key areas of development that is imperative for donors to address lies outside the purview of this report: the ways in which state-provided justice and security
have been privatised. If the privatisation of significant elements of the state’s justice and security institutions and agencies is not tackled, the post-colonial fragile state will not be able to provide adequate, affordable, accessible and accountable justice and security to its citizens and residents. It will also largely be unable to strengthen its relationships and associations with the non-state networks and its capacity to contract out public goods and services will certainly be reduced.

**Strengthen service delivery**

Despite their deficiencies, state institutions and agencies are essential in the distribution and delivery of justice and security. In addition to the justice and security programmes that donors customarily undertake in support of state providers, there is a range of initiatives that can and have been undertaken that bridge the services delivered by state agencies and non-state/local justice and security networks. Many of these programmes draw on the principles of community-driven development programmes supported by the World Bank and other regional banks (Asian Development Bank, 2007) as well as the legal empowerment movement. Others are geared towards strategic approaches to community policing. It should be noted, however, that these recommended programmes do not enhance the contracting out of public goods and services. Rather, they strengthen the abilities of state institutions and agencies to supervise the performance of non-state actors, expand access to justice and security, and more closely knit the state and the second state’s service delivery.

**Paralegals, justices-of-the-peace and legal empowerment**

A classic example is the paralegal programme in Sierra Leone, which engages and seeks “to improve both formal and customary institutions” (Open Society Justice Initiative, 2006).\(^4\) Supervised by lawyers and monitored by community boards, the paralegals work on a range of issues, from domestic violence to the right to education, from police abuse to employment rights. The participation and oversight by lawyers and community boards has been vital to the programme’s success. On the other hand, in Nicaragua a paralegal/justices-of-the-peace programme with hundreds of rural justice mediators, approximately 30% of whom are women, is supervised by the national Supreme Court. As in Sierra Leone, these mediators work on “minor criminal cases, family conflicts and property-related disputes by providing alternative solutions. They advise community members on legal issues and inform them of their legal rights. The facilitators are leaders who are recognised in and elected by their communities. They hold no political posts; the only academic requirement is that they must read and write. Community leaders participate as facilitators on a voluntary basis” (Quintanilla, 2004). It is claimed that crime has fallen by 10% in the programme areas and that the community’s trust in the justice system has increased (Quintanilla, 2004).

Strengthening the skills of the leaders of the second state, many of whom will also be in positions of authority within non-state/local justice networks, is a primary lesson learned from community-driven development (Krishna, 2006; Fox, 1997). In Timor-Leste, to improve service delivery and access to justice, local leaders have been “trained to be able to provide information and legal guidance, education and assistance to members of their communities” (Low, 2007), with emphasis on improving their “mediation of civil disputes between community members and conflict resolution within the community” (Ibid). One of the keys for network leaders and others, particularly paralegals, is:

…not merely to deliver a specific service, but to act as brokers between the community and the wider world. Being more in touch with state facilities as well as those of the outside world, they were expected to help their clients expand their access to resources and help them negotiate their way through unfamiliar procedures. This is very important to people deprived of information, and in the absence of adequate state outreach they are forced to depend for such services on exploitative patrons and middlemen (Gupta, 2000).
Another example of this approach is The Liaison Office (TLO) in Afghanistan, which “looks for linkages between customary and modern institutions that can ease a transition period – or possibly lead to an organic hybrid political order” (Schmeidl, 2009). In Khost, one of Afghanistan’s provinces, the TLO funded a conflict mediation commission comprised of six tribal elders that provided “an alternative dispute resolution mechanism akin to western out-of-court arbitration, and effectively serves to include the authority of tribal elders into the formal conflict resolution architecture at the provincial level” (Schmeidl, 2009). The commission is supported by the provincial governor, who refers cases to the commission and approves its decisions. It is reported that the commission has “so far resolved 23 protracted land disputes, and proactively deescalated emerging conflicts (inter-tribal as well as conflicts involving district-level government bodies)” (Schmeidl, 2009).

What is important to recognise in all of these examples is that the initiatives encompass a wide playing field. Rather than focusing narrowly on strengthening criminal justice mechanisms, they undertake broader conflict resolution disputes, property issues and administrative justice questions. By expanding the issues they address (albeit ones of greater political sensitivity and risk), these support programmes are better able to bridge and blend the arena of state-provided justice and security with that of the non-state networks. It should also be noted that none of the programmes outsources the distribution or delivery of justice and security. Rather each is an extension or strengthening of an already existing, if nascent, relationship between state and non-state/local providers.

Strategic approaches to community policing

In the field of narrower criminal justice and police development initiatives, the possibility of bolstering the relationship between the police and non-state/local justice and security networks is virtually unlimited. In southern Sudan, for example, many, if not all, marketplaces have local associations that are responsible for maintaining orderly conduct within the market. In one of the main Juba markets, there is not only a general market association, but one specifically geared to Ugandan traders. In Malakal there are also two associations, one for “African southern Sudanese” and one for “Arab southern Sudanese”. In the case of the Juba market Ugandan association, police officers are assigned as liaisons, whose sole responsibility is to assist the association and its membership on safety and security issues. If these liaison police officers were to be given on-the-job training – mentored by donor-funded, skilled community policing officers – an incipient community policing programme would be launched. If the donor-funded initiative were also to enhance the ability of the two Juba market associations to prioritise and meet their needs, a comprehensive community policing/problem-solving programme would be underway. This type of community policing/problem-solving police development would be tightly focused on marketplace safety and security, but after six to nine months, it could be replicated in a number of other towns throughout southern Sudan. Within 18 months, the number of trained southern Sudanese police officers and community leaders could be significant. They, in turn, could form the core of a community policing/problem-solving programme that could be expanded beyond marketplaces into building better relationships between the police and other non-state/local justice and security networks, such as taxi associations, neighbourhood watch groups and customary courts.

In Timor-Leste, a donor-supported initiative could be structured along similar lines with highly targeted assistance. The rationale for community policing in Timor-Leste would be the admission that approximately 85% of the police currently work with non-state/local justice and security networks and that 85% of the population looks to these networks for their justice and security delivery. Given this level of active legitimacy, by providing police and community organisation mentors, donors could assist the Timorese police and community leaders in better prioritising community/neighbourhood needs and interests and improving police support to meet those priorities. Each problem-solving pairing of trained police and community leader could then be used
to spread the community safety programme. This model of community policing, as in southern Sudan, is the best method by which donors can support state-provided service delivery in post-colonial fragile states.

**Legislative development**

There is significant need for legislative and regulation development to improve justice and security distribution and delivery. There are two areas in which donors can support development: (i) demarcating authority between state and non-state/local justice and security networks; and (ii) establishing regimes by which state authorities can license, regulate, monitor and audit the activities and operations of private security companies.

**Demarcating state/non-state authorities**

In many countries or regions – including Bolivia, Nicaragua, Guatemala, Malawi, South Africa, Mozambique, Bangladesh, Timor-Leste, Solomon Islands – the activities of non-state/local justice and security networks are incorporated into state law. In many places, these networks’ activities extend past what is allowed in law, but are effectively accepted and authorised in practice. If these activities can be legally certified through legislation or rule-making – primary or subsidiary – the lines between state and non-state/local justice may become less blurred. Once again, this is not an issue of contracting out, but of solidifying the minimal state’s existing relationships and associations.

In southern Sudan, for example, it is not uncommon for a state court to delegate cases to customary courts (Scheye and Baker, 2007). Simple traffic cases may be referred to customary tribunals because state courts are unable to handle cases quickly. In one case I observed in Southern Sudan, the police handed over to the state prosecutor a traffic case that involved a scuffle between one of its officers and the accused. The state prosecutor brought charges in the appropriate magistrate’s court, which in turn gave jurisdiction to a customary court. Within 24 hours of being given authority over the case, the customary court heard testimony from all concerned parties and gave a verdict. The proceedings appeared to be fair, with all parties given an opportunity to rebut testimony. The chiefs sitting on the tribunal asked the defendant whether he believed that the decision of the customary court was equitable and he agreed it was. Punishment was handed down and the case closed.47 From the perspective of accountability, accessibility, affordability and appropriateness, justice was served. Legally, however, the customary court had no jurisdiction over the case, despite it being delegated by the magistrate’s court.

In another instance, the proceedings concerned a politically controversial case in which a mixed panel of customary chiefs adjudicated a case of fighting between an “Arab” and a “southern” Sudanese. As with the preceding example, this case had been referred by the magistrate’s court to the customary one. In this example, the reason for the delegation was not expediency, but politics. “According to observers, since the case was politically delicate and could cause further public disturbances, the customary court was better suited than the magistrate's court to address the issues and resolve the conflict according to the values of the complainants and involved communities” (Scheye and Baker, 2007). The customary court was deemed more suitable and better equipped to resolve the case according to the values of the parties than the state court because the three chiefs who sat on the panel were Dinka, Shilluk and Arab judges. Once again, however, the customary court had no legal jurisdiction to hear the case and its verdict was technically illegal and a violation of the human rights of the parties involved.

In the short to medium-term, the choice these two cases present is between: (i) illegally rendered justice, which is deemed to be legitimate, fair, effective and politically sensitive; and (ii) legally
authorised justice, which is ineffective, costly and politically inept, can lead to increased tension and perhaps violent conflict and defendants being unfairly imprisoned for extended periods of time prior to their court appearance. Claimants may perceive delayed justice to be no justice at all. The answer for the development community is straightforward – donor-supported legislative assistance is needed to establish unambiguous and legally valid procedures by which cases can be delegated from state to non-state/local justice and security networks.

**Licensing and regulating private security providers**

There is a pressing need to establish the legislative and legal regimes through which the post-colonial fragile state can license, regulate, monitor and audit private security companies. Unfortunately, effective “attempts to regulate the industry... have been almost non-existent, with a few exceptions,” such as South Africa (Isima, 2007b). The ultimate objective is to ensure that the private bodies are accountable to the public for their corporate operations and the actions of their employees.48 There are many issues that need to be legally clarified and donors can provide support to those efforts. One of these questions is who private security companies can hire as employees, particularly if they can employ police officers who have been dismissed from the police service for misconduct or conduct detrimental to the public interest. Similarly, it is crucial to determine if public officials are entitled to acquire ownership interests in private security companies and, if so, under what circumstances and with what restrictions.49 Another question that requires clear and concise regulation is how and when police officers can seek employment with private security companies during their off hours.

Donors can also assist in designing and supporting the databases that states will require to license and register not only the private security companies themselves, but their employees, the compulsory training that those employees should undergo and the weapons that the employees are allowed to carry and use. Naturally, the post-colonial fragile state will require donor support in establishing and designing this training. Recording the incidents that occur while private security companies perform their activities ought to be supported as well; the exchange of information between private security companies and the police can help the police improve safety and security.

**Appeals from non-state/local justice networks to state systems**

Following and building upon legislative development, a further step in the long-term state building process is to improve the mechanisms by which decisions made by non-state/local justice and security networks can be appealed in the state court system. The objective is not to remove jurisdiction from the networks, but to strengthen the overall adherence of the multi-layered state system to rule of law. Once the appropriate legislation is ratified and the capacities of the state courts enhanced to cope with the expected increase in demand for their services, one of the keys to appeals is to record cases heard by the non-state/local justice and security network.

As with common law, the law and legal procedures used by the networks can best be understood as part of an evolving legal system that undergoes continuous modification and change. Even if unwritten, the networks have a body of law at their disposal for handing down decisions. Precedents exist, are built upon, and new cases are factually distinguished from previous ones, when appropriate. That evolution can be supported by helping the networks compile case books that over time will consolidate the law by making it more consistent, transparent and accountable.50

Once again, in southern Sudan there had been a tradition of annual meetings of the leaders of the non-state/local justice and security networks. The purpose of the meetings, among others, was to share and exchange ideas on how they had been implementing their laws. These types of meetings should be supported wherever they exist – in southern Sudan, Papua New Guinea, Bolivia, etc.
addition to bringing these leaders together, support could encourage them to focus their discussion on a selected number of salient legal issues for which they could begin to compile case books. The case books would be one of the source materials for the state courts when hearing appeals, given the presumption that state judges are not as familiar with network law as the leaders of the networks themselves. Case books will allow state judges to analyse precedent in their adjudication of appeals, though there will be other grounds upon which to base their decisions as well. In addition, supporting the compilation of case books may make the network’s decisions more consistent and more readily transmittable to claimants who come before the networks, even if they are illiterate, as knowledge and awareness of precedents can filter down.

The compilation of case books may also bolster the work and abilities of the networks’ clerks. Clerks “write” the decisions reached by the network leaders, assemble the case records and, sometimes, may even archive documents. In some ways, the clerks are the repository of network law on which the network leaders rely for their decisions and legal reasoning. They also often advise network leaders on precedents. As the clerks gain more experience in compiling the case books, they will be better able to give consistent advice, pass along their skills to their colleagues, and record cases more reliably and dependably. As an appeal depends on the case record, the work of the clerks is paramount for greater adherence to the rule of law in the post-colonial fragile state system.

From performance measurement to policy and planning units

For the state to be able to exercise its regulatory, monitoring and auditing prerogatives, it will need to measure the performance of all justice and security service providers, including the non-state/local justice and security networks. One of the principal areas of donor support, therefore, should be the development of more adequate and reliable state systems for evaluating the distribution and delivery of public goods and services. Improving these systems should be a priority for donor support; without them the post-colonial fragile state will not be able to develop strategic policies or conduct reliable justice and security reviews. These are the cornerstones of establishing policy and planning units and, therefore, the foundation of effective state building.51

In addition, once state institutions and agencies are more capable of measuring performance and formulating strategic policies and options, they may be better prepared to consider contracting out justice and security distribution and delivery. Without these abilities, state agencies cannot: (i) determine which services may be suitable for contracting out; or (ii) monitor and audit contracts. Both abilities are necessary, although insufficient, for the state to fulfil its legal and fiduciary responsibilities to design contracts and hold contractors accountable. Both are also essential for the state to be able to regulate and audit the activities of private security companies.

Admittedly, strengthening these evaluation and auditing systems is a long-term endeavour, but it may be among the most important initiatives underpinning productive state building. The donor chorus decrying the absence of performance baselines suggests how deep the need is. It is now customary for donors to conduct perception surveys of security and safety; such surveys have been undertaken in Albania, Bangladesh, Yemen, Timor-Leste, Sierra Leone and many other countries. Unfortunately, as a significant percentage of these surveys are done by donors themselves, they do not help to strengthen state institutions as the Asia Foundation surveys are intended to do. Furthermore, the overall lack of concrete and pragmatic discussion about strengthening partner state performance measurement systems in lessons learned reports indicates that this development subject is in its infancy.

The inspector general offices/units of the ministries of justice and of the interior, the supreme judicial councils and prosecutorial agencies can be the focus for improvements in auditing systems. This is
not to undervalue the role of other forms of performance recording, such as court user groups or
neighbourhood audits of police stations. Nevertheless, efforts to support state capacity are of the
utmost priority and ought to be directed towards recording and measuring the performance of state
institutions and agencies that distribute and delivery justice and security. Donor programmes in
Yemen and the Democratic Republic of the Congo may be productive models for replication. Only
once the mechanisms have proven to be accurate and reliable would an expansion into the non-
state/local justice and security networks be prudent. For policing purposes, support to the networks
might focus on the activities of the liaison and community policing officers discussed above. For
judicial activities, the role of the network clerks would be the best place for obtaining performance
indicators. Notaries may also provide valuable data; for example in Yemen, they are not only
registered by the ministry of justice, but are often the source of documentation and pleadings used
in the state and non-state/local justice and security networks.

Donors could agree to dedicate a fixed percentage of total programme funds for justice and security
development – i.e. supporting partner governments’ capacities to regulate, monitor and audit the
performance of service providers. This would have two consequences: (i) signalling to partner
governments that evaluating performance is a crucial good governance function for improving the
distribution and delivery of public goods and services; and (ii) determining which donor programmes
are the most effective development initiatives. Programme effectiveness is not, primarily, measured
by evaluating the actions of the donor. It is evidenced by the change of behaviour and activities of the
institutions, agencies and organisations that receive donor support. If those institutions’ behavioural
changes produce better service distribution and delivery, donor programmes are likely to have been
effective. If there is little improvement in service distribution and delivery, the effectiveness of the
donor programmes is suspect. Consequently, their own national interests and fiduciary responsibility
to their taxpayers should oblige donors to set aside a fixed percentage of total programme costs to
supporting their partner governments’ ability to regulate, monitor, and audit their own distribution
and delivery of justice and security.

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II. JUSTICE AND SECURITY AS PUBLIC AND PRIVATE GOODS AND SERVICES


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**Endnotes**

13. This discussion paper has been commissioned jointly by the Partnership for Democratic Governance (PDG) and the OECD Development Assistance Committee’s International Network on Conflict and Fragility (INCAF). INCAF is a unique decision-making forum which brings together governments and international organisations in order to support work on a range of policy questions relating to conflict and fragility.

14. One of the hybrida combinations is public-private partnerships, when the relationship is not contracted out, but established on a more voluntary and philanthropic basis.

16. It has been estimated that since the 1980s, private security service provision has increased approximately 8% annually in industrialised countries and up to 11% in parts of Latin America, Africa and Asia (Frigo, 2003; Ungar, 2007).

17. Civil society, as understood in western parlance, does not exist in the fragile, post-colonial state (Carothers, 2002; Bellina et al., 2009). An unpublished OECD/DAC draft (January 2009) argues that “states in fragile situations are often characterized... by a lack of clear distinction between the public and the private..., and a lack of constructive relations between the two realms. As a result the public sphere... is generally weak [which]... exacerbates state fragility” (p. 6).

18. See also Isima, 2007.

19. For a discussion of some of the difficulties of international actors engaging in state building, see Development and Change 33, 5, 2002.

20. Unfortunately accurate analyses are rare. Goldsmith and Dinnen (2007) observe that “while international police-building literature has increasingly made reference to the importance of local context and the political character of policing... detailed analyses of the specific settings in which the politics of policebuilding are revealed remain few in number”. See also, Morgan and Mcleod, 2006.

21. Academically, this form of governance is often characterised as a mixed/hybrid system, where there are “overlapping layers of formal and informal spheres of power... with clientelistic” and neo-patrimonial underpinnings (Chabal, 2006: 1; see also Jackson and Rosberg, 1982; Bratton and van de Walle, 1997).

22. Accountability refers to “the responsiveness of the policy maker and service provider to local needs. This entails answerability (providing information and/or a decision), enforcement (strengthening achievement of service norms) and organisational change (changing the way the service is delivered),” (Baker and Scheye, 2007). Accountability also pertains “primarily, about holding values concerning how the relationship is to be conducted between [service provider and customer]... Only in a secondary sense does accountability mean the institution of structures and processes to facilitate this” interaction (Baker and Scheye, 2007; see also Goetz and Jenkins, 2005).

23. In 2004 the UK Department for International Development noted the importance of non-state/local justice and security networks (DFID, 2004). OECD followed suit in 2007 with an analysis of justice and security service delivery in fragile states (OECD, 2006). Explicit donor-supported efforts to understand the centrality of non-state/local justice networks in southern Sudan, Timor-Leste, Afghanistan, Nicaragua and elsewhere have been initiated over the last couple of years.


25. For comparable data for Nigeria, see Alemika and Chukwuma, 2004.

26. For a full discussion of the declining public satisfaction in the Kosovo Police Service, see Scheye, 2008.

27. As one recent critic points out, “this is a crucial question for local ownership,” one entirely bound up in politics and power (Reich, 2006); see also Scheye and Peake, 2005.

28. For alternative definitions of “local owners”, see Ball, Scheye and Van de Goor (2008). Hansen and Wiharta (2007) suggest that local owners “can be grouped into three categories: 1) the population in its various organised and unorganised forms, that is the citizen, civil society and the business community; 2) the authorities, that is the political leadership, the civil service and local government mechanisms; and 3) actors in the justice and security sector.”

29. For a fuller discussion of social efficacy and cohesion, see Scheye (forthcoming 2009).
30. Fragility stems from a “lack of financial, technical and human capacity and from lack of legitimacy, both preventing the making of the state as a robust institution” (Bellina et al., 2009).

31. “As of winter 2007…, the [Southern Sudan] penal code and criminal procedure code were still in draft form. The fate of the lowest three levels of courts … remained legally and operationally unsettled. There was no functioning university law faculty; no law library; no judicial training centre; no official government gazette through which legislation becomes law; no Bar Association; no legal aid; little court administration; and few competent defence counsels or a public defence service.” (Baker and Scheye, 2009).

32. For an academic and conceptual discussion of the issues surrounding private security companies and privatisation of the state, see Johnston and Shearing (2003).

33. It is important to recognise that to those who sell security (private security companies) and to those who buy it (individuals, groups, and organisations with the necessary funds), security has been privatised and is no longer a public good and service (Caparini, 2006).

34. Simelane (2008) argues that the growth of private security is due to the post-colonial fragile state and the privatisation of security services by the political elite to preserve their political and economic prerogatives.

35. For a discussion of public accountability of private security companies, see Vera Institute of Justice, 2000.

36. Sierra Leone yields an interesting acknowledgement of the incapacity of a post-colonial fragile state to regulate private security companies and the privatisation of policing. A contingent of police is assigned to protect the operations and assets of a mining company, Koidu Holdings. The company’s own security personnel exercise direct operational control over the contingent of Sierra Leonean police and accompany the police on their patrols of company property (Abrahamsen and Williams, 2006).

37. Affecting the behaviour of transnational private security companies, however, could have positive repercussions, given that these corporations have seized significant market share in many countries. For example, Group 4 Securicor, the largest private security company, operates in up to 100 countries; Wackenhut, another transnational, has captured approximately 10% of the Nicaraguan market (Ungar, 2007). It is reported that the second largest private security company, Prosegur, has 210 000 employees working in up to 30 countries (Abrahamsen and Williams, 2008).

38. The inability of the Iraqi government effectively to bring Blackwater employees before a court of law for alleged criminal behaviour is evidence of the challenges in applying domestic regulations to transnational security companies in the employ of foreign governments.

39. For an overall discussion of soft regulation, see Cockayne and Mears, 2009. The paper is informed by an attempt by the Ministry of Interior to license and regulate the flow of small arms used by private security companies in Honduras, but the project failed, in part, because of vehement opposition by rank and file police officers who were selling weapons they had collected and/or confiscated.

40. An even greater degree of privatisation has taken place in the Nigerian Delta, where Nigerian police and military have become subservient to the security needs of the oil companies, which have been defined as key national assets, even though they are privately-owned.

41. For Colombian and Liberian examples of this, see Hill et al., 2007.

42. Other than the United States, various prison services have, over the years, been contracted out in the United Kingdom, Peru, Argentina, Chile, and some African countries.
43. It should be noted that detailed analysis is needed to verify the effectiveness of these recommendations.

44. Another successful paralegal programme is the Paralegal Advisory Service in Malawi.

45. Political tensions with the national government in Kabul resulted in an effort by Afghan government to close down the TLO. This had little to do with the organisation’s activities undermining the legitimacy of the Afghan government. Rather, it was a more naked fight for political power and authority, with the national government seeking to further centralise and accumulate control. It is precisely in situations like this that the influence of donors and the development community is important to ensure that effective local initiatives that strengthen the networks of the second state are not undermined, and that a political dialogue and negotiation takes place that guarantees their survival and enhances their productivity.

46. An additional and important topic that can be integrated into these donor supported programmes is microfinance, which addresses comparable issues of the second state, particularly if it is used to help the poor “graduate from the informal money market into organized banking and begin generating sustainable livelihoods” (United Nations ESCAP, 2008).

47. In another example of the blurred boundaries between state and non-state networks, the convicted individual was immediately remanded to the state prison. More tellingly, however, the decisions of non-state/local justice and security networks are, often, more enforceable than those of state courts, which is one of the reasons why they are the preferred choice of many.

48. For a discussion of public accountability of private security companies, see Vera Institute of Justice, 2000.

49. For a discussion of this issue in Bolivia, see Quintana, 2003.

50. It is important to recognise that compiling case books is not equivalent to codifying network law. The difference between the two activities echoes the differences between common and civil law; the former is based on precedent and the latter on a written code.

51. As the Karachi example suggests, it is feasible to contract out performance measurement systems, even though it must be noted that in the Karachi case measurement activities were not contracted out.