



SEMINAL REPORT

Fostering New Child Rights Constituencies: Leveraging Knowledge on Customary Justice Systems



Terre des hommes
Helping children worldwide.





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Terre des hommes (Tdh) is the leading Swiss child rights organisation. Since 1960, Tdh has helped build a better future for vulnerable children and their communities, making an impact with innovative and sustainable solutions. Active in more than 30 countries, Tdh works with its own teams and/or local and international partners to improve the daily lives of millions of children and their relatives through programmes on health, access to justice for and with children and youth, migration, protection, water and sanitation and emergency relief. Our work is financed by support from private individuals and institutions, with administrative costs kept to a minimum.



Griffith University is situated in South-east Queensland, Australia. Since 1975, Griffith University's teaching and research has been focused on addressing the most important social and environmental issues of our time. One of the ways Griffith University is doing that is by establishing research 'Beacons', including the Disrupting Violence Beacon. Scholars from the Disrupting Violence Beacon have collaborated with Terre des hommes in producing this seminal report. The Disrupting Violence Beacon views violence as a pressing global problem that is characterised by gendered, racialised and inter-generational harms, as well as complex cycles of trauma and inequality within families, communities and nations. Through interdisciplinary collaborations, international partnerships and projects that contribute transformative responses to human security, the Disrupting Violence Beacon aims understand and respond to violence in all forms.





Impressum

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Citations:

Colliou, Y., Gil, M., Marchetti, E., O’Leary, P.
*“Fostering New Child Rights Constituencies:
Leveraging Knowledge on Customary Justice
Systems. Seminal Report”*, 2024.

Acknowledgements:

The authors are deeply grateful to all the contributors of this Seminal Report: Kristen Hope, Aoua Traoré, Boubacar Tchombiano, Christelle Antonetti, Claudia Campistol, Erica Harper, Hedayatullah Rameen, Khitam Abu Hamad, Porgo Tasséré, Isabela Cordua, Taliah Swart, Laura Ospina, Jennifer Davidson, Ali Wardak, Baudouin Dupret, Philip Jaffé, Mohammed Yahia, Mahmoud Abu Kamal, Mahammad Kaddoura. We want to express our gratitude to the customary justice actors in the different countries who spent many hours of their time over many years sharing information about the cases they have dealt with.

Design:

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ISBN: 978-0-646-89446-1

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Helping Children Worldwide

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Introduction



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Introduction

Children around the world experience multiple and intersecting forms of discrimination and violence. This often results in social exclusion, lack of access to services and resources, and violations of their rights. Despite being fully entitled rights holders in justice matters, children can face challenges in both accessing and receiving justice that is developmentally appropriate, protective, and restorative. Consequently, children have a high degree of vulnerability within justice systems. In addition to the discriminations faced by adults on the basis of gender, sexual identity, migrant status, disability, race, nationality, faith, indigeneity or ethnicity, children often do not have the legal authority or agency, nor even the developmental capability, to fully participate in the justice process. This exposes children to very particular barriers that impede equitable access to justice and the exercise of their rights.^[5] Responding to this situation requires a special focus on child-centered, scalable, and practical achievable innovative evidence-informed solutions.

Children and youth come into contact with the law for various reasons, including, but not limited to being allegedly involved in criminal-related matters, being witnesses in family or other proceedings, being victims of neglect, physical, sexual, or psychological violence, or as a result of violations of their rights such as exploitative labor. How children interact and are treated by the justice apparatus and the resulting outcomes (in any form) are extremely significant issues that can have varying impacts on children's lives. Justice outcomes can have significant impacts on a child's development and future potential, but also, overall, on social cohesion opportunities at the community level.^[6]

For decades, the international community and national authorities have oriented justice sector reform strategies around supporting official institutions. The focus has been on formal justice systems that are often geographically limited, sometimes perceived

^[5] Liefwaard, T. "Access to justice for children: Towards a specific research and implementation agenda," *The International Journal of Children's Rights*, 27, no.2 (2019), 195–227.
^[6] United Nations Children's Fund (UNICEF), The Regional Office for CEE/CIS, *Children's Equitable Access to Justice, Central and Eastern Europe and Central Asia*, UNICEF, Geneva, 2015.

as untrustworthy, and not always culturally appropriate.^[7] Rulings can also take a long time to be rendered. Meanwhile, customary justice systems have been regularly excluded from these strategies because they are often seen as 'incompatible' with the 'values' of the modern nation-state, often said to operate in ways that are inconsistent with international human (and, hence, child) rights standards, and to exacerbate unequal power dynamics derived from conservative social norms.^[8] These factors have often forced customary justice systems to largely operate covertly from official state institutions and thus, not be subject to much independent analysis and critique.

Over time, it has become increasingly clear that an exclusive focus on state systems has not been effective in creating access to justice for all.^[9] The case is forthright: prevailing estimates suggest that over 80% of justice decisions in developing countries are delivered at the community level.^[10] Customary justice systems are the first resort for a vast majority of individuals seeking justice for reasons of access, cost, and time.^[11] A majority of recipients of customary justice are children. At the same time, formal systems still lack in many cases child-friendly approaches, so the distance between children and formal justice is conspicuous. It is one of the primary aims of this report to conceptualize the access to justice that children are currently privy to, specifically as it relates to those children who are particularly vulnerable, children who engage with the law in various contexts and the forms of justice to which they are exposed, including formal and informal dispute resolution mechanisms.^[12]

Contemporary approaches to child-centered justice point to the need to engage with customary justice systems. The Committee on the Rights of the Child in its General Comment No. 24 (2019) on Children's Rights in the Child Justice System, has acknowledged the consideration of the customary justice system

in justice reform is required, stressing the fact that restorative approaches practiced in customary justice systems might well provide opportunities with the formal child justice system. The ability to access justice is a crucial component of securing peaceful, just, and inclusive societies where effective and accountable institutions govern at all levels, as recognized by the Agenda 2030 and Sustainable Development Goals (SDG) 16 (targets 16.1 and 16.3). The centrality of customary justice systems is imperative to achieve justice for all. Equal access to justice for all cannot be realized without engaging the justice systems to which most people—and particularly child constituencies—already turn. While the demand for justice, including child-centered justice, is growing, pathways to justice are diverse and there are many complex challenges in the architecture, supply, and financing of justice. As efforts advance to prioritize and accelerate action, the reality of justice services must meet international goals in a realistic context. With the expected growth of the population in the coming years, the justice systems will be unable to cope appropriately with substantial increases in cases without the development of new, innovative, and restorative justice practices. While keeping in focus formal justice systems, it is important to consider the variety of customary justice actors and mechanisms that exist and are largely used by women,^[13] children and their families.

Customary justice systems and practices have their own complexities. Globally they are varied and diverse and remain relatively unexplored. This requires a deep dive into their complexities with attention to how they can be accessed. Customary justice actors evolve to remain relevant over time and renegotiate their legitimacy vis-à-vis the community members they serve. Community-based conflict resolution systems are trusted and valued. They are also versatile, which may lend to them particular potential of improved justice outcomes for children.

^[7] Colliou, Y. and Hope Burchill, K. *Customary Law & Juvenile Justice*. Terre des hommes. (2016).

^[8] United Nations Children's Fund (UNICEF), The Regional Office for CEE/CIS, *Children's Equitable Access to Justice, Central and Eastern Europe and Central Asia*, UNICEF, Geneva, 2015.

^[9] Ewa Wojkowska, *Doing Justice: How informal justice systems can contribute*, December 2006.

^[10] Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (Copenhagen, 2012), 7.

^[11] *Ibid.*

^[12] Liefgaard, T. "Access to justice for children: Towards a specific research and implementation agenda," *The International Journal of Children's Rights*, 27, no.2 (2019). 195–227.

^[13] Gaston, E. and Luccaro, T. 2014. Women's access to justice in Afghanistan. *Peaceworks*.

The task at hand, therefore, is not a matter of denying the existence of shortcomings of customary justice systems (and, likewise, of formal justice ones). In particular, the informal nature of such systems may lack procedural safeguards and consistency in outcomes, reflect power structures and discriminatory practice in the culture or society, and leave decision-makers unaccountable.^[14] The potential for breaches of human rights is therefore a key consideration in this somewhat less-explored arena of justice. Conversely, the benefits of customary justice systems to its users in comparison to formal justice may include cost-effectiveness, cultural accessibility and relevance and speed of processing, to name a few.^[15] It is therefore rather a matter of gathering qualified evidence on how they function and what are the entry points, seeking to co-create workable, context-specific responses that are able to deliver justice for children that uphold their rights.

Over the last few decades there has been calls for child friendly justice, especially in informal systems^[16] Most recently 'momentum' has begun to address the justice gap for children with the aim of delivering child-centered justice that is safe and non-violent, and that is restorative, empowering, and non-discriminatory for all children regardless of whether they come in contact with the law as alleged offenders, victims, or witnesses.^[17] Recognition of the failure and limitations of state systems of justice for children have led to calls for transformative justice as well as the utilization of customary justice responses^[18] especially in low income and vulnerable community contexts.^[19]

Laying the foundations for real progress here requires fostering new constituencies, and a transformation of the narrative with a solid evidentiary basis (know to act, learn to improve).

This Seminal Report is the first to provide evidence about the landscape of customary justice processes, based on an in-depth study of 3,894 children's cases dealt with by customary justice systems in Lebanon, Jordan, the Palestinian Territories (West Bank and the Gaza Strip), Afghanistan, Egypt, and Burkina Faso. Across these territories, this report aims to contribute to the understanding of the complex ways in which informal justice systems impact the children who participate in them, either as victims or perpetrators. This *avant-garde* action-oriented research was carried out by Terres des hommes (Tdh) over a six-year period from October 2013 to June 2019, in close collaboration with customary justice actors. Tdh is an international humanitarian umbrella organisation operating to contribute to global action and research that aims to foster and preserve children's rights across many spheres, including access to justice.

The survey was implemented in a longitudinal approach, so as to reconstruct individual trajectories and the logic of their transformations, overcoming a limitation of more common cross-sectional surveys which provide information only at a given time. The methodology was defined with help of a scientific committee made up of experts from the Centre Interfacultaire des Droits de l'Enfant at the University of Geneva, the Ecole de Criminologie at the University of Lausanne, the School of Social Work at Griffith University, the Department of Criminology at the University of South Wales and the University of Louvain la Neuve. The dynamically applied and modified survey enabled individual interviews with the customary actors responsible for resolving problems and conflicts in their community. These are community actors ranging from customary judges, traditional chiefs, elders and many others depending on the context, and these persons act as the leader of the conflict resolution process, often with significant support and assistance from other actors in the community.

^[14] Harper, E., and Colliou, Y. "Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones," Hague J Rule Law 15, (2022): 75–94.

^[15] *Ibid.*

^[16] Liefwaard, T. (2015). Child-friendly justice: protection and participation of children in the justice system. *Temp. L. Rev.*, 88, 905.

^[17] Unicef. (2020). Global status report on preventing violence against children 2020. <https://www.unicef.org/reports/global-status-report-preventing-violence-against-children-2020>.

^[18] Harper, E., and Colliou, Y. "Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones," Hague J Rule Law 15, (2022): 75–94.

^[19] Mingus, M. (2022). Transformative justice: A brief description. *Fellowship*, 84(2), 17–19.



The Seminal Report is structured into six chapters: Chapter 1 provides a detailed explanation of the data collection and methodology and its limitations; Chapter 2 focuses on an accurate description of the customary justice system, its actors, and its functioning; Chapter 3 explores the profile of children and families who resort to customary justice proceedings; Chapter 4 dives into customary justice proceedings and how they operate in children's cases, describing the types of cases, interactions with other justice systems, sources of custom, religion and state laws used by the customary actors, as well as the investigation methods and case outcomes delivered; Chapter 5 analyzes the opportunities and risk that children face when accessing customary justice proceedings, giving a 'pride of place' to different forms of participation of children in those systems; and finally, Chapter 6 presents the major findings and

contributions to knowledge and discussion from this mixed methods and analytical study of customary justice systems aiming at enabling new (and better) ways of approaching and contextualizing children's access to justice.

This Seminal Report has been compiled through the partnership with Terre des hommes and the Disrupting Violence Beacon at Griffith University. It is the belief of these organizations that the uniqueness of the data and its analysis provided in the Seminal Report will be paramount to accelerating a focused agenda and action into child-centered justice having the centrality of customary justice systems and making the case for much needed linkages between formal and customary justice system to ensure justice with and for children.





1. Methodology and limitations

1. Methodology and limitations

1.1 Methodology

1.1.1 Field survey conditions

This research is a field study using operational mechanisms of an international non-government organisation, Terres des hommes, with a mission to promote child rights and well-being. To achieve this, operations are based on collaboration with community organizations who lead and manage conflicts regarding children, with collaboration focused on improving a child's access to justice. The methodology employed an action-oriented approach to gain knowledge from the process employed by customary justice actors and practitioners, as well as participants. This required a close working relationship with all parties. Terre des hommes decided to adopt an action-oriented approach because it was the most effective way of gathering the information to identify the strengths and weaknesses of practices on the ground. It also opened up ways of changing problematic practices and creating positive changes for individuals and communities. This approach was well aligned to established processes of monitoring and evaluation methods to survey and assess impact. The methodology discussed in this chapter was validated by a Scientific Committee made up of subject matter experts from the Centre Interfacultaire des Droits de l'Enfant at the University of Geneva, the Ecole de Criminologie at the University of Lausanne, the School of Social Work and Law School at Griffith University, the Department of Criminology at the University of South Wales and the University of Louvain la Neuve.

In order to measure impact and change particularly about issues relating to children's participation in customary justice procedures, a longitudinal approach was used which enabled Terres des hommes "to reconstruct individual trajectories and the logic of their transformations", as opposed to so-called cross-sectional surveys which aim "to find out about

the situations, practices and opinions of respondents at a given time". While a cross-sectional survey allows for the measure of changes in major variables "they say nothing about transition processes".^[20]

The data was collected between October 2013 and June 2019. Since this data collection phase Terres des hommes has continued to work in the countries and territories studied, allowing for a deeper understanding of the customary justice practices and adding to confidence and contextual relevance of the data presented in this report. The length of the survey enabled Terres des hommes to make adjustments, particularly to the method of data collection. The main change was to switch from administering the questionnaire in the form of notetaking to collecting data digitally, and also to adjust and delete certain questions during the course of the survey. Véra Nikolski noted in 2011 that,

When you carry out a long-term field survey, the stance you adopt and your relationship with the subject under study inevitably change over time. Returning to them, as part of a reflective approach, enables us to see how the distance between the interviewer and the respondents has fluctuated over time, and also to appreciate the relative value of different postures, some of which are clearly more productive than others.^[21]

A total of 3,894 cases were collected, including 1% (n=36) in 2013, 13% (n=525) in 2014, 10% (n=401) in 2015, 16% (n=634) in 2016, 24% (n=937) in 2017, 22% (n=866) in 2018 and finally 13% (n=495) in 2019. The table below showcases the cases collected per year for each country and territories included in the survey study.

^[20] Mercklé, Pierre. « Analyse longitudinale » Sociologie, PUF, décembre 2020. journals.openedition.org, <http://journals.openedition.org/sociologie/2577>.

^[21] Nikolski, Véra. « La valeur heuristique de l'empathie dans l'étude des engagements « répu gnants » ». Geneses, vol. n° 84, n° 3, Belin, novembre 2011, p. 113–26.



	Afghanistan	Egypt	Lebanon	Gaza strip	West Bank	Burkina Faso	Total	%
2013	-	36	-	-	-	-	36	1
2014	-	150	-	191	184	-	525	13
2015	25	195	-	121	60	--	401	10
2016	61	139	-	261	173		634	16
2017	171	154	23	224	191	174	937	24
2018	163	161	123	143	221	55	866	22
2019	137	84	53	55	87	79	495	13
Total	557	919	199	995	916	308	3894	-

Figure 1. Number of cases collected per year and per country, by geographical context

The countries and territories covered by the field survey were integrated over the course and timeframe of the field survey. As indicated in the table, collection commenced in Egypt in 2013, in the Palestinian territories in 2014, in Afghanistan in 2015 and in 2017

for both Lebanon and Burkina Faso. This means that the dataset does not necessarily cover the same time period for every country and territory, but despite this, comparisons are still possible since practices do not dramatically change over a short period.

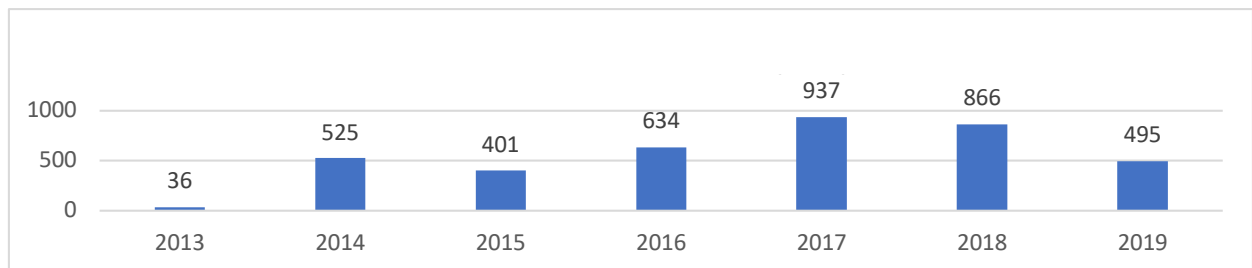


Figure 2. Number of cases collected per year



All the information comes from individual semi-directive interviews conducted with the customary justice actor responsible for resolving conflicts and problems within their community. While this comes with certain limitations, the approach was selected for this survey because,

The semi-directive interview is a conversation or dialogue that generally takes place between two people. It is a privileged moment of listening, empathy, sharing and recognition of the expertise of the lay person and the researcher. Once the researcher has established a relationship of trust with the informant, he or she will collect the story.^[22]

De Sardan goes on to say that “[e]mpathy in interviewing is a real dilemma in which the combination of empathy and ‘the right distance’ and that of respect and a critical sense are particularly difficult to achieve”.^[23] The bond of trust that the people in charge of conducting the interviews were able to forge with the customary justice actors was a key element in the field survey. Even if decisions of the customary justice actors are often made public, the role of the actors is exercised in complete discretion, which cannot be understood without further inquiry. The people conducting the interviews were national employees of the Terre des hommes with expertise in child protection or access to justice.

The overall process was steered by a team of four people in close coordination with the research managers based in the intervention countries. The co-ordination team designed the questionnaire and trained the interviewers in its use, while constant technical and technological support was provided to the field teams. Consultation with the Scientific Committee also served as a quality control measure through the process.

The terms child and customary justice actor are used repeatedly. The term ‘child’ refers to any person between the ages of 0 and 18 in accordance with Article 1 of the Convention on the Rights of the Child, which states: “For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.” We have used the term customary justice actor to define all the actors in charge of conflict management processes that take place on the fringes of the state sphere. The notion of customary justice actor refers to all community actors, whether they are called customary judges, traditional chiefs, arbitrators, members of a conflict-regulation assembly, elders, etc., depending on the context. The customary justice actor refers to the person in charge of the conflict regulation process, even if, as we shall see, in most situations he or she is accompanied or assisted in this task by other community justice actors.

^[22] Imbert, Geneviève. « L’entretien semi-directif : à la frontière de la santé publique et de l’anthropologie ». Recherche en soins infirmiers, vol. N° 102, n° 3, Association de Recherche en Soins Infirmiers, 2010, p. 23–34.

^[23] Imbert, Geneviève. « L’entretien semi-directif : à la frontière de la santé publique et de l’anthropologie ». Recherche en soins infirmiers, vol. N° 102, n° 3, Association de Recherche en Soins Infirmiers, 2010, p. 23–34.

1.1.2 Data

Ethical considerations and data confidentiality

Without exception, the customary justice actors participated voluntarily in the field survey. They saw it as a form of recognition of their practice and their role within their community, but also as a way of gaining access to information in the field of children's rights through their regular relationship with the interviewers. The field survey and its objectives were presented to them so that they could position themselves and give their free and informed consent to their participation. A Scientific Committee comprising a number of key subject matter experts was established in the initial stages of the research to provide recommendations that guided the research approach.

Data relating to cases handled by customary justice actors was collected anonymously. Customary justice actors were explicitly instructed not to divulge any confidential information, such as the address or place of residence of the children, their surnames, first names or any other information that could identify them or their families in a conflict resolution process. All the data collected on the children does not, therefore, enable the child to be formally identified. An identifier has been allocated to each child in order to link him or her to the country and year of collection, as well as to a code number corresponding to the case in question. Several children or young people can be linked to the same case (victim and perpetrators, siblings, witnesses, etc.). To establish a child profile, only the child's sex, age or an estimate of the child's age communicated by the customary justice actor interviewed, was used.

Validation, quality and presentation of data

To ensure consistency between the questions asked and the answers given, the data checking process was scrupulously followed. The aim was to ensure that the data entered is as accurate, and as complete as possible and that it corresponds to the reality of each case. An internal validation process among qualified experts at Terre des hommes, coupled with the revisions made by the Scientific Committee was put in place to check all

the information collected through the questionnaires. Given the contextual and cultural differences that exist between countries/territories and between regions within the same country/territory, any comparison must be made with caution. The data collected cannot be considered representative of all the regions studied, as it comes from a sample of customary justice actors in a given geographical area. None of the data contained in this report should be interpreted without taking into account the technical and methodological information that accompanies it. Where tables show significant variations from one year to the next, they should be interpreted with caution in the sense that they may simply be the consequence of a methodological change, for example, when the questionnaire was adapted to a digital data platform.

The definition of the concepts measured may vary significantly from one region to another, or interpretations may also depend on social and cultural norms, such as when it comes to the definition of an offence. Caution should therefore be exercised when comparing certain data, especially with regard to traditional justice systems and their methods of resolving community conflicts, for which, to our knowledge, there are no other similar survey processes. There are two main biases that need to be taken into account when analysing this data. Firstly, customary actors themselves answer questions about cases or situations that they themselves have managed. Social desirability bias is defined as,

The known adequacy of a person's observed or anticipated behaviors to the motivations or reputed effects of the typical members of a social group, or by, a tendency on the part of the individual to want to present himself favourably in the eyes of society. It is characterised by the respondent's desire to gain a positive evaluation from the people around him [...] Desirability bias is triggered by two factors: the nature of the questions (sensitive and/or highly personal subjects) and the presence of an interviewer. The latter activates the existence of social norms from which it is important not to deviate.^[24]

^[24] BUTORI, R. et PARGUEL, B. Les biais de réponse – Impact du mode de collecte des données et de l'attractivité de l'enquêteur. p. 20.

Secondly, when the questionnaire is administered, several days and sometimes weeks have passed since the case was dealt with, which can, given that customary justice actors take virtually no notes, alter the quality or accuracy of the information transmitted.

The data collection tool is nonetheless valid in the sense that it effectively measures the functioning of the various traditional justice systems applied to children. However, any interpretation of the data must

occur with an understanding of the iterative development process within which the questionnaire was administered. The next section of this chapter outlines how the data collection tool was developed, including changes to the definitions of the response categories and the technical aspects of how the questions were presented. This section will outline the elements to be considered in order to interpret the data, such as the definition of certain concepts, the limitations and the changes made.

1.2 The data collection tool

1.2.1 The questions

As part of the validation and refinement process, the questionnaire was subject to two major changes. Firstly, in the beginning of 2016 the questions were reviewed, resulting in the modification of several questions and the deletion of others that proved to be of little relevance during collection. Secondly, in early 2018, a new medium for administering the questionnaire was introduced. Prior to 2018, data was collected on paper and then manually inserted by the interviewers into an Excel spreadsheet. The new method, known as Mobile Data Collection (MDC), involved using smartphones or tablets to collect data using a customized tool created specifically from the Kobo Toolbox open-source software. The use of information management (IM) is a major advancement in data collection procedures, as it allows for a faster, more secure and contemporary survey methodology. The MDC tool collected exactly the same information as the paper-based questionnaire, but simplified data collection in the sense that it reduced human error such as typographical errors, and the questionnaire could be administered, on average, in less than 30 minutes instead of 75 minutes in paper format. The data was able to be collected offline, i.e., without an Internet connection, and then sent to the server as soon as the device was connected to a network. In this sense, while the questionnaire modality was changed to a digital format, it was still conveniently usable in the geographical contexts in which the data collection took place. A continuous and iterative review of the data collection tool ensured that changes made, while relatively minor, improved the accuracy and applicability of the data collection methodology.

The aim was to collect information only on children involved in a conflict or problem that required the intervention of a customary justice actor. Customary justice actors were therefore asked to answer questions about all victims or perpetrators under the age of eighteen. However, the data revealed that several cases involving 18 year olds were also collected, notably in Afghanistan, the Gaza Strip and the West Bank. Provided the conflict or inciting issue took place before the child had reached the age of 18, this data was included.

In its initial version, the questionnaire was drawn up in English, then translated into Arabic for use in Egypt, Lebanon, the Gaza Strip and the West Bank, into French for use in Burkina Faso, into Dari for the provinces of Kabul and Takhâr in Afghanistan, and into Pashtun for the Nangarhâr region.

The questionnaire contained 53 questions, including 52 closed-ended questions and one open-ended question, allowing a brief narrative to be inserted. Some of the questions are screening questions and others are follow-up questions. Screening questions make it possible to subdivide the sample without asking respondents questions for which they do not have answers. The detail questions allowed for a greater depth of knowledge about certain subjects that only concerned the part of the sample that answered the filter question. This made it possible to substantially shorten the questionnaire for some respondents who dealt with cases that did not contain certain details.



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1.2.2 The thematic clusters

The questionnaire was designed and structured around five thematic sections relating to the location, the typology of customary justice actors, the profile of the children, the cases, the conflict management processes and the interviewer's feedback as child protection specialists on the outcome of a case and the way in which the case was handled.

For the first three categories of questions, which concerned location, the typology of traditional actors and the profile of children, most of the questions were closed, for which the respondent was offered a choice from among pre-established answers. For the questions concerning the type of cases handled and the conflict resolution processes, as well as the opinion of the person who collected the data concerning the course of the case handled, closed and open questions were used.

The questions concerning location contained a series of questions and data specifying the country/territory, the governorate, the province, the village where the customary justice actor was located and the type of case. For reasons of confidentiality concerning customary justice actors, as well as the children and families involved in the conflict resolution processes, the names of the villages have been omitted.

The questions concerning the profile of customary justice actors specified the name of the actor, their gender, the type of actor, whether he or she had a job beyond their function as a customary justice actor in charge of conflict management, and if so, what that profession or job entailed, whether he or she was affiliated with an official structure, and if so, which structure, and finally which official or state body controlled this structure. The purpose of the latter data is to assess the degree of rapprochement between customary justice actors and the state or public domain. The vast majority of actors (95%) were male (n=247) as opposed to female (n=12), and included arbitrators, imams, *islah* men, tribal judges, mukhtars, etc. in the Middle Eastern countries operating under Islamic legal contexts. In Burkina Faso actors included land chiefs, tradition chiefs, and grand chiefs. More detail on the actors and their roles are provided in the next chapter of this report.

The questions relating to children's profiles included data on a child's gender, age at the time of the dispute or conflict, and their parents' level of education (illiterate parents, one parent able to read and write, both parents able to read and write, one parent having completed secondary school, both parents having completed secondary school, one parent having completed university, both parents having completed



university). Data on the configuration of the family home was also collected, i.e., for each case treated, whether it is a two-parent household, a single-parent household with the father present, a single-parent household with the mother present, whether the child headed the household, whether the child lived with relatives, whether the child was unaccompanied, whether the child lived on the street or whether the child was placed in an institution. The question of the parents' employment status was also addressed, i.e., whether the parents were unemployed, whether one of the parents was self-employed, whether both parents were self-employed, whether the father, mother or both parents were permanent employees. Data was also collected about the children's level of schooling, i.e., whether they were attending school regularly, irregularly, dropping out of school or had never been to school. The customary justice actor in charge of the case was also asked whether the child had ever had

any previous experience with the customary justice system. The customary justice actors were asked what role the child played in the dispute, i.e., whether he or she was the perpetrator, victim, witness, accomplice, party of the perpetrator or party of the victim.

The questions concerning the type of cases and conflict resolution processes made it possible to specify the type of case handled by the customary justice actor according to a list of predefined headings, i.e. whether it concerned a breach of family law, a breach of family law with domestic violence, a property dispute, a breach of the highway code, assault, theft, drug use, drug trafficking, sexual harassment, sexual assault, rape, consensual sexual relations, consensual sex outside marriage, early marriage, homicide, attempted homicide or negligent homicide. An "other" option in the questionnaire allowed the traditional actor to specify whether it concerns another type of case. The

types of cases under customary proceedings included in the study are presented in more detail in Chapter 3 of this report. Another question allowed the customary justice actor to disclose who referred the case to him or her, i.e., the perpetrator, the perpetrator's party, the victim, the victim's party, a witness, a third party, the police, a professional mediator, a child protection professional or the prosecutor. The customary justice actor was asked to specify whether other actors, religious leaders, child protection professionals, social workers, psychologists or other stakeholders had been involved in the management of the case, and if so, what their role was.

Questions also asked whether official justice or state actors were involved in the management of the case. Some of the data revealed whether the child spoke to a legal expert or lawyer and received advice, whether he or she was heard during the resolution of the case, and whether he or she gave his or her opinion on how the case should be resolved. A whole series of questions made it possible to specify the investigation methods and the degree of involvement of the parties.

The data collected made it possible to define how the facts were investigated, whether the child was subjected to physical and/or psychological punishment, whether the victim and perpetrator were personally involved in the process and, if so, whether their involvement was voluntary, and whether the victim and perpetrator agreed on the facts. A record was also made of approximately how long the proceedings lasted (in days), how the dispute was resolved, if there was a decision and how that decision was perceived by the parties, and whether there a written document

setting out the terms of the outcome of the case. The customary justice actor was also asked what frame of reference he or she used to resolve the case, what were the main outcomes of the case and whether the child gave an opinion on the outcome and, if so, what was that opinion. Data was also recorded on the point of view of the people who collected the data from the customary justice actors. This enabled some evaluative data on whether the result was proportional or adapted to the dispute, whether the children involved benefited from follow-up interactions with the customary justice actor, whether there were elements that made it possible to detect a form of discrimination in the conflict management process, whether the result made it possible to rehabilitate the child involved, and whether the result made it possible to repair the harm suffered by the community. They were asked whether the nature of the conflict referred, under national law, to the civil or criminal sphere.

This methodology was devised to be an active, field-driven and evidence-based research model that could provide updated and relevant data on the scope and impact of customary and informal justice practices in the Middle East and Northern Africa, from the point of view of customary justice actors themselves. This comes with certain limitations such as not having the views of children as customary justice users and as being central to the dispute and the conflict resolution process. Nonetheless, the robustly established and monitored data collection tool was applied across various geographical contexts to give a comprehensive overview of the profiles of actors in customary justice, the children and their cases, and the access to justice that these populations have available to them.





2. The amalgam of actors in customary, non-state, and community-based justice systems

2. The amalgam of actors in customary, non-state, and community-based justice systems

2.1 The plurality of legal and custom-based systems

Over the past few decades, the legal community has taken an increasing interest in the concept of customary or informal justice systems, which may complement or provide an alternative to formal and state justice processes. The United Nations Development Programme (UNDP) defines informal justice as the mechanisms and procedures that exist separate from formal justice institutions.^[25] In contrast, the International Development Law Organisation (IDLO) considers the concept more in view of the cultural, religious and customary beliefs that underpin these systems in practice, using the term ‘customary justice’.^[26] As is evident, a precise definition of this legal structure is difficult to establish, and there is great variation in the formality, framework, state recognition, supervision and monitoring and implementation of customary justice systems.^[27] Non-state justice systems can be particularly prominent in countries where religious legal systems prevail or in those with less developed formal justice systems. Chopra and Isser note also that customary legal systems are often the main or only dispute resolution mechanism in fragile countries,^[28] and a recent review discussed the prevalence of customary systems in countries with a strong Indigenous and traditional history, recognizing the impact of colonization to the practice and perceptions of these non-state justice systems.^[29] The current study explored five

primary countries in the Middle East and North Africa (MENA) and West Africa regions, where a diverse range of customs, traditions and political contexts may be observed. However, by nature of being majority-Muslim countries, there are some similarities in their customary justice systems. A brief overview of the customary justice system in Afghanistan, Burkina Faso, Egypt, Lebanon and the West Bank and Gaza Strip territories in Palestine is presented below.

Afghanistan is dominated by Islamic and customary law systems,^[30] with dispute resolution taking many forms. Typical customary bodies include the *Wakil-e Gozar*,^[31] the *jirgas* (gatherings of elders in the Pashtun area), the *shuras* (councils of elders ranging from local/mosque *shuras* to district and provincial *shuras*) and many other recognized elders.^[32] These actors are chosen by the community to represent it. The Palestinian territories are influenced by a history of occupation and conflict, with a strong traditional authority. Hence, customary and informal justice processes are common in the regulation of relationships and disputes. Typical actors include the *Islah* men and *mukhtars*, who mediate the conciliation processes under *Shari’a* principles. In Burkina Faso, reliance on customary or traditional law is high, with councils of elders and elected chiefs mediating disputes on land matters and less commonly, criminal conflicts.^[33] In

^[25] United Nations Development Programme, UNICEF – United Nations Children’s Fund, UN Women – United Nations Entity for Gender Equality and RESTORATIVE JUSTICE: AN INTERNATIONAL JOURNAL 51 the Empowerment of Women (2012). Informal justice systems charting a course for human rights-based engagement. New York: UN Development Programme(UNDP), UNICEF, and UN Women.

^[26] Harper, E. (2011). Customary justice: from program design to impact evaluation. Rome: International Development Law Organization (IDLO).

^[27] Danish Institute for Human Rights. (2011). *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*. UN Women.

^[28] Chopra, T., & Isser, D. (2012). *Access to Justice and Legal Pluralism in Fragile States: The Case of Women’s Rights*. Hague Journal on the Rule of Law, 4(2), 337–358.

^[29] Islam, Zahidul. “Informal and Decolonized Alternative Criminal Justice.” Chapter. In *The Encyclopedia of Rural Crime*, edited by Alistair Harkness, Jessica René Peterson, Matt Bowden, Cassie Pedersen, and Joseph Donnermeyer, 224–27. Bristol University Press, 2022.

^[30] International Commission of Jurists (2019). Indigenous and other traditional or customary justice systems: selected international sources, <https://www.icj.org>.

^[31] A *Wakil-e Gozar* would be a person selected by the community to represent a particular neighborhood or geographical area, and acts to serve the community alongside other actors, and to coordinate with government or provincial authorities. Hameed Razaq. *Review of Wakil-e-Gozaars’ Duties and Their Relationship with Administrative Corruption*. Integrity Watch Afghanistan, p. 23, <https://iwaweb.org>. Consulted on 13 juin 2020.

^[32] Dorransoro, Gilles. « Le déclin de l’institution tribale en Afghanistan ». La constante « Tribu » : Variations arabo-musulmanes, édité par Hosham Dawod, Demopolis, 2016, p. 93 117. Open Edition Books, <http://books.openedition.org/demopolis/239>.

^[33] Fofana, H. (2018). Rapprocher la justice des justiciables. Une ethnographie de la « distance judiciaire » au Burkina Faso. *Droit et société*, 99, 393–410.

Lebanon, both local and Syrian refugee communities often opt for informal justice approaches to mediate or resolve conflict,^[34] with actors typically comprising the immediate family or cultural community such as the *islah* men and other religious leaders.^[35] In Egypt, informal justice is likewise commonly preferred, where a mediator (or *waseet*) is approached to organize proceedings between the complainant and the perpetrator. Resolution may be based on one or all of *Shari'a*, custom or previous judgements^[36] and actors may include elected mediators such as a *muhakkim* (Egyptian term for similar actor as the Lebanese or Palestinian *Islah* man), or other community leaders.

The question of legal systems has often been approached in a binary manner, with the scope of intervention of the institution and that of customary justice regularly contrasted. We note, however, that the boundary between traditional conflict management bodies and public institutions is tenuous. Moreover, there is a certain closeness between traditional actors and the administration. This section examines the actors involved in informal justice processes across the studied countries, with insights drawn from the customary justice systems within which they operate, and the factors contributing to the legitimacy of both the processes themselves and the actors that operate within them.

2.2 A fine line with public institutions

Some national legislation regulates the scope of intervention of traditional actors in terms of access to public office or in the electoral field, as is the case in Togo^[37] and Liberia. The Law on traditional chieftaincy and the status of traditional chiefs in Togo specifies that the duties of a traditional chief are incompatible with any employment or elective office.^[38] A traditional chief may, however, be entrusted with a specific public mission of no more than one year's duration. State and non-state customary law systems often share the same personnel.^[39] Traditional institutions have thus been described as immobile, reluctantly

accepting modernity, incapable of responding to current needs, and therefore condemned to disappear sooner or later in the face of modern, powerful and dynamic institutions.^[40]

The traditional actors who took part in the field survey spoke about affiliations they might have with official structures. This enables us to understand whether they exercise their role and authority in conflict management in a compartmentalized manner or whether they are linked to other structures or dynamics, whether public, associative or otherwise.

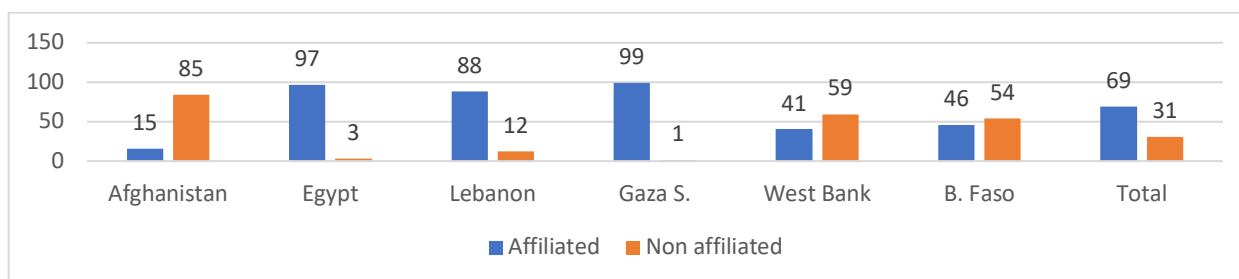


Figure 3. Proportion of cases handled by customary actors affiliated to an official structure (%)

[33] Fofana, H. (2018). Rapprocher la justice des justiciables. Une ethnographie de la « distance judiciaire » au Burkina Faso. *Droit et société*, 99, 393–410.

[34] Harper, E., and Colliou, Y. "Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones," *Hague J Rule Law*, (2022): 75–94.

[35] International Alert (2018), Just in-between: Informal justice on the intersection of mediation, arbitration and referral, <https://www.international-alert.org/publications/just-in-between-informal-justice-syrian-refugees-vulnerable-lebanese>.

[36] Campistol, C., Hope, K., Colliou, Y. and Marcelo, F.A. "Customary justice for children in Egypt: an overview of the situation in the Governorate of Assyut," *Restorative Justice*, 5, no. 1, (2017): 29–52.

[37] Loi N° 2007-002 du 08 Janvier 2007.

[38] Article 9.

[39] Liberia: resurrecting the justice system. Africa Report N°107. International Crises Group, 2006.

[40] BLEUCHOT, H. Les institutions traditionnelles dans le monde arabe. KARTHALA Editions, 1996.

We note that 62% of the traditional players involved in the field survey acknowledged that they had a link with official institutions, and 16% of them said that they were affiliated to a political party.

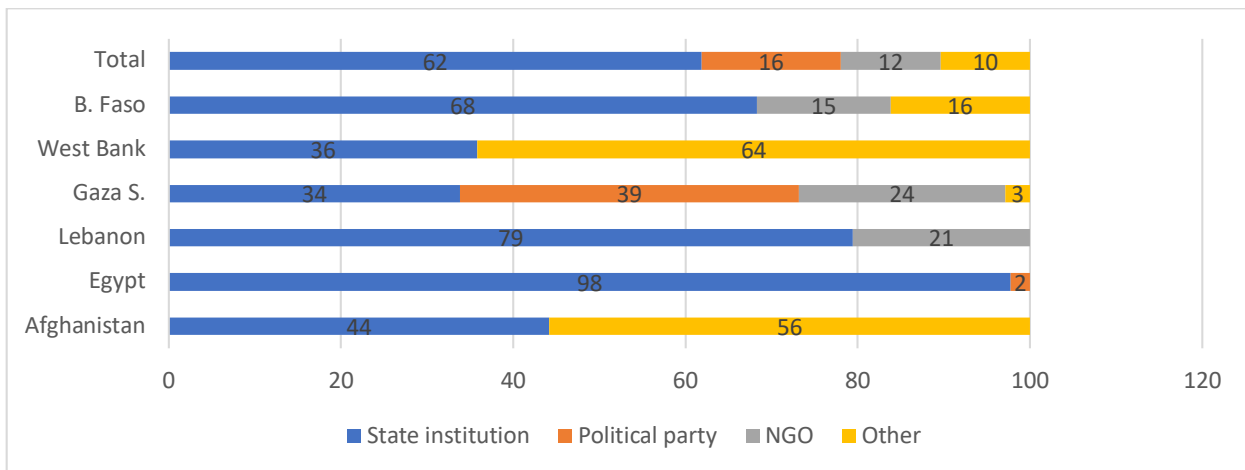


Figure 4. Type of official structures with which customary actors are affiliated (%) in relation to the number of cases handled

It is important to qualify the notion of affiliation as formulated in the questionnaire sent to the traditional actors involved in the field survey. Interviews with some of the customary actors enabled us to gain a better understanding of the links they mentioned with official structures. Some said that they were affiliated to structures such as trade unions, mosque/churches, the department of tribal affairs or municipalities in the West Bank. The notion of affiliation varied from very active involvement in a trade union, to representation of the community or neighborhood in the municipality, to active participation in a religious structure.

Affiliation with political parties is essentially found in Lebanon and the Gaza Strip, which is not surprising insofar as in these two contexts authority is assured by political parties. Governance is provided by the Palestine Liberation Organisation (PLO), whose local structure is embodied by the Popular Committee, made up of representatives of several political parties, including Fatah. A 2020 report outlined that, “today, the Popular Committee (al-lijna al-sha’biyya) is the main local political body in each of the camps. It operates like a municipality, managing water, electricity and infrastructure. It is also responsible for resolving conflicts within the camps”.^[41] We note that, with the exception of Egypt, the West Bank and Afghanistan, a certain number of customary actors

state that they are affiliated to or collaborate with NGOs. This can be explained by the fact that in many contexts, development projects are implemented in partnership with ministries or other structures to which NGOs can therefore be assimilated in the population’s understanding.



^[41] Zaki, Hala C. Abou. «Repenser le politique dans le camp de Chatila : l’expérience des Ahali». A contrario, vol. n° 23, no 2, BSN Press, décembre 2016, p. 57-75. Consulté le 26 juin 2020.

2.3 Duality of roles

Discussions with the community players in charge of conflict management and involved in the field survey enabled us to identify their main professional affiliations, namely: local elected official, civil servant, judicial profession, military personnel, religious player, manager, qualified professional, commercial activity, landowner, farmer, occasional worker or other. A local elected official is an activity carried out, for example, within a town council and for which remuneration is received; a religious actor is an activity as Imam or Head of a Koranic school. An executive is a person who generally carries

out a professional activity within a company in which he or she has management responsibilities. A qualified professional is defined as a person exercising technical authority in his or her trade, or as a skilled worker. A commercial activity is defined in this context as any activity relating to trade. A landowner is a person who makes a profit from renting out his land.

The field survey found that most of community players in charge of conflict management also have a professional activity.^[42]

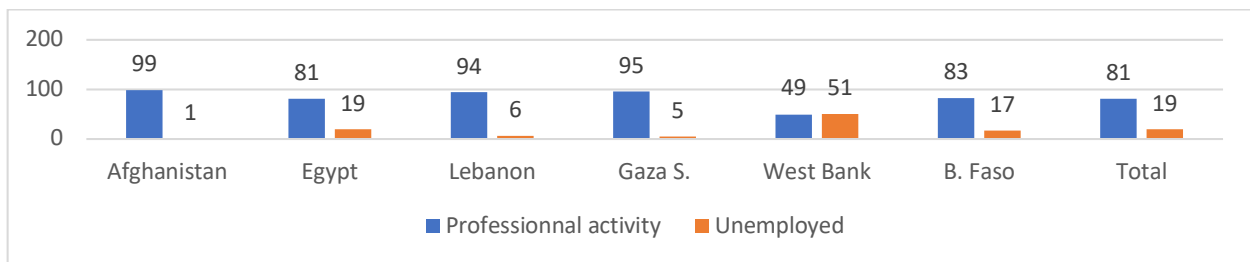


Figure 5. Proportion of cases handled by customary actors exercising a professional activity (%)^[43]

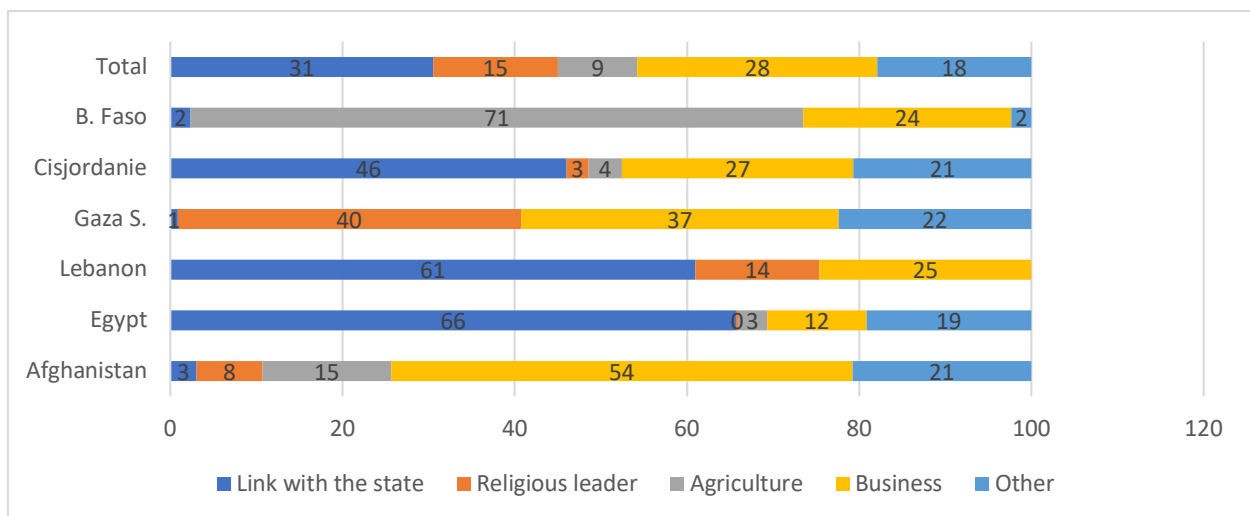


Figure 6. Areas of professional activity of customary actors (as a % of the number of cases handled)^[44]

^[42] Overall, for the 90.5% (n=3,524) of cases for which this data was available, we found that in 19.5% (n=686) of cases the customary actors were not working at the time they were in charge of the conflict management process; in 80.5% (n=2,838) of cases the customary actors were working at the time the process was taking place. We note that the vast majority of actors not in employment are retired, particularly in Egypt where 100% of customary actors not in employment claim to be retired. In the West Bank, 50.6% (n=396) of customary actors do not have a job.

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^[44] Overall, for the 77.5% (n=3,015) of cases for which this data is available, we note that in 22.8% (n=688) of cases, the customary actor in charge is a public official by profession; in 3.4% (n=103) of cases, it is a local elected official; in 1.2% (n=35) of cases, it was a judicial actor who led the conflict management process as a customary or community actor; in 3.1% (n=94) of cases, it was a military officer by profession; in 14.5% (n=438) of cases, it was a religious leader; in 7.9% (n=238) of cases, he/she was a farmer; in 0.5% (n=15) of cases, he/she was a day laborer; in 0.8% (n=25) of cases, he/she was a landowner; in 11.7% (n=353) of cases, he/she was a laborer, salesperson or caretaker; in 8.6% (n=260) of cases, they were skilled workers; in 7.5% (n=226) of cases, they were managers, company directors or craftsmen; in 17.9% (n=540) of cases, the customary actors stated that they held other professional positions in addition to their customary actor activity.

Overall, we note that in 31% of cases, customary actors exercise a profession linked to the state. This data calls into question the impression of 'informality' that this type of justice can offer and corroborates "the complementary relationship between the two judicial orders".^[45] A recent policy brief noted the frequent occurrence of non-state actors having state affiliations and roles, including the concern that community-based actors may only represent the more powerful people in their community.^[46] In 14.5% of cases, their profession was in the field of religion; in 9% of cases, their profession was in the field of agriculture; and in 28% of cases, they had a professional activity related to the business sector. A consequence of these affiliations is that being a local elected official, civil servant, manager, religious actor, landowner or having a professional activity within the judiciary or the army (which accounts for 31% of the customary actors) affords the actors a certain status within the community, which no doubt influences the decision in recruiting them to lead conflict management processes.^[47]

More generally, the professions of farmer, agricultural worker, day laborer, laborer, salesperson, caretaker or skilled worker (which represented 28.7% of the professions occupied by customary actors at the time they were surveyed) confer less prestige than other professions. In addition, the income generated by this type of activity is certainly less than the income generated in other professional categories. In 71.3% of cases, the conflict management processes were carried out by customary actors who exercised more prestigious professional activities, which are synonymous with much higher sources of income.

Related to this is the fact that retired people play an important role in the sphere of conflict management at a community level. If we simply consider the three contexts of Egypt, the Gaza Strip and the West Bank, where 17.9% of the cases were handled by retired customary actors, we can see that the influence of the elders and the respect accorded to them by the community is a very important element in conflict management. It is interesting to note that in the two contexts for which this information was provided, i.e., the Gaza Strip and the West Bank, in 77.5% of cases the customary actors were retired teachers. The prestige of having been a teacher in a previous occupation and having attained a certain level of education is considerable, resulting in the legitimization of retired teachers as customary actors.

This chapter provides an overview of the actors interviewed in the customary and informal justice systems of Afghanistan, the Palestinian West Bank and Gaza Strip territories, Lebanon, Egypt and Burkina Faso, focusing on their chosen roles and affiliations. The next chapter will present the profiles of the children and families who participated in customary justice processes during the field survey, to expand our understanding of who uses these systems as justice forums.

^[45] Ben Nefissa, S. « Les assemblées d'arbitrage en Égypte ». *Égypte/Monde arabe*, n° 1, 1, juin 2005, p. 55–72. [journals.openedition.org, https://doi.org/10.4000/ema.1037](https://doi.org/10.4000/ema.1037).

^[46] Denney, L. and Domingo, P. (2023) Taking people-centred justice to scale: the role of customary and informal justice in advancing peoplecentred justice. ODI Policy brief. London: ODI.

^[47] This link with the state or administrative authority is particularly strong in Egypt (63%), Lebanon (61%) and the West Bank (46%). It is much less so, and in significant proportions, in Afghanistan (2.9%), Burkina Faso (2%) and the Gaza Strip (1%), where we can see a real disparity between the customary dimension and the sphere of the state in terms of the actor's profile.





3. A deeper look at the profile of children and families resorting to customary justice systems



3. A deeper look at the profile of children and families resorting to customary justice systems

3.1 Children's individual characteristics

The United Nations' Convention on the Rights of the Child defines childhood as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier", with a nearly identical statement also found in the first article of other charters on child rights, such as the African Charter on the Rights and Welfare of the Child and the Islamic Covenant on the Rights of the Child in Islam. The status of "child" under these conventions entitles the holder to special rights, such as the right to safety, to education and culture, and to the right to equitable legal processes that takes their juvenile state into account.^[48]

Childhood is not always so clearly or consistently defined. The Islamic concept of childhood is based not on chronological age so much as puberty, which is identified as sexual maturity (ability to ejaculate in boys and menstruation in girls).^[49] Abu Hanifa

and Shafi'i proposed that puberty may commence between ages 12 and 15 lunar years for boys and between 9 and 15 lunar years for girls (as characterised by sexual maturity markers such as ejaculation for boys and menstruation for girls), which accords with baligh (legal maturity) in Note 1 of 1210 of the Civil Code. Article 1 of the Organization of the Islamic Conference (OIC)'s Covenant of the Rights of the Child in Islam (CRCI) protects the rights of any child who has not attained maturity. There is much variation in the accepted thresholds for attaining adulthood under the Islamic context; for example, a 2015 review study quotes Imams Malik, Shafi and Ahmad stating that a child, regardless of sex, becomes an adult at age 15, and Imam Abu Hanifah suggests a female becomes an adult at 17 and a male at 18.^[50] Across most cultural and legal contexts globally, 18 years of age is the accepted threshold for adulthood for both boys and girls.

3.1.1 Sex & Gender^[51]

The data gathered shows a noticeable gender disparity in children's involvement in customary justice processes, with boys comprising 81% and girls only 19% of all children in the data set.

Taking a deep look per country, the average breakdown varies slightly geographically. Burkina Faso

recorded the highest percentage of girls (29%), followed by Lebanon and Egypt (both at 24% for girls). In contrast, only 14% of girls in Afghanistan and only 16% of customary justice processes in Palestine involved cases for girls. This gender disparity affects children in contact with customary justice systems, both boys and girls alike.

^[48] United Nations. 1989. "Convention on the Rights of the Child." Treaty Series 1577 (November): 2; Organisation of the Islamic Conference (OIC), *Covenant on the Rights of the Child in Islam*, June 2005; African Charter on the Rights and Welfare of the Child (ACRWC) (1990). Charter on the Rights and Welfare of the Child.

^[49] Anwarullah. (1997). *The Criminal Law of Islam*: AS Noordeen.

^[50] Islam, M.S. "Criminal accountability and juvenile offenders: A study under Islamic principles, International law and the Children Act, 2013". *International Journal of Ethics in Social Sciences*, 3, no. 2, (2015).

^[51] While acknowledging the terminological and content differences between 'sex' (physical differences between people who are male, female (or intersex); a person typically has their sex assigned at birth based on physiological characteristics) and 'gender' (involves how a person identifies, it is linked with social constructs and norms and it is not binary), for the purpose of In this seminal report, sex & gender are considered as part of a continuum while providing analysis of the data gathered in relation to social constructs or norms that apply to the customary justice systems examined.

In a broader context, this disparity seems to accord with known records. For example, a 2023 review of the formal Saudi Arabian juvenile justice system found that 90% of convicted juveniles included in the study were male,^[52] with similar trends seen globally although the gap is decreasing.^[53] Potential factors contributing to the disparity include the different socialization of boys and girls, or the comparative likelihood that boys will be exposed to law-breaking behavior as a consequence of social pressure and under less stringent parental control,^[54] to name a few. Cultural context is also a factor when considering gender differences in juvenile involvement with crime and justice proceedings. In more traditional and patriarchal societies, gender role values may indirectly encourage defensive or violent responses in boys.^[55]

Less information is available on the interactions of boys and girls in informal justice systems. Terre des hommes has previously reported difficulty gathering data particularly when girls are involved, due to the nature of offences typically brought before customary proceedings.^[56] It has been previously indicated that women and girls may prefer customary and informal justice options in order to conserve their family’s honour by avoiding the scrutiny associated with formal court proceedings.^[57] The proportion of cases by gender for the countries data was collected for in this survey are presented in the table below.

	Afghanistan		Egypt		Lebanon		Gaza Strip		West Bank		Burkina Faso		Total	
	Nb	%	Nb	%	Nb	%	Nb	%	Nb	%	Nb	%	Nb	%
Girls	80	14	219	24	48	24	84	8	223	24	90	29	744	19
Boys	477	86	700	76	151	76	911	92	693	76	218	71	3150	81
Total	557	100	919	100	199	100	995	100	916	100	308	100	3894	100

Figure 7. Number of cases collected by gender (Nb) and percentage (%) compared to the total number of cases collected

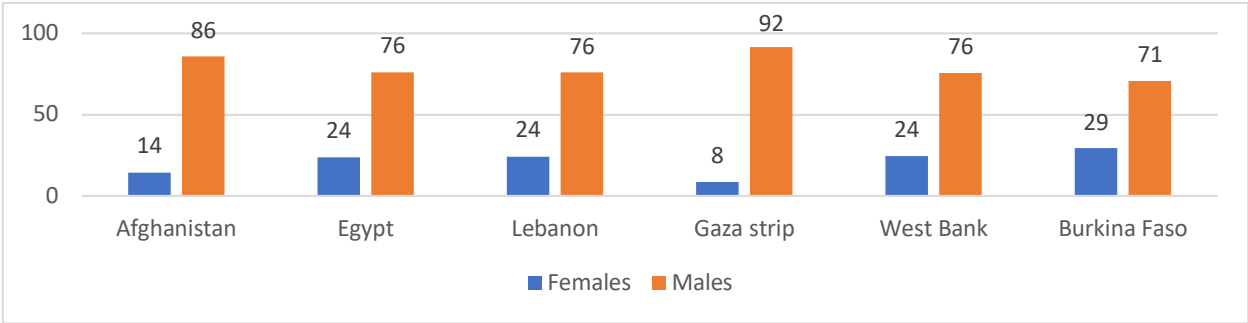


Figure 8. Number girls/boys, per country

[52] Pryce, Daniel K, Hajed A Alotaibi, and Francis D Boateng. "Gendered Criminality and Punishment: Does Gender Influence Juvenile Offending and Punishment in Saudi Arabia?" *Crime & Delinquency*, 28, no. 26, (2023).

[53] Puzanhera C. Juvenile arrests 2011. *OJJDP Juvenile Justice Bulletin*. 2013

[54] Cumley, S. R., Heimer, K., & De Coster, S. (2015). Crime and Gender. In J. D. Wright (Ed.), *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)* (pp. 132–136). Elsevier.

[55] Khoury-Kassabri, Mona, Edith Blit-Cohen, Mimi Ajzenstadt, and Lana Jerjes-Loulou. "Arab Youth Involvement in Delinquent Behaviors: Exploring Hirschi’s Social Bond Theory from a Qualitative Perspective." *Societies* 13, no. 5 (2023): 128.

[56] Barak, A. (2013). *Children in Conflict with Law and Informal Justice System in Hebron Governorate*. Terre des hommes.

[57] A study of informal justice systems: Access to justice and human rights. Sustainable Development Goals Fund. 2013.

We note that the average number of cases handled by customary actors, by gender, in Afghanistan, Egypt, Lebanon and the West Bank is relatively consistent with the overall average, i.e., 81% (n=3,150) of boys and 19% (n=744) of girls. We note, however, that the number of cases of girls involved in customary justice systems in Burkina Faso, corresponding to 29% (n=90), is higher, whereas in the Gaza Strip, where it corresponds to 8% (n=84), and in Afghanistan, where it corresponds to 14% (n=80), it is lower than the average. Our hypothesis is based on the fact that Afghanistan is an Islamic republic, and the Gaza Strip is run by a political party known for its conservatism, and that consequently, the weight of religion and a more accentuated form of conservatism than in the other contexts would favor the treatment of cases involving girls at the level of the immediate family, or that girls are less authorised to leave the family circle and would therefore be less exposed to potential problems. It is interesting to note that the proportion of girls and boys, whether victims or perpetrators, involved in the customary justice systems covered by the survey are identical in Egypt, Lebanon and the West Bank.

The higher number of boys who engaged in offence-related conduct might be related to the fact that in the countries under analysis girls are less exposed to factors that may lead to law-breaking behavior due to stricter parental control and other cultural/social norms that prevent their freedom of movement, so they have statistically fewer chances to engage in certain conducts/actions that might be reviewed by customary justice systems. This concerns the socialization of boys as risk-takers, which assumes their higher inclination to engage in thrill-seeking behavior that

may include or result in criminal activity.^[58] However, the paths leading girls to carry out offence-related behavior has not been sufficiently explored. This male-dominated approach of perceiving boys as the likely offender in terms of gender comparison has a clearly counterproductive effect: boys are more likely to be considered violent and dangerous whereas girls are seen as troubled or unruly.^[59] Hence, male juveniles are criminalized far more than their female counterparts.^[60] Traditional gender stereotypes, for instance, the thought that girls are less dangerous, remain present in the customary justice system and likewise negatively impact boys. At the same time, this may indirectly give more latitude to adults that might target girls to commit offences since they will be less regarded by customary justice actors.

Another element of relevance highlighted largely by the literature,^[61] and evidenced in Chapter 1 of this Seminal Report for the countries analyzed, is the fact that customary justice actors are overwhelmingly male. There is some evidence male justice actors treat boys and girls differently. In some situations, it is evident that girls are in fact protected. Specifically in cases involving girls and honour crimes, the identity of the girl tends to be concealed in order to shield her from societal stigma and safeguard her reputations and that of her family.^[62] Research in Afghanistan shows that cases with women and girls are often resolved within her immediate family or community elders rather than state actors,^[63] which may result in less visibility and access to justice. Essentially, customary justice actors may view the maintenance of confidentiality in disputes involving girls as a sign of success and equate restoring the child's honour with justice for the victim.^[64]

^[58] Cumley, S. R., Heimer, K., & De Coster, S. 2015. Crime and Gender. In J. D. Wright (Ed.), *International Encyclopedia of the Social & Behavioral Sciences (Second Edition)* (pp. 132–136). Elsevier.

^[59] Niget, D. (2012). Chapitre 16. Bad girls. La violence des filles: généalogie d'une panique morale. In C. Cardin & G. Pruvost (Eds.), *Penser la violence des femmes* (pp. 300–313). Paris: La Découverte.

^[60] Henriksen, A.-K. (2018). Vulnerable Girls and Dangerous Boys: Gendered Practices of Discipline in Secure Care. *Young*, 26(5), 427–443.

^[61] UNWOMEN et al; Wojkowska; A. Wardak and J. Braithwaite, 'Crime and War in Afghanistan. Part II: A Jeffersonian Alternative?', *British Journal of Criminology*, 2013, Vol. 53 pp.179–214

^[62] Terre des hommes. (2020). *Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan and Palestine*.

^[63] Gaston, E. and Luccaro, T. 2014. Women's access to justice in Afghanistan. *Peaceworks*.

^[64] Barak, A. (2013). *Children in Conflict with Law and Informal Justice System in Hebron Governorate*. Terre des hommes.

3.1.2 Age

Laws and standards, at international, regional, and national levels, relating to children's access to justice rights refer to the need to establish a threshold below which children cannot be held criminally responsible for their actions: this is the age of criminal responsibility. This age is linked with their development. Particularly, recent research^[65] looking at brain development evidence has found that the prefrontal cortex, which is responsible for decision-making, impulse control, and cognitive control, is one of the slowest parts of the brain to mature and is not fully developed until around the age of 18–20 years old. Other studies have presented similar findings.^[66] The severity of the juvenile justice system and consequences therein are also mediated by the general perception that juveniles are less able to withstand encouragement to offend due to social and peer pressure than adults.^[67] Current scientific and legal understanding provides for an appropriate minimum age of criminal responsibility, whereunder children receive appropriate treatment in the justice ecosystem depending on whether they are under or over that age.^[68] Children who commit an offence under the minimum age of criminal responsibility cannot be held criminally responsible. Children who have reached or passed the minimum age of criminal responsibility at the time of the commission of an offence, but who are under the age of 18, may be charged and subject to juvenile justice proceedings, in strict compliance with the Convention on the Rights of the Child.^[69]

The threshold of criminal liability varies widely according to time and culture. The UN Standard Minimum Rules for Juvenile Justice recommends that legal systems that recognize the concept of a threshold of

criminal responsibility for children should not set an age threshold that is too low^[70] and that the threshold should be enshrined in law.^[71] Although this may vary according to the context, most states have adjusted their legislation and set an age of criminal responsibility and an age of criminal majority, which is generally 18. This sets the threshold above which an individual must, in particular, answer for their actions before a court of general jurisdiction if they have committed an offence and at which they are considered developmentally fit-for-trial). As is discussed earlier in this section, different cultural and legal contexts pertain to the definition of 'childhood', and varying definitions apply as it relates to criminal culpability.

In the countries where data has been gathered, the following legal frameworks apply: The Afghan legal framework specifies that a person who has not reached the age of 12 is not criminally liable.^[72] Egyptian law states that the term 'child' refers to any individual who has not reached the age of 18 and sets the age of criminal responsibility at the time of the offence as 12.^[73] Lebanese law states that a minor is a person who has not reached the age of 18 and that a person under the age of 7 at the time of the offence is not criminally liable.^[74] In Palestine, the Child Protection Act stipulates that a child cannot be held criminally liable below the age of 12.^[75] In Burkina Faso, a child is defined as any human being under the age of 18,^[76] which sets the age of criminal 'majority', and the minimum age of criminal responsibility is set at 13 years. Table X below provides the age of criminal responsibility/legal minority for a majority of Middle Eastern Asia and African countries.

^[65] The Royal Society. "Legal Applications of Neuroscience." 13 December, 2011, <https://royalsociety.org/news/2011/legal-applications-of-neuroscience>.

^[66] Wishart, H 2018, 'Young minds, old legal problems: Can neuroscience fill the void? Young offenders & the age of criminal responsibility bill – promise and perils', *The Journal of Criminal Law*, 82(4) ; Bigenwald, A & Chambon, V 2019, 'Criminal responsibility and neuroscience: No revolution yet', *Frontiers in Psychology*, 10.

^[67] Pryce, Daniel K, Hajed A Alotaibi, and Francis D Boateng. "Gendered Criminality and Punishment: Does Gender Influence Juvenile Offending and Punishment in Saudi Arabia?" *Crime & Delinquency*(20230826) (2023).

^[68] CRC General comment No. 24 (2019) on children's rights in the child justice system.

^[69] Ibid and CRC articles 37 and 40.

^[70] The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Article 4.1.

^[71] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

^[72] AFGHANISTAN. Juvenile Law (Juvenile Code) – Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.). Article 2(2). In force until the takeover of Afghanistan by the Taliban in August 2021.

^[73] EGYPT. Law n°12 OF 1996 promulgated the child law amended by law n°.126 of 2008. Article 2 (2).

^[74] LEBANON. Law n° 422 The protection of juveniles in conflict with the law or at risk. Article1. Article 3.

^[75] PALESTINE. Law by Decree of 2016 on the Protection of Juveniles. Articles 1 and 5.

^[76] BURKINA FASO. Law on the protection of children in conflict with the law or at risk, 2014. Articles 2 and 9.

Age	Country/state index
7	Brunei Darussalam, India, Kuwait, Lebanon, Liberia, Libya, Malawi, Mauritania, Myanmar, Namibia, Nigeria (southern and northern states), Pakistan, Qatar, Seychelles ^b , Singapore, Sudan ⁱ , Swaziland, United Republic of Tanzania, Thailand, United Arab Emirates, Yemen, Zimbabwe.
8	Indonesia, Kenya, Zambia.
9	Bangladesh, Ethiopia, Islamic Republic of Iran (girls only ^b), Iraq, Oman.
10	Bhutan, Cameroon, Cote d'Ivoire, Guinea, Lesotho, Malaysia (under the Penal Code ^c), Mozambique ^g , Nepal, South Africa, Syria.
12	Afghanistan, Egypt, Eritrea, Gambia, Ghana, Israel, Jordan, Morocco, Palestine (West Bank), Saudi Arabia ^d , South Sudan, Sri Lanka, Uganda.
13	Algeria, Benin, Burkina Faso, Chad, Comoros ^e , Djibouti, Gabon, Madagascar, Mali, Niger, Senegal, Togo, Tunisia, Uzbekistan.
14	Angola, Botswana, Cambodia, Central African Republic, Mainland China, Democratic Republic of the Congo, Japan, Kazakhstan, Democratic People's Republic of Korea, Kyrgyzstan, Mauritius ^f , Rwanda, Sierra Leone, Somalia (South/Central), Tajikistan, Turkmenistan, Vietnam.
15	Bahrain, Burundi, Islamic Republic of Iran (boys only ^b), People's Democratic Republic of Laos, Somaliland, Philippines.
16	Mongolia, Timor Leste, Sao Tome and Principe.

^a Legal minority delineates the minimum age at which a child is considered legally liable and responsible for juvenile justice action but is still entitled to non-adult judicial processes.

^b Age defined in lunar years, based on the Hijri calendar.

^c Malaysia operates under a dual secular and Islamic law, the latter of which states that Muslim children are criminally responsible from the onset of puberty (Syariah Criminal Offences Federal Territories Act 1997).

^d Under Shari'a law, children are liable after the onset of puberty, the minimum given age for is 7 years.

^e Under the Penal Code. Under Shari'a law, boys are considered legally mature only when they reach physical maturity (14–15 years) (Cipriani, Children's Rights and the Minimum Age of Criminal Responsibility, Ashgate, 2009, p. 194–5).

^f Children under 14 may only be subject to criminal measures if they have 'discernment', but no lower age is given in the Criminal Code Act (Sections 44 and 45).

^g In 2014, a new Penal Code was being drafted in Mozambique to raise the age of criminal responsibility to 14 years, however, it is unclear whether this was enacted.

^h Under the Penal Code (Section 15), males under 12 are presumed to be incapable of carnal knowledge, and may not be prosecuted for some sexual offences.

ⁱ Provisions are made for secular, Shari'a and customary laws (Juvenile Justice Law 2007).

^j Children aged 7–15 can be criminally responsible if they have attained puberty (Criminal Act 1991, Sections 3 and 9), but there is no lower age limit given for offences under the Narcotic Drugs and Psychotropic Substances Act (1994, Articles 15 and 20).

Table 1. Age of legal minority^a for Africa and Middle Eastern Asia

^[64] Barak, A. (2013). *Children in Conflict with Law and Informal Justice System in Hebron Governorate*. Terre des hommes.

^[65] The Royal Society. "Legal Applications of Neuroscience." 13 December, 2011, <https://royalsociety.org/news/2011/legal-applications-of-neuroscience>.

^[66] Wishart, H 2018, 'Young minds, old legal problems: Can neuroscience fill the void? Young offenders & the age of criminal responsibility bill – promise and perils', *The Journal of Criminal Law*, 82(4); Bigenwald, A & Chambon, V 2019, 'Criminal responsibility and neuroscience: No revolution yet', *Frontiers in Psychology*, 10.

^[67] Pryce, Daniel K, Hajed A Alotaibi, and Francis D Boateng. "Gendered Criminality and Punishment: Does Gender Influence Juvenile Offending and Punishment in Saudi Arabia?" *Crime & Delinquency* (2023) 0826 (2023).

^[68] CRC General comment No. 24 (2019) on children's rights in the child justice system.

^[69] Ibid and CRC articles 37 and 40.

^[70] The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Article 4.1.

^[71] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

^[72] AFGHANISTAN. Juvenile Law (Juvenile Code) - Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.). Article 2(2). In force until the takeover of Afghanistan by the Taliban in August 2021.

^[73] EGYPT. Law n° 12 OF 1996 promulgated the child law amended by law n° 126 of 2008. Article 2 (2).

^[74] LEBANON. Law n° 422 The protection of juveniles in conflict with the law or at risk. Article 1. Article 3.

^[75] PALESTINE. Law by Decree of 2016 on the Protection of Juveniles. Articles 1 and 5.

^[76] BURKINA FASO. Law on the protection of children in conflict with the law or at risk, 2014. Articles 2 and 9.

Traditional conflict management mechanisms do not generally take into account the child’s age in terms of his or her capacity to discern in the case of the commission of an offence, but rather in relation to the notion of ‘puberty’, a period in that refers to the transition to adulthood. As discussed, this is particularly relevant in the Islamic context where puberty typically denotes legal and religious maturity under Islamic convention, with different age ranges stated for boys and girls. Attainment of puberty marks a child as a religious adult (known as *baligh*), subject to Islamic legal sanctions, and ages are typically given from 9 years for girls and 12–15 years for boys. Child protection in Muslim communities places particular attention to the Covenant of the Child in Islam (CRCI)

and the UNCRC that in many areas converge.^[77] As such this may differ from the contextual definitions of a child and their age of criminal responsibility.

Puberty is not, however, a strict marker of criminal responsibility or of the majority of age. In the countries examined, the average age of children involved in traditional conflict management processes is 13, with a median age of 14. The figure below shows that the average age of children involved in customary justice systems is 13.2, with a median age of 13.8. There is a relatively large variation of almost three years in the average age between Afghanistan and the West Bank, where a median age of 15 and 14.6 years is found, and Egypt, where the median age is 12.2 years.

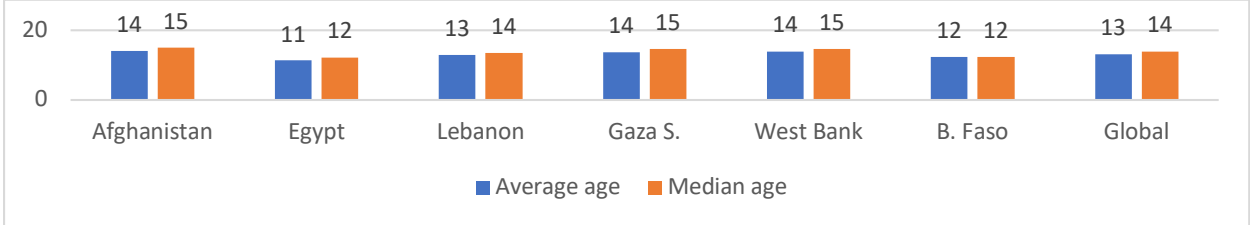


Figure 9. Average and median age of children

Overall, for 99.8% of cases for which data was available (n=3,886), the majority of children involved in customary justice proceedings were aged between

12 and 17 years. The following figure below shows cases this trend more clearly.

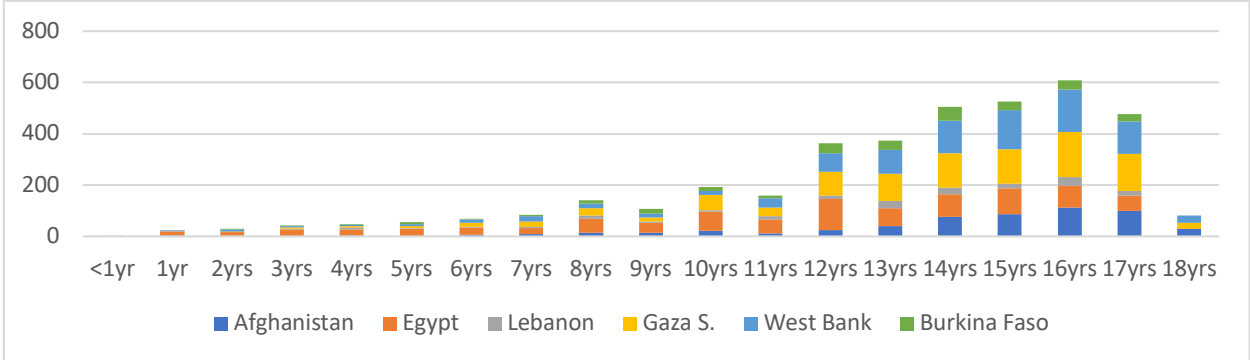


Figure 10. Age of children involved in customary justice proceedings

Hence, while the conceptualization of ‘childhood’ and ‘puberty’ related to children’s cases dealtwith by customary justice systems is significantly influenced by culture and customs,^[78] it is relevant to consider that the ‘age of puberty’ might vary between boys and girls.

This idea of linking the age of responsibility to puberty is paramount in any debates and discussions regarding thresholds that are linked with a child’s development (and more particularly, brain development) in the engagement with customary justice (and other systems).

[77] O’Leary, P., Abdalla, M., Hutchinson, A., Squire, J. and Young, A. “Child protection with Muslim communities: Considerations for non-Muslim-based orthodoxies/paradigms in child welfare and social work,” *The British Journal of Social Work*, 50, no. 4, (2020). 1201–1218.

[78] Corradi, G. and Desmet, E. (2015). A review of literature on children’s rights and legal pluralism. *The Journal of Legal Pluralism and Unofficial Law* 47 (2) : 226–45.

3.2 School and family environment

School and family, as social determinants, are key indicators for a relevant analysis of child justice systems. Standards in the administration of justice for children commonly refer to social inquiry reports in order to guide judicial actors in their decision-making.^[79] Social investigation reports are an indispensable aid in most cases. Customary justice systems do not

carry out these social investigations, and nor do they have those means at their disposal, but customary justice actors usually know the children, their families and their communities well. In the sections below, an analysis of the school and family environment is presented and linked to cases of children dealt with by customary justice systems in the countries of focus.

3.2.1 Children's level of schooling

A number of studies^[80] have demonstrated the link between dropping out of school and offence-related behaviors and actions in youths (juvenile delinquency). Potential reasons for this may include less opportunity for appropriate psychological development and learning of positive social behaviors,^[81] as well as reduced employment opportunities and stigmatization that may accompany school-leaving. On the other hand, an association between behavioral problems and school attendance has also been suggested, in the sense that poor academic and social performance and a lack of school connectedness may be accompanied by stigmatization and, in certain cases, violent or delinquent behavior (anti-social conduct eventually leading to the commission of offences).^[82] An association between victimization in bullying or peer-violence in school and delinquency in juveniles has also been presented.^[83] There is a paucity of non-Western research on this association, however, a 2015 study in Turkey also noted that school bonding and successful school attachment was associated with decreased delinquency, with parental and social influences playing a large mediating role.^[84]

There are multiple explanations for why education has such a significant impact on crime reduction. Some claim that education can improve children's cognitive and social skills, reducing their likelihood of engaging in criminal behavior.^[85] Education can also provide individuals with better opportunities for employment and social mobility.^[86] Since poverty is a pathway to crime, economic opportunity may significantly reduce crime. Lastly, education can expose children to social norms that discourage criminal behavior.^[87] While the relationship between education and crime is well-established, the underlying mechanisms of this relationship are complex. A recent study found that several contextual factors, including the quality of education, the availability of economic opportunities, and the strength of social norms against criminal behavior can moderate the relationship between education and crime.^[88] Also, the school environment tends to reproduce social inequalities. With that wide myriad of factors, it is important that we do not associate in a linear fashion non-attendance at school or low levels of schooling with potential delinquent behavior.

^[79] The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), Article 16.1.

^[80] Shavisa, T., Ndiku, J.M., Asiligwa, R.A. and Gaunya, C.R. 2015. An evaluation of the relationship between school dropout and involvement in criminal behaviour among juvenile delinquents serving at Shikusa Borstal Institute, Kenya. *International Journal of Education and Research* 3(11); Hjalmarsson, R. and Lochner, L. 2012. The impact of education on crime: International evidence. *CESifo DICE Report*.

^[81] Thompson, K.C. and Morris, R.J. 2016. Characteristics of Juvenile Delinquents. In: *Juvenile Delinquency and Disability. Advancing Responsible Adolescent Development*. Springer, Cham.

^[82] Henry, K.L., Knight, K.E. and Thornberry, T.P. 2012. School disengagement as a predictor of dropout, delinquency and problem substance use during adolescence and early adulthood. *Journal of Youth Adolescence*, 41, 156–166; Aldridge, J.M., McChesney, K. and Afari, E. Relationships between school climate, bullying and delinquent behaviours. *Learning Environments Research*, 21, 153–172.

^[83] *Ibid*; Duah, Ebenezer. "Bullying Victimization and Juvenile Delinquency in Ghanaian Schools: The Moderating Effect of Social Support." *Adolescents* 3, no. 2 (2023): 228.

^[84] Yuksek, D.A. and Solakoglu, O. 2016. The relative influence of parental attachment, peer attachment, school attachment and school alienation on delinquency among high school students in Turkey. *Deviant Behaviour*, 37(7), 723–747.

^[85] Payne, A. and Welch, K. 2015. 'How School and Education Impact the Development of Criminal and Antisocial Behavior'. 237–51. Cham: Springer International Publishing.

^[86] *Ibid*.

^[87] *Ibid*.

^[88] Asante, G. and Bartha, A. 2022. 'The Positive Externality of Education on Crime: Insights from Sub-Saharan Africa'. *Cogent Social Sciences* 8 (1).



According to UNESCO’s data system for the sustainable development goals and the ranking of states,^[89] the net enrolment rate, i.e., the percentage of the population attending school in relation to the official compulsory school age, is 79.7% on average for the countries and territories covered by the field survey in this seminal report. This average must take into account that for Afghanistan, data is only available for secondary education and this same data is not

available in all contexts for the same years. Further, in the Lebanese context, data was only able to be collected in Palestinian Camps and may not be representative of the whole context, and was therefore not included in the average in order to limit bias in the analysis. We observe that with a regular school enrolment rate of 78%, children in contact with customary justice processes are at the level of the net enrolment rate (79.7%).

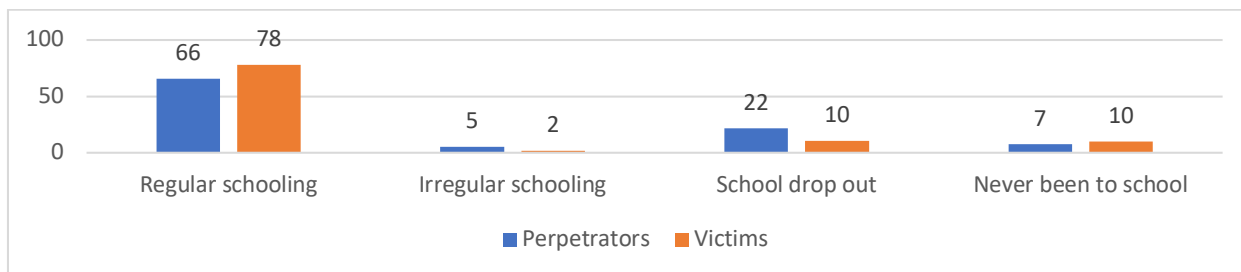


Figure 11. Level of schooling of children involved in customary justice systems^[90]

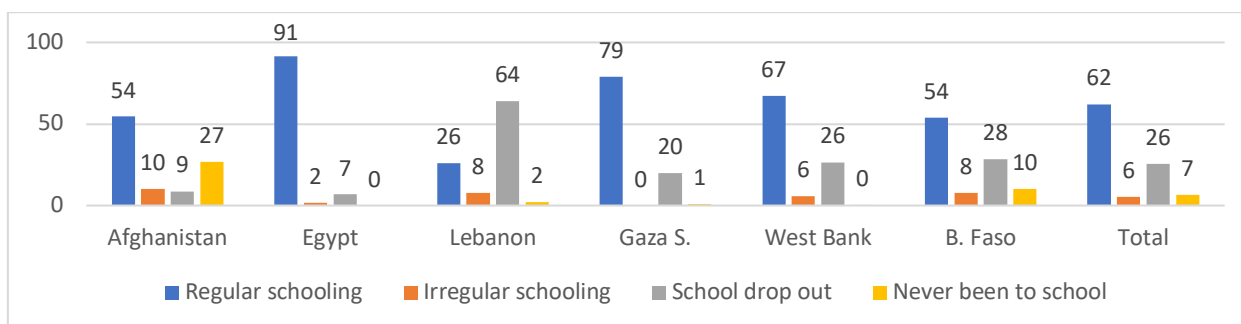


Figure 12. School situation of children 'offenders' in contact with customary justice systems

[89] By enrolment rate in relation to the age group for which education is compulsory.

[90] Overall, for the 67.7% of cases (n=2,715) for which this information was available, we found that in 71.5% (n=1,942) of cases, the children involved in a conflict management process at customary level were attending school regularly; in 12.9% (n=351) of cases, they were attending school irregularly; in 6.9% (n=187) of cases, they were dropping out of school; in 8.7% (n=235) of cases, they had never been to school.

The data shows that the level of schooling of children in contact with customary justice systems (both as offenders and victims) in Afghanistan,^[91] Egypt,^[92] Lebanon,^[93] the Palestinian territories,^[94] and Burkina Faso,^[95] in certain contexts there is a correlation between the proportion of children attending school and the proportion of children in contact with customary justice systems. This is particularly obvious

in refugee camps in Lebanon, where 26% of cases handled by customary actors involved children who attend school, compared with an official school attendance rate of 57%.^[96] We also note a correlation in the Palestinian territories, where the school enrolment rates for children in contact with customary justice systems are lower than the general averages. The situation is similar in Burkina Faso.

3.2.2 Children’s household composition

The family environment is an essential base for the children’s development as well as for their possibility to exercise the rights to which children are entitled. The environment in which they grow with their parents is an important determinant in the analysis of their contact with customary justice systems. ‘Parent’ refers to the person or persons having parental responsibility in accordance with national laws.^[97]

The data gathered in the countries included in the seminal report enabled us to gain a better understanding of the family context in which the children who have been in contact with customary justice systems live. We have been able to determine whether they live with their biological family, in a single-parent household (with their mother or father), or whether the child lives with relatives.

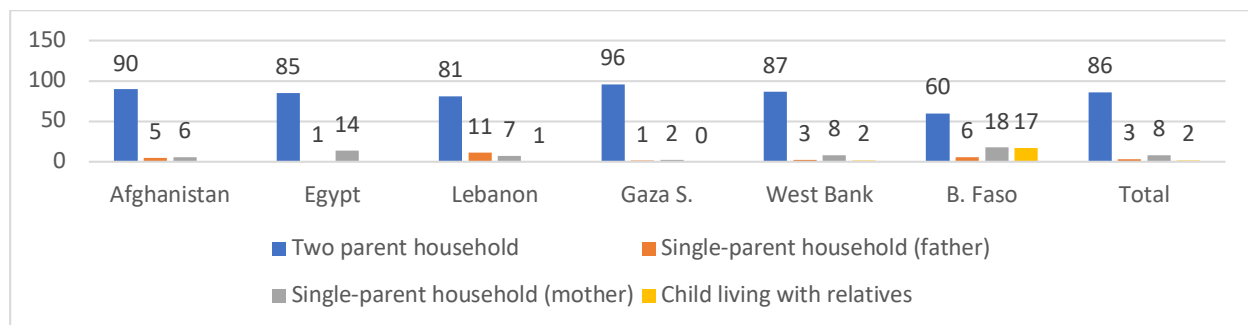


Figure 13. Family situation of children in contact with customary justice systems

^[91] In Afghanistan, the enrolment rate for secondary education between the ages of 13 and 18 is 50.4% in 2018. Hence, the same age bracket for children in contact with the customary justice system was considered and it was found that 53% of child offenders attended regular school. It was noted, however, that the sample of child victims in regular education (65.8%) is higher than the national average.

^[92] Egypt’s school enrolment rate is 94.6% in 2019. Our study reveals that, according to customary justice actors, in 91.4% (n=160) of cases, the child offenders attended school regularly; in 96.9% (n=279) of cases, the child victims attended school regularly.

^[93] The level of schooling in the Palestinian refugee camps in Lebanon is particularly low. A comparison with the situation in Syria, which has a slightly smaller refugee population than Lebanon, shows that Palestinians in Lebanon are lagging behind in terms of education. Whereas in Syria 98% of Palestinian children attend UNRWA schools or other educational establishments, only 57% of Palestinian refugee children in Lebanon attend primary school. Taking primary and secondary education together, less than half the Palestinians in Lebanon are enrolled in school (44%), compared with more than three-quarters in Syria (77%). Our study reveals that in 26.1% (n=24) of cases, the child offenders were in regular education; in 47% (n=31) of cases, the child victims in contact with the customary justice system attended school regularly.

^[94] In the Palestinian territories, the level of schooling was 92% in 2017. Our data reveal that in the Gaza Strip, in 79% (n=241) of cases, the child perpetrators attended school regularly; in 87.5% (n=217) of cases, child victims attended school regularly. In the West Bank, in 67.4% (n=186) of cases,

^[95] In Burkina Faso, the level of school enrolment was 68.3% in 2017. Our study reveals that in 53.7% (n=102) of the cases, the child offenders attended school regularly; in 66.7% (n=64) of the cases, the child attended school regularly.

^[96] It should be borne in mind, however, that this figure only concerns primary school enrolment.

^[97] Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

A significant proportion of children in customary justice systems (86%) live in a household with their two biological parents. The situation in Burkina Faso needs to be explained further: of the 244 children under 15 years old, 57% live in a two-parent household, 4% live with the father, 17% live with the mother and 22% live with relatives. In the case of Burkina Faso, there is therefore a correlation between not living

with both parents and being in contact with customary justice systems. We note that 17% of Burkinabe children involved in customary justice processes do not live with at least one of their biological parents. This situation should be seen within the African context where “more and more children are forced to ‘fend for themselves’ in order to survive”.^[98]

3.2.3 Educational and professional situation of children’s parents

While the children in our database were overall moderately educated (as per their level of schooling), their parents’ level of education is lower. Some studies are linking the likelihood of children’s deviant and delinquent behaviors with lower education levels and a lack of knowledge regarding normative values in their parents.^[99]

In 2017, the literacy rate in Egypt was 71%.^[100] Terre des hommes’ data shows that in 35% of cases handled by customary justice systems, one of the parents could read and write, and in 18% of cases, both parents could read and write. The literacy rate for people aged 15 and over was 43% in Afghanistan in 2018. Our sample

shows that in 18% of cases one of the parents could read and write, and in 29% of cases, both parents could read and write. The national literacy rate in Burkina Faso in 2018 was 41%. Our data shows that in 33.9% of cases, one of the parents could read and write, and in 5% of cases, both parents could read and write. For the Palestinian territories,^[101] the literacy rate in 2019 was set at 63% and 65% in the Gaza Strip and the West Bank, respectively. Our data for the Gaza Strip shows that in 16% of the cases one of the two parents could read and write and that in 32% of the cases both parents could read and write. For the West Bank, in 12% of the cases one of the two parents could read and write, and in 37% of the cases both parents could read and write.

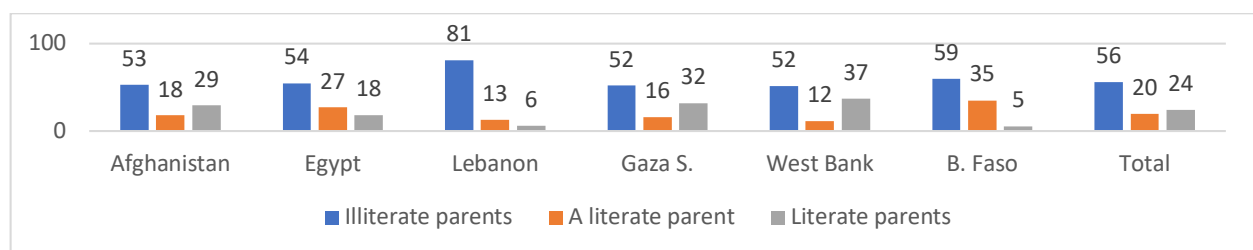


Figure 14. Proportion (%) of parental illiteracy related to children in contact with customary justice systems

^[98] AYISSI, A., et al. « Droits et misères de l’enfant en Afrique ». Études, vol. 397, n° 10, 2002, p. 297–309.

^[99] Chalfin, A. and Deza, M. “The intergeneration effects of education on delinquency,” *Journal of Economic Behavior and Organisation*, 159, (2019): 553–571.

^[100] World Bank, Literacy rate, total adults (% of people aged 15 and over): <https://data.worldbank.org/indicator/SE.ADT.LITR.ZS?locations=EG>.

^[101] “Territory and population, key figures 2019”. Platform of French NGOs for Palestine: <https://plateforme-palestine.org/Territoire-et-population-les-chiffres-cles-2019>.

When looking at the employment status of the parents, generally, over half (54.5%) of the families relied on one self-employed parent, while only 2% had both parents with a permanent job. These results, however, need to consider the following: in the countries analysed in this report, and broadly in developing countries, it is difficult to measure salaried or work-related activity accurately, because the idea of a “professional situation” and “stable salaried employment” is the exception, with most of the working population working in large informal sectors characterized by a myriad of very small production units operating without any (real) legal framework. The employer is also the only employer, or they employ a workforce made up of unpaid family helpers.^[102]

For the purpose of providing more qualified data in relation to those important nuances, we have tried to distinguish between informal employment and more structured professional activity. The “self-employed” category consists mainly of day-to-day tasks such

as working in the fields, selling at markets, working on building sites, owning a horse-drawn carriage, bicycle, or moped for deliveries, or having one’s own sales outlet or mechanical workshop. The “permanent employment” category essentially represents paid jobs within a private structure or in public administration. The “unemployed” category creates a great deal of vulnerability for the household as a whole, while the “self-employed” category is linked with insecurity in the sense that the vast majority do not benefit from the protection of social services, and consequently do not receive unemployment benefits in the event of job loss or a drop in activity.

In 21% of the cases dealt with by the customary justice actors, both parents of the child were unemployed, in 67% of the situations one (94%) or both parents (6%) have an activity in the “informal sector”, and in 13% of the cases, one (86%) of the two (14%) parents have a “permanent job”.

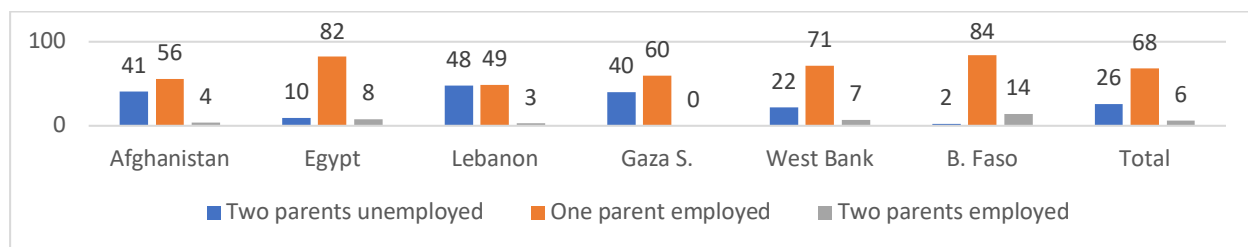


Figure 15. The professional situation of parents of children involved in customary justice systems

There is a significant variation between Burkina Faso, where in 2% of cases both parents are unemployed, and Afghanistan, Lebanon, and the Gaza Strip, where in 41%, 48%, and 40% of cases respectively both parents are unemployed. This can be explained by the extreme precariousness of these contexts, which are largely made up of displaced and refugee populations.

Below is a comparison between the unemployment rates recorded in the field survey and the rates specified by the World Bank^[103] as a percentage of the active

female population and as a percentage of the active male population. Briefly, parental unemployment was highest in Lebanon (48%) and Afghanistan (41%), while parents in Lebanon had the lowest unemployment rate at 2%. The survey data seems to reflect population unemployment trends in the Palestinian territories; in the Gaza Strip, 29% of parents were unemployed compared to 18% in the West Bank, which may be attributable to the socioeconomic deprivations particularly present in the Gaza Strip.

[102] PHELINAS, P. « Comment mesurer l’emploi dans les pays en développement ? » *Revue Tiers Monde*, vol. 218, n° 2, 2014, p. 15–33.

[103] Indicators | Data. <https://donnees.banquemondiale.org/indicateur>.



Country	National average %	Survey parents %
Afghanistan	15.6 ^a	41
Egypt	30.2 ^b	10
Lebanon	29.6	48
Burkina Faso	4.75 ^c	2
Gaza Strip*	46.4	29
West Bank*	13	18

^a 19% for women and 12.1% for men

^b 24.3% for women and 5.9% for men

^c 4.8% for women and 4.7% for men

* It is recognized that national employment data from the Palestinian Territories are not necessarily accurate, owing to the unstable socioeconomic status of these settings, particularly the Gaza Strip.

Table 2. Comparison of unemployment rates between field data and World Bank (average per country)

In Afghanistan and the Palestinian territories, we found a correlation between children in contact with the law through customary justice systems and low family incomes. This is not the case in Egypt and Burkina Faso,

where the proportion of unemployed parents in our sample is lower than the unemployment rates recorded at the national level.

3.3 Children as parties of customary justice processes

3.3.1 The children's role in the case

Prior to entering into the customary justice proceedings in the following chapter of this report, a child's role in the process, and their previous contact with those systems is presented.

Terre des hommes' data has captured whether children were considered accused/offenders or victims of the cases dealt with by customary actors in the countries of analysis.

In almost all countries, child victims and accused were equally divided. Notably, victims were overrepresented in Egypt (66% of children), while 64% of the children in Burkina Faso were the accused party in customary justice processes.

Out of the total children in the data samples, 85% of girls were categorized as victims, while it was much lower for boys at 43%. These trends indicate that girls and young women are more likely to interact with informal justice processes as victims rather than as accused parties. Only between 9–12% of girls in the studied countries were deemed the accused party in a dispute, except for Afghanistan and Egypt, where the share of accused girls was 33%.

The above is in line with the dichotomy presented previously in the sex and gender section where girls are less likely to be treated as accused or offenders (as opposed to boys)^[104] in (juvenile) justice processes,^[105] including customary ones. A study on Afghanistan children found that boys are also more likely to be in settings where they are exposed to violence, particularly in the workplace where boys are far more present than girls in this context.^[106] In addition to the reproduction of patriarchal norms within those systems (gender gap), it is worth noting, the "tension" between re-establishing community balance as one of the fundamental outcomes of customary justice cases and the notion of "protecting girls" in those contexts linked with gender-related norms. In the so-called family-related cases or in cases where the honour of the family could be compromised by what happened to the girls (particularly if it involves acts of intimate and/or sexual nature), girls may face difficulties in resorting to customary justice processes to seek retribution against the perpetrator in general, and even much more if the perpetrator belongs to the family which it is not uncommon. The presence of several competing interests in this process may require the weaker party to often compromise to achieve the restoration of peace in the community.^[107] As such, some girls' families may have reached a compromise – including monetary compromises – with their perpetrators' families before the case can be escalated or reach customary forums.

^[104] Campistol, C., Hope, K., Colliou, Y., and Aebi, M. F. "Customary justice for children in Egypt: An overview of the situation in the Governorate of Assyut," *Restorative Justice*, 5, no. 1, (2017): 29–52.

^[105] Gliksmann, M. (1997). Gender-based differences in the treatment of young offenders by the police and the children's court in New South Wales, Australia. *Medicine, Science, and the Law*, 37(2), 165–169.

^[106] O'Leary, P., Cameron, C. M., Lakhani, A., Osborne, J. M., de Souza, L., Hope, K., Naimi, M.S., Khan, H., Jawad, Q.S. and Majidi, S. (2018). Violence against children in Afghanistan: concerns and opportunities for positive change. *Child abuse & neglect*, 76, 95–105.

^[107] Harper, E. (2011a). Customary justice: From program design to impact evaluation. International Development Law Organization.



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3.3.2 Child’s previous history with customary justice systems

Several studies^[108] have linked the absence of re-offending or recidivism as a measurement indicator that the justice process and its outcome/solution (mainly in the formal justice systems) is effective. The data sample reveals that about 29% of all children had previous encounters with customary justice systems, with the West Bank (71%) and Afghanistan (45%) having the highest percentages. Furthermore, a significant majority of those (65%) with previous experiences had multiple interactions with customary justice systems.

In 20% of all cases in which the customary justice actor reported having heard the child for another dispute was related to theft. Additionally, 19% of children who had previous encounters with customary justice actors were due to assaults, and 18% were due to domestic disputes.

While recidivism is not linear and can be caused by multiple factors aside from the (customary) justice process as such, the previous data provides some interesting insights to be taken into account while looking comprehensively into the types of cases and their investigation (see chapter 4) and also into the (restorative) solutions that are (and to be) offered by customary justice actors dealing with cases, particularly where children are recurrent users/parties of those systems.

In summary, this chapter highlighted the individual characteristics and demographic factors of children who engaged with customary justice in this study, and outlined children’s role and prior involvement with such proceedings. To increase comprehension of the state of child rights in this setting, the next chapter will discuss the existing scope of knowledge on children in the customary justice arena.

[108] Klingele, C. "Measuring change from rates of recidivism to markers of desistance," *The Journal of Criminal Law and Criminology*, 109, no. 4, (2019): 769–817; Bucklen, Kristofer Bret. "Desistance-focused criminal justice practice." *Desistance From Crime* (2021): 111.





4. Customary justice proceedings in children's cases

4. Customary justice proceedings in children's cases

4.1 Types of children's cases dealt with by customary justice systems

Results in this chapter challenge common perceptions that customary justice does not deal with particular cases, such as those involving serious criminal offences like rape and murder. The cases dealt with by customary justice systems have significant crossover with formal justice systems, with some variance in different cultural and religious contexts. Customary justice involving children arises in disputes where there are civil or criminal issues that relate to either public or private order requiring third party intervention or arbitration. No distinction can be made between offences against the public order and those of an individual or private order. Any 'abnormal' act can jeopardize the social coexistence of the group if it is not immediately channeled and dealt with by all the members of the community.^[109] A community/society, of any geographical nature, develops general notions and unwritten norms of what should be left to the personal initiative or individual arbitration when a dispute arises.^[110]

Depending on the tribe or ethnic group, there are often varying degrees of distinction between private law and public law, and the nuances may or may not be clear cut and easily recognized. The dichotomy 'civil law-penal law' does not necessarily overlap with notion of 'private law-public law'.^[111]

African scholars have often argued that African law makes no distinction between civil and criminal offences.^[112] The ordinary offences provided for and

punished by the Quran are divided by Muslim jurists themselves into offences of blood, offences against honour, financial offences.^[113] As discussed in Section 3 of this report, the Islamic concept and definition of childhood, particularly in reference to sex differences, also plays a role in the handling of offences to and by children under Islamic law.^[114]

In order to determine the nature of the conflicts or the categories of offences of cases dealt with by customary justice actors in matters involving children, a series of categories determined in consultation with customary justice actors, were identified from the data gathered. The categories of cases can be broadly separated into matters that are considered personal or private, meaning an offence committed against a person or family, as opposed to the community. Categories of offences considered personal or private include family conflicts with or without child abuse, early marriage, consensual sexual relations outside marriage, sexual harassment, assault and rape.^[115] Other non-personal/private categories of offences included those which posed a risk to community stability, such as property conflict, traffic offences, assault, theft, drug use and trafficking, homicide, attempted homicide and manslaughter. An additional 'other' category was used in the survey, to allow for the customary actor to specify the cases they dealt with which did not fall into the aforementioned categories.

^[109] RAYNAL, M. *Justice traditionnelle. Justice Moderne. Le devin, le juge, le sorcier*. L'Harmattan, 1994.

^[110] OLAWALE ELIAS, T. *La nature du droit coutumier africain*. Présence Africaine, 1961.

^[111] BRILLON, Y. *Ethno criminologie de l'Afrique noire*. Les Presses de l'Université de Montréal, 1980.

^[112] OLAWALE ELIAS, T., *op. cit.*

^[113] BERCHER, L. *Les délits et les peines de droit commun prévus par le Coran. Leur réglementation dans les rites malékite, chaféite et hanéfite*. Société anonyme de l'imprimerie rapide, 1926.

^[114] Hutchinson, A. J., O'Leary, P., Squire, J. and Hope, K. "Child Protection in Islamic Contexts: Identifying Cultural and Religious Appropriate Mechanisms and Processes Using a Roundtable Methodology," *Child Abuse Review.*, 24, (2015): 395–408.

^[115] Harper, E. (2011a). *Customary justice: From program design to impact evaluation*. International Development Law Organization.



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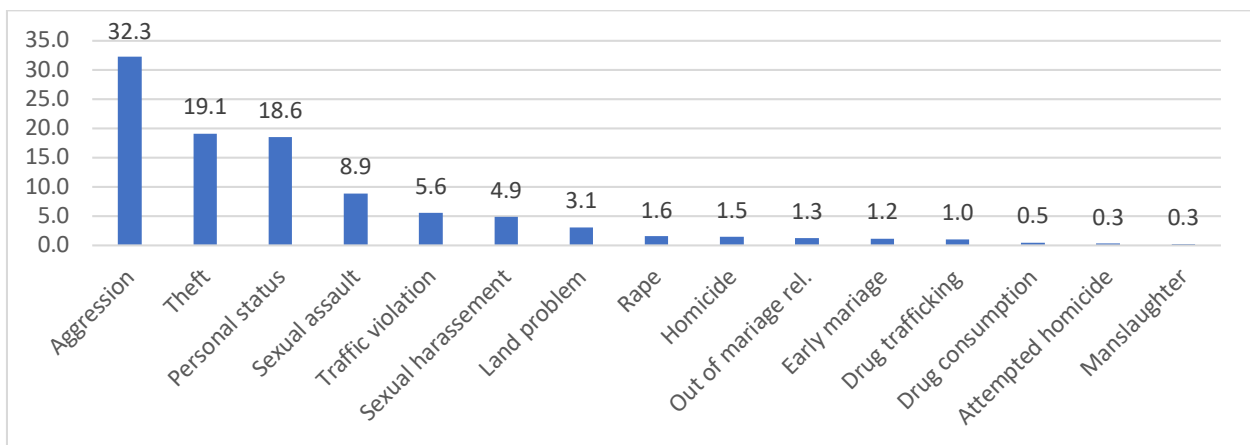


Figure 16. Types of children's offences dealt with by customary justice actors ^[116]

The existing literature on the subject generally suggests that most cases dealt with by customary justice systems would concern questions of personal status such as disputes over marriage, divorce, child custody, and inheritance.^[117] The resolution of a (serious) criminal case by a customary justice actor would depend on his or her skills and ability to resolve inter- or intra-community disputes. This contrasts with the majority of the literature which assumes that homicide, whether intentional or unintentional, and attempted homicide are very likely to be referred to

the official courts, whereas domestic violence and minor neighborhood disputes are generally resolved by community-based mechanisms.^[118] These cases would be considered of low seriousness according to local customs. Based on the data collected in relation to cases concerning children, we found that these assumptions were not borne out, firstly in terms of the nature of the disputes dealt with by the customary justice actors, and secondly in terms of the question of criminal acts and their referral to the official courts.

^[116] Overall, for the 77% (n=2,995) of cases for which this data is available, 18.6% (n=556) of the cases dealt with by customary justice actors related to family law/conflict disputes, 3.1% (n=92) of cases related to land issues, 5.6% (n=167) of cases related to traffic offences, 32.3% (n=968) of cases related to assault, 19.1% (n=527) of cases related to theft, 0.5% (n=14) of cases related to drug use, 1% (n=31) of cases related to drug trafficking, 4.9% (n=146) of cases involved sexual harassment, 8.9% (n=266) of cases involved sexual assault, 1.6% (n=47) of cases involved rape, 1.3% (n=39) of cases involved consensual sex outside the marriage, 1.2% (n=35) of cases involved child/early marriage, 1.5% (n=45) of cases involved homicide, 0.3% (n=9) of cases involved attempted homicide, 0.3% (n=8) of cases involved manslaughter.

^[117] Harper, E. (2011a). *Customary justice: From program design to impact evaluation*. International Development Law Organization.

^[118] Effa Okupa, "Traditional and informal justice systems in Africa", presentation to the OHCHR Expert Meeting (in cooperation with the University of Namibia Law Faculty), Windhoek, June 2007.



4.2 The sources applied by customary justice systems when dealing with children’s cases (custom, religion, state laws)

Positive law^[119] does not preclude the existence of customary law or references to religious precepts in the administration of justice. This logic leads to ‘informal’ mechanisms that combine, without necessarily opposing, the different systems of laws and legal standards in force.^[120]

For instance, most African justice systems combine legal and governance mechanisms including the informal justice system administered by community leaders and traditional authorities based on customary rules.^[121] Henri Bleuchot states that “the expressions of Muslim law became fixed fairly quickly’, while social life continued to produce ‘stable governance forms”, which we will always call institutions because they are based on rules or customs which, although not listed by Muslim jurists, nonetheless constitute law.^[122] Baudouin Dupret points out^[123] that in societies where urbanization was low, “the local custom occupied a predominant place and it was often only in a subsi-

diary capacity that Islamic doctrine and institutions were imposed”.^[124]

According to the customary justice actors from Burkina Faso who participated in Tdh’s research, values, customs, traditions and religion are their sources of reference for handling and resolving children’s cases:

We refer to custom and decisions taken in the past in similar situations (traditional chief, Naaba tigre); we base ourselves on the values of our community, according to the teachings of our ancestors and our customs (land chief); we usually base ourselves on our traditions to make the right decisions (village chief); we make decisions taking into account social cohesion, mutual aid, religion and the law of the land in certain cases (religious leader).^[125]

[119] Positive laws are human-made laws that oblige or specify an action. Positive law also describes the establishment of specific rights for an individual or group.

[120] MAHAMAN TIDJANI, A. “Justice for the Highest Bidder”. *Politique africaine*, vol. 83, n° 3, 2001, p. 59–78.

[121] The Munyonyo Declaration on Juvenile Justice in Africa. Defence for Children International. African Child Policy Forum, 24 January 2012, p. 8.

[122] BLEUCHOT, H. *Les institutions traditionnelles dans le monde arabe*. KARTHALA Editions, 1996.

[123] Between the early days of Islam and the advent of reform in the Ottoman Empire.

[124] DUPRET, B. *La charia. Des sources à la pratique, un concept pluriel*. La Découverte, 2014.

[125] Extracts from interviews conducted with traditional chiefs as part of the field survey in Burkina Faso.

In Afghanistan, normativity based on “collective responsibility and honor”^[126] is perfectly symbolized by the Pashtunwali, which means ‘the way of the Pashtuns’ and is the code of behavior applied in the Pashtun communities. This unwritten code of laws and governance dates back to pre-Islamic times. It is based on the notions of honour and hospitality, and in theory applies to all Pashtuns, wherever they may be.

The Afghan population tends not to strictly distinguish between religious principles and customary practices, though some researchers point out that the latter are in contradiction with Islamic principles.^[127] For example, according to the study data, the Pashtunwali clearly states that a female cannot receive an inheritance, while the Quran states that a female must receive half of the share received by her brothers. Most of the time, when there are conflicts of this type, the community leaders will make the following decisions: the female can receive half of her father’s money, while the male receives the land; if the female is very poor, she will probably receive something; if she has no financial problems, or if she belongs to a family that can afford it, she might receive nothing. These different situations are the subject of constant negotiation within the Pashtun community. Decisions taken in those cases inform the resolution of future disputes.

The notion of sources used by customary justice actors to inform their decisions was included in the data collected and analyzed. ‘Positive law’ refers to the laws in force in the country, ‘customary norms’ refers to a customary justice actor’s community system of norms and values, while ‘religious laws’ are based, logically, on religious precepts applicable in each context.^[128] Customary justice systems often apply normative frameworks based on custom and religion, but some draw on elements of the national legal framework, as we can see below, wherein 7% of the cases collected, the community actors in charge of dispute resolution processes referred to the positive law in force in their country when making a decision. Religion often has a considerable influence on the development of customs, and thus customary law. As an example, the Islamic influence on customary law in Afghanistan is seen in matters of marriage consent for women, and deprivation of women’s rights to inherit property under Pashtunwali guidelines.^[129] This grey area in the co-existence of legal structures preclude a clear delineation of legal frameworks, particularly in the countries of interest to this study. The data shown in the graph below reflects previously recognized trends, in that customary and religious law prevail over positive law in areas where multiple legal systems exist.^[130]

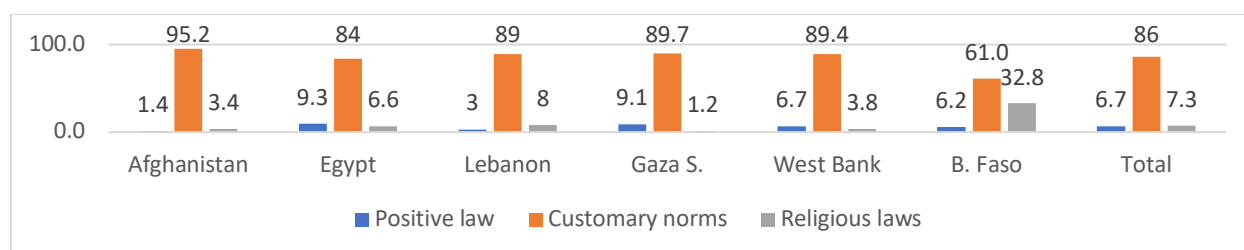


Figure 17. Sources used taken by customary justice actors when resolving children’s cases (%)

It is in Afghanistan (95.2%) that customary justice actors referred mostly to customary norms. In Burkina Faso (32.8% of cases), compared to other contexts, customary justice actors used mostly religious precepts. In Egypt (9.3%) and the Gaza Strip (9.1%), customary justice actors referred mostly to positive law.

The fact that few customary justice actors (7.3%) indicated referring to religion and that the majority of them referred to customary norms is in line with scholars who believe that “there is not a plurality of customs, religious, moral, legal (...), there is custom, in the full sense of the word, as a rule of life, or obligatory practice”.^[131]

[126] DUPRET, B. La charia. Des sources à la pratique, un concept pluriel. La Découverte, 2014.

[127] DE LAURI, A. « Terre, normes de propriété et litiges à Kaboul ». Revue des mondes musulmans et de la Méditerranée, n° 133, 133, juin 2013, p. 133–49.

[128] Overall, we found that for the 73.9% (n=2,877) of cases for which this data was available, in 6.7% (n=193) of cases customary actors referred to positive law when making a decision; in 86% (n=2,473) of cases they referred to customary norms, and in 7.3% (n=211) of cases they referred to religious precepts.

[129] Khan, H.M. Islamic law, customary law and Afghan informal justice. *Special Report*, 2015.

[130] Statement to commemorate the 25th anniversary of the adoption of the Convention on the Elimination of all forms of Discrimination against Women, 13 October 2004.

[131] VERDIER, R. *Ethnologie et droits africains*. Journal des Africanistes, vol. 33, n° 1, 1963, p. 105–28.

4.3 How children's cases are brought to customary justice systems

There are several main factors that impact whether or not a dispute is lodged in the customary justice system: the geographical characteristics of the community (urban/rural), the nature of the dispute/crime/offence, the degree to which the issue impacts community stability, and the willingness of the parties to engage in reconciliation. There are usually no fixed rules.

A dispute may be lodged before, in parallel, or after contact with formal justice actors. Although disputes usually reach the customary justice system following

action by the victim's family, a case may also be brought by the offender's family (due to fear of retribution on the part of the victim and their family, or to avoid their child's case going to the formal justice system, police custody or beyond), formal justice actors (out of fear of escalation in a given community), or a third party (support person, relatives, community members, etc.). Customary justice actors may also unilaterally decide to investigate a case if they deem community stability may be threatened.^[132]

4.3.1 The interface between formal and customary justice system: the referral of children's cases

The literature generally accepts that the relationship between customary and state justice systems can take different forms, ranging from acceptance, recognition and established interaction to a form of proscription.^[133] It would be wrong to regard the situation as binary; the two systems need to be approached with a great deal of fluidity (justice ecosystem). Among the customary justice mechanisms that often manage the resolution of disputes and regulate 'community behavior' through decisions, are 'tribal courts', 'religious tribunals', 'cultural tribunals'.

These justice bodies often coexist with a formal justice system.^[134]

In the geographical contexts studied, 8% of children's cases were referred to customary justice systems by state institutions.^[135] In some cases, depending on the type of offence and the social and economic situation of the parties involved, the police may encourage a family to withdraw the case from the formal system and encourage them to refer it to the customary justice mechanisms (e.g. Egypt).^[136]

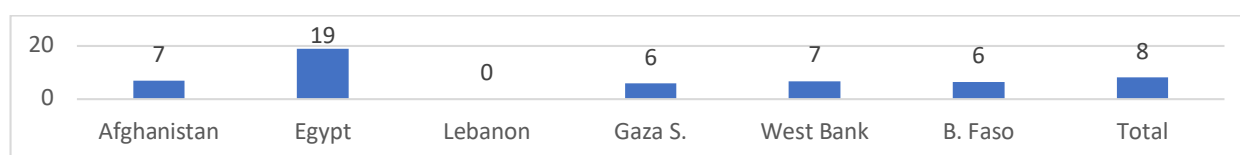


Figure 18. Proportion of cases referred to customary justice systems by formal/State institutions (%)^[137]

^[132] Terre des hommes, 2020. Children in contact with the law and customary justice systems in Afghanistan, Egypt, Jordan and Palestine.

^[133] Danish Institute for Human Rights. (2011). *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*. UN Women.

^[134] UNITED NATIONS HUMAN RIGHTS COUNCIL. Report focusing on the protection of children's rights in the justice system. 1 April 2015.

^[135] Police 6.4% (n=190); child protection services 1.1% (n=33); public prosecutor 0.7% (n=20).

^[136] Campistol, C., Hope, K., Colliou, Y., and Aebi, M. F. "Customary justice for children in Egypt: An overview of the situation in the Governorate of Assyut," *Restorative Justice*, 5, no. 1, (2017): 29–52.

^[137] The differences observed for Egypt and Lebanon can be explained by the fact that in Egypt, the proximity between the customary justice actors and the formal institution is more pronounced than in the other contexts and that, faced with certain situations, the authorities feel/are unable to find a solution. In Lebanon, the data was gathered in Palestinian refugee camps, where the Lebanese authorities do not refer cases to the Palestinian authorities.

When cases are referred to customary justice actors, they proceed with a degree of independence from official institutions. On average, customary justice actors referred 2.1% of cases to the state authorities. Recourse to the formal system, as justified by the customary justice actors and by the parties involved in a dispute resolution process, may occur when all other options have been exhausted.

In the geographical contexts studied, cases of a sexual nature were most commonly among those referred to formal institutions. In Afghanistan, 1.5% of sexual offences were referred, which constituted 25% of rape cases for which data was provided (n=1). In Lebanon, all rape cases were referred to the formal system, as well as substantial proportions of cases involving sexual harassment (25%) and sexual assault (75%). Of the 22 cases (11.1%) in Lebanon involving

sexual offences, 64% were referred. In the Gaza Strip, 19.6% of offences were sexual in nature, of which 5% were referred to formal systems. Similarly, 5% of sexual offences in the West Bank territory in Palestine (15.9%) were referred to formal justice. No sexual offences in Egypt and Burkina Faso were referred out of customary justice.

Apart from the fact that recourse to the official authorities is not a practice that is well accepted within the communities, more practical factors such as the cost of justice and the length of proceedings discourage the litigants to resort to the formal system.^[138] Previous Terre des hommes reports have also noted cultural or linguistic inaccessibility and the remoteness of rural and traditional communities as factors that discourage participants from seeking out formal justice proceedings.^[139]

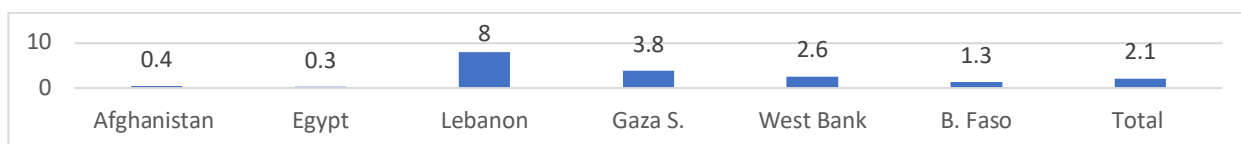


Figure 19. Proportion of cases referred to formal institutions by customary authorities (%)^[140]

Formal justice sector actors also appeared to engage and cooperate with customary justice systems. The police play a key role in the discussions and negotiations that precede the customary justice mechanism involvement.^[141] In all of the geographical contexts covered by the data, it was found that the police and prosecutors used their discretionary powers to avoid initiating legal proceedings and, instead, resorted to customary justice actors. In the Gaza Strip and in the West Bank, the juvenile police (a special department within the police) encouraged the parties to use

customary justice resolution processes. In criminal matters, apart from cases of immediate imprisonment, public prosecutors widely resorted to customary justice actors to ensure that sentences are complied with by the concerned child.^[142] Alternatively, customary justice procedures may also be activated after the dispute has been referred to the police,^[143] either at the request of one of the parties or at the request of the police. In the field survey, we found that 69% of the customary justice actors had close links with formal institutions.

^[138] International Council on Human Rights Policy (ICHRP) (2009) When legal worlds overlap: human rights, state and non-state law. ICPHR, Geneva; Harper, E. and Colliou, Y. 2022. Re-imagining customary justice systems: Interrogating past assumptions and entertaining new ones. *Hague Journal on the Rule of Law*.

^[139] Colliou, Y., & Hope Burchill, K. (2016). Customary Law & Juvenile Justice. Terre des hommes.

^[140] The difference in Lebanon can be explained by the fact that in cases involving crimes, the authorities are theoretically obliged to refer cases to the Lebanese authorities.

^[141] MOKRANI, S. Technical Support to Research-Oriented Action about Informal Justice Systems and Children in Asyüt. Terre des hommes Foundation, 2015, p. 54.

^[142] AFFICHARD, J. Normes juridiques, concepts statistiques et fonctionnement des tribunaux africains. *La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux*, n° 16, 16, avril 2019.

^[143] Campistol, C., Hope, K., Colliou, Y., and Aebi, M. F. "Customary justice for children in Egypt: An overview of the situation in the Governorate of Assyut," *Restorative Justice*, 5, no. 1, (2017): 29–52.



4.3.2 The referral of children's cases to customary justice systems by the litigants or other parties involved in the case

Customary justice proceedings may be initiated by the victim's family or by the family of the alleged perpetrator.^[144] Those proceedings generally begin with a referral of the case by complaint, by information, by petition, or by the voluntary appearance of the parties involved.^[145] Under an appearance of extreme simplicity and rapidity, the procedural pathway in customary law varies according to the social group concerned, the instance seized, the nature of the offence, and the status of the victim and perpetrator.^[146]

The referral procedure is subject to formalities that vary according to the nature of the case.^[147] In Egypt, when customary justice mechanisms are used to resolve disputes, the process is initiated by a few men or by a group of men who approach the parties in conflict to propose a solution.^[148]

Customary justice is sought first and foremost to right the wrongdoings and to erase the feelings of hatred and vengeance that has surfaced between two families as a result of commission of an offence.^[149] The essence of the justice process is to establish the norms resulting from social relations and positions of the parties, with the customary justice actors taking into account everything they learn about the case.^[150] The customary justice process involves not only the litigious rights but also the person involved, their status, and overall relationships between the parties involved, and between them and the community.^[151] The nature of the offences, their impact on the stability of the community, and the willingness or unwillingness of the parties involved to initiate customary justice proceedings are the three main criteria for engaging in a customary dispute resolution procedure.

^[144] CAMPISTOL, C., et al., *op. cit.*

^[145] BRILLON, Y., *op. cit.*

^[146] RAYNAL, M. *Justice traditionnelle. Justice Moderne. Le devin, le juge, le sorcier.* L'Harmattan, 1994.

^[147] OLAWALE ELIAS, T., *op. cit.*

^[148] KORSHOLM NIELSEN, H-C. *Négociation et écriture À propos du droit coutumier en Haute-Égypte.* Égypte/Monde arabe 34 | 1998, décembre 1998, p. 10.

^[149] BRILLON, Y., *op. cit.*

^[150] VERDIER, R., *op. cit.*

^[151] *Ibid.*

In Upper Egypt, customary justice processes can be initiated by the victim's family or by the family of the alleged perpetrator.^[152] According to custom, when requesting the assistance of customary justice actors, the child accused of the offence must acknowledge having committed the offence and, together with his/her family, take responsibility for the act, express regret and a desire for conciliation.^[153] Similarly, in the Gaza Strip, dispute resolutions are often initiated by families or representatives approaching a *mukhtar*, or the *mukhtar* initiating proceedings himself.^[154]

Results show that in 31% of cases, the case is referred to the customary justice system by the perpetrator or the perpetrator's family, which indicates a desire for reparation or, sometimes a way of seeking clemency from the customary body/actor responsible for ruling on the case.

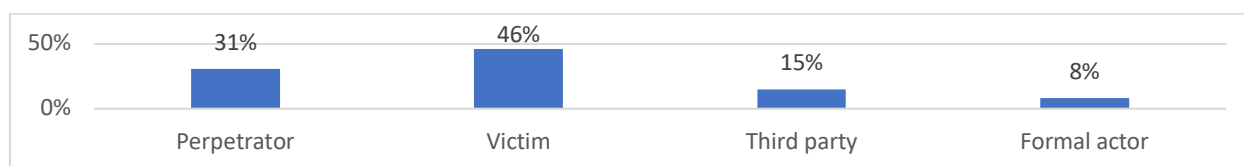


Figure 20. Referral of a child case to a customary justice system by different parties ^[155]

In some contexts, the customary justice process begins when the party (the offender) asks a customary justice actor/body (e.g., reconciliation committee) to mediate between the parties for the resolution of the dispute in question. In the Palestinian territories, and more specifically in the Gaza Strip the first step, in most cases, is to call on a '*mukhtar*', who may also decide to become involved in the case. Based on data from the survey, it is estimated that 90% of cases in the Gaza strip are resolved at this level. If the *mukhtar* belongs to the community of both parties, he can act

alone. If this is not the case, he will not be considered impartial. Another *mukhtar* will represent the other family and the two will work together to find a solution. If an agreement is not reached at this first level, a second level called conciliation will be held ('*Sulh*' based on custom, religion, or tribal traditions). The process can last from one week to several months, depending on the seriousness of the case. In order for the process to reach a decision or resolution, up to twenty conciliation sessions may be necessary.^[156]

^[152] CAMPISTOL, C., et al., *op. cit.*

^[153] GORSKA, E., et KLAKLA, J-B, *op. cit.*

^[154] Adamczyk, Sarah and Barbara Col. 2012. Customary Dispute Resolution Mechanisms in the Gaza Strip. Norwegian Refugee Council.

^[155] Overall, for the 76.4% of cases (n=2,978) for which this information is available in 30.9% (n=921) of the cases, the customary actor was seized by the perpetrator or the perpetrator's party; in 46.3% (n=1,378) of cases, the matter was referred to the customary actor by the victim or the victim's party; in 14.6% (n=436) of cases, the customary actor was informed by a third party; in 8.2% (n=243) of cases, the case was referred to the customary actor by a formal actor.

^[156] ADAMCZYK, S. et COLL, B. *Customary Dispute Resolution Mechanisms in the Gaza Strip.* Norwegian.

4.4 Investigation of the cases' facts by customary justice systems

The international normative framework, as well as national legislation, advocates and stipulates the need to develop and respect investigative procedures to document justice proceedings. The Beijing Rules recommend that, except for minor offences, a thorough investigation should be carried out in order to document the case concerning the child in question.^[157] In Afghanistan, the police are responsible for gathering evidence, while a special prosecutor for minors is in charge of the investigation phase.^[158] In Burkina Faso, the juvenile judge in charge of the case conducts interviews and challenges the evidence, as well as relying on experts for assistance in coming to a decision about the facts of a matter.^[159]

The seriousness of the offence, the social background of the alleged perpetrator and the victim, and the structure of the community determine the form that the investigation process will be carried out within customary justice processes.^[160] The customary actor in charge of ruling in the case will base his or her opinion firstly on the statements and reputations of the parties, and secondly on testimony and presumptions.^[161] Confessions and excuses play a major role, and establishing the facts is less important than in the official courts, where this practice is commonplace.

Witnesses are the main sources of information in a customary justice process.^[162] In literature referring to traditional African law, it is regularly pointed out that with certain offences, such as adultery or witchcraft, it is virtually impossible to establish proof even with witness accounts.^[163] To make up for the lack of proof,

the court would rely on the 'judgment of God', with proof of guilt or innocence depending on the success or failure of the test imposed.^[164] Customary law also approves extreme practices such as trial by ordeal, in which the accused is subjected to intense pain.^[165]

The first stage in the intervention carried out by the arbitrators in Egypt^[166] is the establishment of a truce called "al '*atwa al amniyyah*', the aim of which is to avoid any revenge. It is not uncommon for the victimized family to take justice into their own hands by attacking material goods, burning the property of the other family, or even physically attacking members of the opposing party. Another truce called '*atwa taftteesh*' is called when evidence has been provided by the aggrieved family but is rejected by the accused party. In this case, the victim's family has a period of between one and six months to gather new evidence. If the accused family acknowledges the charges, a third truce corresponding to the confession, called '*atwat al i'tiraf*', is established, during which the arbitrators decide on the outcome of the process.

G rard Cornu defines an oath as "a solemn affirmation (originally religious), oral or written, by which a person promises (swears) to behave in a certain way or attests (also by swearing) to the truthfulness of a statement".^[167] The oath occupies a considerable place in customary law as a method of proof. The oath was required of the alleged perpetrators, not the victim, by the customary justice actor. To make up for the lack of proof, the court relies on the "judgment of God".^[168]

^[157] UNITED NATIONS GENERAL ASSEMBLY. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Resolution 40/33 1985. Article 16.1: "Except in the case of minor offences, before the competent authority takes a final decision prior to sentencing, the juvenile's background, the conditions in which he or she lives, and the circumstances in which the offence was committed shall be thoroughly investigated so as to facilitate the disposition of the case by the competent authority."

^[158] AFGHANISTAN. Juvenile Law (Juvenile Code) – Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.). Articles 9.1 et 9.2. "Detection of children offences is the responsibility of police while special juvenile prosecutor's office is responsible for assessment, investigation, and prosecution of juvenile crimes. The juvenile prosecutor cannot initiate legal action directly against children who have committed crimes unless a person or a source submits a written complaint to the prosecutor."

^[159] BURKINA FASO. Law on the protection of children in conflict with the law or at risk. 2014. Article 61: "To establish the truth, the children's judge shall use various means. He shall proceed by means of questioning, confrontations, travel, searches, and the commissioning of experts. A home search is carried out in the presence of at least one of the minor's parents or legal representatives."

^[160] BRILLON, Y. *Ethno criminologie de l'Afrique noire*. Les Presses de l'Universit  de Montr al, 1980

^[161] VERDIER, R. « Ethnologie et droits africains ». *Journal des Africanistes*, vol. 33, n  1, 1963, p. 105–28

^[162] OLAWALE ELIAS, T. *La nature du droit coutumier africain*. Pr sence Africaine, 1961.

^[163] Ashforth, Adam. "Witchcraft Justice, and Human Rights in Africa: Cases from Malawi." *African Studies Review* 58, no. 1 (2015): 5–38.

^[164] *Ibid.*

^[165] VERDIER, R. « Ethnologie et droits africains ». *Journal des Africanistes*, vol. 33, n  1, 1963, p. 105–28.

^[166] Interview with a group of customary justice actors (arbitrators) in the governorate of Assiut in Egypt in February 2016.

^[167] CORNU, G. *Vocabulaire juridique*, 8 me  dition. Presse Universitaires de France, 2020.

^[168] VERDIER, R. « Ethnologie et droits africains ». *Journal des Africanistes*, vol. 33, n  1, 1963, p. 105–28.

Oaths and ordeals are intimately linked. The oath precedes the trial by ordeal and the trial by ordeal is a way of testing the oath. Oaths prove the guilt or innocence of an individual. In some ways, the trial by ordeal is the equivalent of the 'judgment of God' in ancient European law.^[169] Testimony is undoubtedly an important source of information in a customary trial. Witness evidence can be gathered at several points in the proceedings, firstly during an informal phase and, if necessary, during the customary justice 'trial'.^[170] According to custom, a certain number of witnesses must testify

for a fact to be considered proven.^[171] Each fact, which is likely to shed light on the behavior of the parties in their overall relationship, is deliberately examined by the customary justice body/actor.^[172]

According to Terre des hommes' data, customary justice actors referred mainly to testimonies (51%) and to evidence and testimonies at the same time (21%). Additionally, 8% of customary justice actors sought legal support to advise them during an investigation of a child's case.

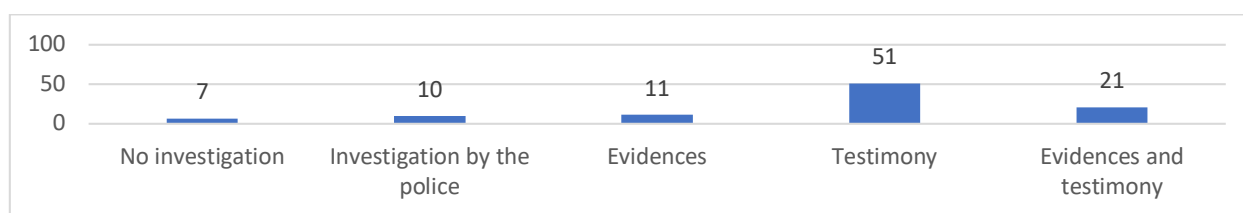


Figure 21. Investigation methods used by customary justice systems in children's cases (%)^[173]

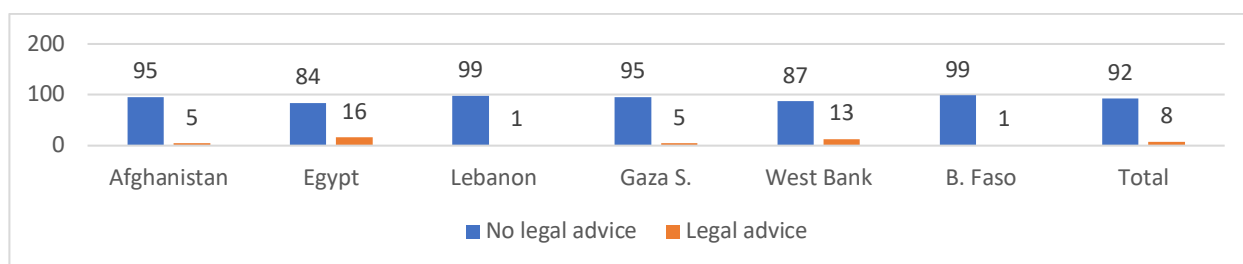


Figure 22. Proportion of customary justice actors who sought legal advice for the investigation of the children's cases (%)^[174]

Customary justice hearings during the investigation are usually held in a neutral place defined by the customary justice actor(s). For example, in Egypt, it often takes place in the house of the arbitrator or a respected third party in the community; in Afghanistan, it may also take place in a mosque. In general, the main disputing parties are summoned to give their testimonies. The customary justice actors may consult with relevant experts (e.g., lawyers, as shown above) to

hear their opinions on the case. In Gaza, the tribal judge may also ask the parties to swear an oath to speak the truth. Cases related to honour (most often involving sexual abuse) and lineage are held in private. However, in countries where group customary sessions are held, such as the customary councils in Egypt or the 'jirga/shura' in Afghanistan, testimonies might be given in front of everyone who is gathered for the customary session.

^[169] CRAYNAL, M. Justice traditionnelle. Justice Moderne. Le devin, le juge, le sorcier. L'Harmattan, 1994.

^[170] *Ibid.*

^[171] CAILLE, J. La justice coutumière au Maroc. Imprimeries Réunies. Casablanca, 1946.

^[172] VERDIER, R. "Ethnologie et droits africains". Journal des Africanistes, vol. 33, n° 1, 1963, p. 105-28

^[173] Overall, for the 77.6% (n=3,021) of cases for which this data is available, in 8.8% (n=266) of cases handled by customary actors, no investigation was carried out, and in 24.5% (n=740) of cases, an investigation was carried out by the police, in 10.1% (n=305) of cases, customary justice actors based their decisions on evidence, in 39.7% of cases they based their decisions on testimony (n=1,200), in 16.9% (n=510) of cases they based their decisions on evidence and testimony. The police were involved in the investigation in 25.5% of the cases.

^[174] Overall, for the 51.5% (n=2,005) of cases for which this information was available, in 7.7% (n=154) the customary justice actor sought external legal advice, while in 92.3% (n=1,851) he did not. It is in Egypt in 16.3% (n=75) of cases and in the West Bank in 12.7% (n=39) that customary justice actors most often sought external legal advice to support them during the investigation of children's cases.

4.5 The outcome of the case in the customary justice systems and its enforceability

Customary justice appeals to religious morals and outwardly facing social value systems to emphasize forgiveness and reparation of the social bonds harmed during the dispute. At the same time, the outcome may also require a penalty or compensation as part of re-establishing the balance disrupted by the crime.^[175]

Customary justice is established collectively and statutorily within each community, hence the group is in a sense liable for the acts of its members.^[176] African law is not a deductive system, in which a body of a priori principles are used to derive a set of specific rules.^[177] Retribution is understood as 'deserving punishment'. In this sense, customary justice may be influenced to adjust certain decisions based on influences from the public, or as a 1980 report stated, "The omnipresent pressure of the collective conscience forces the members of a tribal community to comply with social rules spontaneously, passively and slavishly, for fear of public opinion in particular".^[178]

In Muslim countries, custom is embedded in justice practices. The presence of the *Quran* and the *Sunna* can always be invoked as '*ultima ratio juris*' (the last rule, or the last resort of law). There is 'continual interference'^[179] between the two systems. The offences and penalties provided for in the Quran are called '*Hodoud*', which means "limits" or "barriers" that the "divine legislator" commands to be enforced against certain offences "determined by his law".^[180] The main effect of the offence is to give rise to a claim for blood or money in favor of the victim or his/her beneficiaries. Certain customs are well known, such as the '*diya*', or 'blood money', and, among others, the penalty of retaliation.^[181]

Yazid Ben Hounet points out that, in Muslim contexts, violence can be managed in several ways, either cumulatively or according to a compensatory logic.^[182] Cumulatively, the penalty of retaliation is applied collectively and involves groups as a whole, as in the case of feuds^[183] or vendettas. In a compensatory approach, the penalty of retaliation is applied in such a way as to compensate for individual violence with other individual violence.^[184] The other compensatory method is the '*diya*', where violence is compensated for by property. If the offender refuses to carry out the sentence, to pay the fine or compensation, or to return another person's property that he or she is improperly in possession of, the sentence would be enforced.^[185]

In the Palestinian territories, customary justice does not accept physical punishment. In cases of homicide or honour killings, victim families can choose between financial compensation or vendetta, which means that within three days of the crime being committed, the victim's family can take justice into their own hands without risking prosecution by the customary or tribal authorities.^[186]

The '*diya*', or financial penalty, is the most frequent punishment in Egypt.^[187] Blood money is one of the ways of dealing with violence in the Muslim context, although there is a scale of retribution depending on the seriousness of the case (murder, sexual abuse, honour crimes). The final decision regarding the amount remains at the discretion of the customary justice actor (arbitrator). The amount of the *diya* is not fixed in advance but is determined at the end of the trial. In cases involving physical injuries, there is a

[175] Terre des hommes. Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan and Palestine, 2020.

[176] DUPRET, B. La charia. Des sources à la pratique, un concept pluriel. La Découverte, 2014.

[177] VERDIER, R. "Ethnologie et droits africains". Journal des Africanistes, vol. 33, n° 1, 1963, p. 105–28.

[178] BRILLON, Y. Ethno criminologie de l'Afrique noire. Les Presses de l'Université de Montréal, 1980.

[179] BLANC, F. P. Le droit musulman. 2ème édition. Dalloz, 2007.

[180] BERCHER, L. Les délits et les peines de droit commun prévus par le Coran. Leur réglementation dans les rites malékite, chaféite et hanéfite. Société anonyme de l'imprimerie rapide, 1926.

[181] *Ibid.*

[182] BEN HOUNET, Y. Cent dromadaires et quelques arrangements. Notes sur la *diya* (prix du sang) et son application actuelle au Soudan et en Algérie. Revue des mondes musulmans et de la Méditerranée, n° 131, 131, juin 2012, p. 203–21.

[183] A prolonged and bitter quarrel or dispute.

[184] A process called '*Qisas*' in Arabic.

[184] OLAWALE ELIAS, T. La nature du droit coutumier africain. Présence Africaine, 1961.

[185] Interview with a customary justice actor in Ramallah, the West Bank in October 2019.

[187] An assessment of the informal juvenile justice system in Assiut, Cairo, and Damietta Governorates. Terre des hommes, 2013, p. 39.

scale: a stitch in the head is estimated at EGP 500,^[188] a stitch on an apparent part of the body is estimated at EGP 1,000^[189], a multiple fracture at EGP 25,000,^[190] an injury involving the fitting of a splint or screws is estimated at EGP 50,000.^[191] In addition to settling the amount of the 'diya', customary justice actors (arbitrators) are responsible for determining the amount of time in which the payment should be made.^[192]

For a case of homicide, the customary justice procedures are the same as for any other case, except that the members of the two families involved in the process must go up to the fifth generation so that the extended family bears responsibility for the crime committed by one of its members. The police are not involved in the process, although they may be asked to provide security in the area where the customary justice process or trial is taking place. The amount of the 'diya' is established with reference to Islamic tradition. It is customary to refer to the 'hadith'^[193] or traditions that differentiate between accidental and intentional homicide. In the first case, an amount equivalent to 100 camels must be paid, which today represents around EGP 600,000.^[194] In the second case, the amount is EGP 800,000.^[195]

The amount of the 'diya' also depends on other factors. If the victim is married and has children, the amount will be higher. If a woman is killed inside her home, the amount of the 'diya' will be twice the amount for the murder of a man. The amount is lower in the case of a child than in the case of an adult or a young adult who has grown up. The 'diya' must be handed over to the

victim's father within forty days. The 'diya' is symbolic in nature, indicating that the two parties have found common ground and that there can be no revenge. In certain situations, in addition to paying the 'diya', the perpetrator's family may be obliged to go into exile and leave the community in order to help the victim's family mourn.

African law aims to preserve the social equilibrium of the community, whereas the law generally in force in Europe is very much a law of sanctions.^[196] Because of the integration of religious, moral, and legal standards, it is not always easy to distinguish between offences that should be publicly sanctioned by the community as a whole and those that should remain in the realm of private reparation. Offences and crimes such as theft, assault and even, in many cases, homicide, give rise to private customary justice proceedings. On the other hand, a dispute over inheritance or the division of land can involve an entire village or community in the customary process.^[197]

Custom is expressed in the form of proverbial sayings/sentences, common expressions, and jibes,^[198] from which a set of major legal principles can be deduced, but which in no way constitute a body of fixed and rigid legal rules.^[199]

According to Tdh's data, most of the outcomes of customary justice processes related to children's cases ended in monetary compensation (32.7%) in favor of the victim.

^[188] Approximately 26 Euros.

^[189] Approximately 53 Euros.

^[190] Approximately 1300 Euros.

^[191] Approximately 2600 Euros.

^[192] Terre des hommes. Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan, and Palestine, 2020.

^[193] The facts and sayings of the Prophet and his companions.

^[194] Approximately 32000 Euros.

^[195] Approximately 42000 Euros.

^[196] OLAWALE ELIAS, T. La nature du droit coutumier africain. Présence Africaine, 1961.

^[197] BRILLON, Y. Ethno criminologie de l'Afrique noire. Les Presses de l'Université de Montréal, 1980.

^[198] To jibe with someone is to agree with them.

^[199] VERDIER, R. *Ethnologie et droits africains*. Journal des Africanistes, vol. 33, n° 1, 1963, p. 105–28.

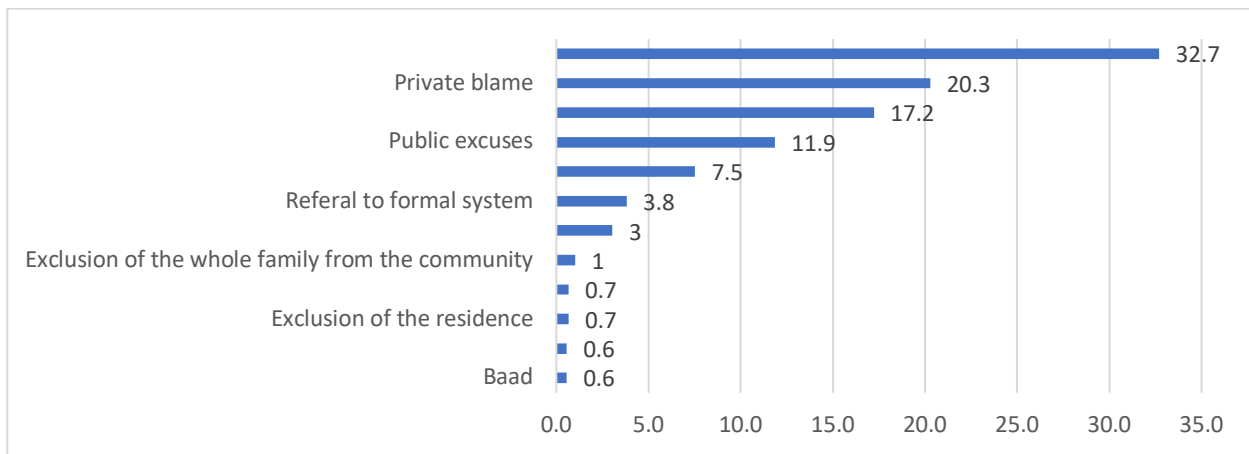


Figure 23. Outcomes of customary justice processes related to children's cases ^[200]

Less commonly, the controversial practice of 'baad' was applied to the benefit of the victim or his/her family as a form of compensation in 0.6% of cases, or the financial equivalent of 'baad' in some cases (also 0.6%). 'Baad' is a traditional practice in which one or more young girls are handed over to the injured party as compensation for the harm suffered. If a man has been killed, the crime has diminished the 'vital forces' of the victim's group. In exchange, the guilty party must give one or two young girls to restore the balance of vital forces. ^[201] The practice of offering a female in marriage as a means of settling disputes violates the laws of the Afghan state, Sharia law, and fundamental human rights. ^[202] The Human Rights Council condemned the customary practice known as 'bad dadan' as part of the Universal Periodic Review of Afghanistan in May 2009. Most of the literature indicated that 'baad' has become rare, indicating that significant efforts were made to eradicate this practice because it was perceived as "un-Islamic":

People before used to give baad but now there isn't the custom anymore to give girls. This ended a long time ago. In place of 'baad', people pay money and compensation. If people accept the money and sheep they say they want, they will decide to give this instead of the girl. ^[203]

Aside from overt compensation mechanisms, the Terre des hommes data showed that as a consequence of being found guilty of their prescribed offence, the child or their family was required to receive a private reprimand, that is, in the exclusive company of those involved in the proceedings. This happened in 20.3% of cases, compared to 7.5% of cases where the outcome was a public reprimand in view of the public community. Similarly, the child or his/her family were more often required to make a private apology to the victim, or their family (17.2%) compared to a public apology (11.9%). As is evident from most outcomes observed in the data, the belief that customary justice tends to favor restorative and compensatory outcomes ^[204] appears to be corroborated in the study data, particularly in view of the low referral rate (3.8%) to formal and state justice proceedings, which are considered to be more retributive in nature.

^[200] According to the customary justice actors in charge of the processes, in 32.7% (n=1,128) of cases, the perpetrator's family had to pay financial compensation to the victim or his/her family; in 1% (n=35) of cases, the child found guilty and his/her family were expelled from the community; in 0.7% (n=24) of cases, the child found guilty was expelled from his/her place of residence; in 0.7% (n=24) of cases, the child found guilty had to do work for the community; in 3% (n=104) of cases, the child found guilty had to do work for the victim.

^[201] RAYNAL, M. Justice traditionnelle. Justice Moderne. Le devin, le juge, le sorcier. L'Harmattan, 1994.

^[202] WARDAK, A. "State and Non-State Justice Systems in Afghanistan: the Need for Synergy". University of Pennsylvania Journal of International Law, vol. 32, n° 5, 2011, p. 1305.

^[203] Archambaud, G.G., 'L'Afghanistan et le langage de l'égalité: une approche de la poétique du contrat social sur une zone de fracture du système-monde', PhD Thesis, Université de Bourgogne, 2013, p.60.

^[204] Colliou, Y., & Hope Burchill, K. (2016). Customary Law & Juvenile Justice. Terre des hommes.

The issue of formalizing customary legal decisions in writing is usually the subject of controversy depending on the country, region, and characteristics of the customary justice system in question. It is generally accepted that decisions taken as part of a customary justice process are not formalized in writing, in that “written documents, such as minutes, are generally not drawn up”.^[205] The customary law may be oral or written.

In Egypt, the customary justice actor (arbitrator) notes down the outcome/verdict and the type of sanction/ measures determined, and both parties sign the document. The arbitrator may also sign the paper, implying that he or she takes on the role of guaranteeing that

the judgment is implemented. If, at the time of judgment, proceedings referring to the same case are still ongoing in the formal justice system, the document issued by the arbitrator can be taken to the police station or court as proof that a solution has been found in the informal system, and on that basis, formal actors would cease any proceedings.^[206]

The results showed that in 38% children’s cases customary justice actors produced a written document at the end of the process. Afghanistan and the West Bank made the most use of written documentation of decisions.

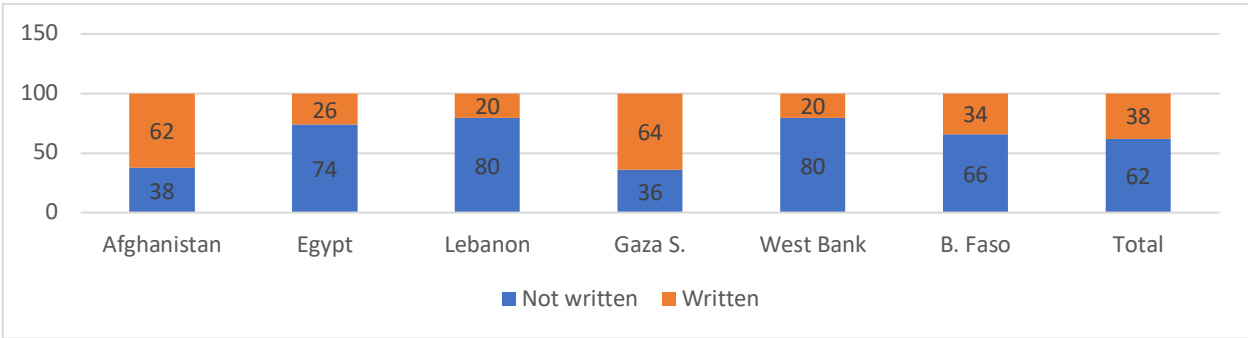


Figure 24. Proportion of verdicts formalized by customary justice actors handling children’s cases in a written document (%)^[207]

In summary, this chapter presented the types of cases identified in the Terre des hommes data as passing through customary justice proceedings for children in the countries of interest, as well as the interface between formal and customary systems, and the typology and frequency of referral out of and to formal juvenile justice. The next chapter will provide data and information on mediation and conciliation as opposed to hearings determined by judgement, the duration and scope of customary justice proceedings, and children’s participation in the hearing of their cases.

^[205] KUBA, R. *La grammaire rituelle des hiérarchies : migrations et chefs de terre dans une société segmentaire (Burkina Faso)*. Autrepport, vol. n° 30, 2004, p. 63–76.
^[206] Terre des hommes. *Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan, and Palestine, 2020*.
^[207] Overall, in 38% (n=1,434) of cases, customary justice actors stated that a document was drafted. In 62% (n=2,333) of the cases, the customary justice actors stated that they had not produced a written document to formalize the decision taken at the end of the customary justice processes.





5. Opportunities and risks for children within customary justice systems

5. Opportunities and risks for children within customary justice systems

5.1 Mediation & conciliation vs judgment

Customary justice proceedings are of exceptional importance to the child in contact with the justice system, but the outcome or judgement of their case is no less crucial. The outcome of a hearing or mediation process will have enduring and sometimes permanent effects on the child's social, physical and emotional wellbeing. Aside from African law, which uses more than arbitration to settle disputes, the more restricted the community is, the more conciliation and arbitration procedures are given 'pride of place'. Having said that abirritation and conciliation are far from being the only forms of conflict resolution in the countries and territories studied.^[208] One of the traditional forms of conflict resolution in the Arab world is a customary process called 'Sulh', which can be defined as a mixed form of mediation and arbitration.^[209] Non-conflictual matters such as marriage, adultery within the family, and palavers^[210] for health and death fall within the scope of matters to be conciliated. Cases that are determined by adjudication, are instead, considered to be of a serious and conflictual nature.^[211]

The data obtained from the countries/territories of focus distinguish between mediation, which is a process during which the customary authority facilitates the conflict resolution process, and judgment, which means that the outcome of the conflict management process is decided by the customary justice actor who has the final verdict regarding the matter in dispute. Mediation is a process in which a neutral customary justice actor assists two or more parties to resolve a conflict by finding a solution acceptable to all parties involved.

In the context of this field study, mediation should be understood as a 'posture' in which the customary justice actor limits himself to facilitating a process during which the parties involved will themselves find the solution, unlike conciliation, which is a process that allows for the conciliator to largely influence the final outcome. The notion of judgment is understood as:

The action of judging someone, a case, in compliance with the laws and regulations in force. Nor does the word of the elder, the wise man, or the chief predetermine the solution to subsequent cases in the manner of a normative precedent that can be generalized and is therefore intended to dictate an identical solution to similar facts.^[212]

The figure on the next page depicts the proportion of children's cases either mediated or judged in the countries and territories of interest. Notably, actors in the Palestinian territories of the Gaza Strip and West Bank considered 98% of cases as being mediated rather than adjudicated. In countries with a strong Islamic influence on the legal processes, even in informal justice, the conciliatory precepts of Islam may encourage a more mediation-centered approach to justice, particularly when it involves children. A stark comparison is seen in Lebanon, where near equal proportions of adjudication and mediation are noted. This is perhaps owing to the high proportion of Palestinian refugee camps with their own forms of political authority, as a degree of firmness is expected from customary justice actors in this context.

^[208] RAYNAL, M. Justice traditionnelle. Justice Moderne. Le devin, le juge, le sorcier. L'Harmattan, 1994.

^[209] GORSKA, E., et J. B. KLAKLA. " Arab customary law and the modern Western idea of restorative justice ". The Polish Journal of the Arts and Culture., 2017, p. 20.

^[210] In Africa, the palaver is a custom of meeting, and of creating or maintaining social links. It is an egalitarian institution in which all or part of a village community participates. This custom also makes it possible to settle a dispute without violence.

^[211] ITOUA, J. Otwere et justice traditionnelle chez les Mbossi (Congo-Brazzaville). L'Harmattan, 2011.

^[212] OTIS, G. La production du droit autochtone : comportement, commandement, enseignement. Revue générale de droit, vol. 48, n° 1, juillet 2018, p. 67–89.

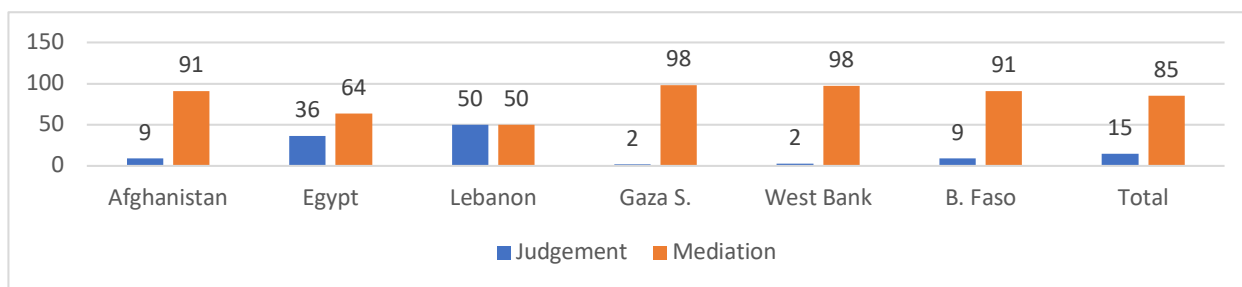


Figure 25. Proportion (%) of cases mediated and judged by customary justice systems concerning children's cases ^[213]

In addition to adjudication/sentencing, conciliation and mediation, some customary courts reported using sentencing circle models and family group conferences (75%).

The use of mediation, conciliation, and its derived collective forms, such as sentencing circles and family group conferences by customary justice actors provide a more participatory and restorative way to address the harm caused by the child to a victim but also to the community as a whole. ^[214]

5.2 Duration of customary justice processes

When it comes to juvenile justice, the time it takes to finalise a matter is an important indicator of justice, one that is emphasized in most international and regional regulatory instruments on children's access to justice rights. In view of the situation of the child as a developing individual and in respect of the principle of development, the timeliness of proceedings concerning children must be respected. ^[215] The Beijing Rules state that all cases must, from the outset, be dealt with swiftly and without avoidable delay. ^[216] Justice adapted to children, therefore, needs to be "swift and diligent justice". ^[217]

In all proceedings concerning children, the principle of urgency should be applied in order to provide a prompt response and to protect the best interests of the child. ^[218] The Covenant on the Rights of the Child in Islam includes a clause that stipulates signatories to the Covenant must ensure that legal matters must be decided expeditiously. ^[219] The judicial authorities must be more responsive to everyday transgressions and speed is an indissociable element of the quality of the administration of justice. ^[220]

^[213] Overall, in 15% (n=581) of cases, the customary justice actors consider that they have issued a judgment.

^[214] HARPER, E. and COLLIU, Y. Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones. Hague Journal on the Rule of Law. (2022). Advocacy Brief on Child Justice: Diversion of children in conflict with law from formal judicial proceedings in Europe and Central Asia. <https://www.unicef.org>.

^[215] BARRY, T. S. L'examen de l'article 37 de la Convention relative aux droits de l'enfant et des règles et principes des Nations Unies relatifs à la privation des libertés des enfants en conflit avec la loi. Revue de l'Université de Moncton, 2017, p. 83–104.

^[216] UNITED NATIONS GENERAL ASSEMBLY. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Resolution 40/33 1985. Article 20.1

^[217] COUNCIL OF EUROPE. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010.

^[218] COUNCIL OF EUROPE. Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 2010.

^[219] ORGANIZATION OF THE ISLAMIC CONFERENCE. Covenant on the Rights of the Child in Islam. 2005. Article XIX.3(d).

^[220] FRANCE, Ministry of Justice. Circulaire relative à la mise en oeuvre de la justice de proximité. 15 December 2020.

Most national laws refer to the need for proceedings in the area of juvenile justice to be conducted quickly. The African Charter on Human and Peoples' Rights provides that everyone has the right to have his or her case heard and to be tried within a reasonable time.^[221] In Afghanistan (pre-Taliban takeover in 2021), the law stipulated that the investigation phase must be carried out within one week, with a possible extension of three weeks at the request of the prosecutor.^[222] In the West Bank and Gaza Strip, speeding up the trial phase is considered a priority.^[223]

Despite the international, regional and national legal frameworks favoring speedy proceedings in children's cases, the principle is far from being respected. The official justice system is subject to long delays, and children are often placed in detention for months or years without trial.^[224, 225]

Dispute resolution processes in the customary justice systems are generally considered to be faster than court processes. This is partly because cases are determined more quickly, but also because customary justice processes generally take place in community, avoiding the need for parties to the conflict to make the time-consuming journey to court. There are further time delays and costs associated with seeking legal representation in formal justice systems. As Joëlle Affichard explains, considerable time can be taken in formal justice proceedings where referrals and adjournments can be lengthy. This results in '*sine die adjournments*' or certain matters not proceeding because they have prescribed (statutes of limitations).

Outside formal proceedings other mechanisms can be used to bring peaceful disputes to a close without causing more trauma or distress.^[226]

Litigants seek a fair, rapid, and compromising solution to their dispute.^[227] For example, in Arab countries, within 24 hours of the offense being committed, the male relatives of the offender ask local members of the reconciliation committee to persuade the injured party to settle the case.^[228] These systems^[229] can be more accessible than formal mechanisms and have the advantage of offering culturally appropriate solutions quickly and relatively cheaply.^[230] The customary justice actors in Egypt, whether in the Cairo region, in the governorate of Assiut in Upper Egypt, or in Damietta in the Delta, highlighted the advantages of customary justice systems, referring in particular to the speed of decisions.

The formal courts are criticized for a number of shortcomings, including excessive delays caused by a backlog of cases.^[231] It is, however, difficult to compare the findings in the current study because there is little to no information about formal juvenile justice practices in the countries and geographical contexts covered by Terre des hommes' data.

Comparing the dates between the detention warrant and the issue of the detention measure for 29 defendants in a juvenile detention center in Africa, Terre des hommes' data showed that the average time spent in pre-trial detention was 145 days, with a median of 48 days. In Lebanon, according to official

^[222] AFGHANISTAN. Juvenile Law (Juvenile Code) – Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.). Article 15. 'The juvenile prosecutor is obliged to complete the investigation within one week after receiving the file. If the investigation cannot be completed within the mentioned period, the prosecutor is obliged to request from the relevant court extension of this period to three weeks. Duration for preparing the indictment Article 15 The juvenile prosecutor, after completing the investigation and collecting information mentioned under Article 17 of this code, is obliged to complete the indictment in one week and submit it to the court officially. If completion of the indictment is not possible within the mentioned period, the prosecutor can request three weeks extension from the relevant court provided that the child is not kept in detention'.

^[223] PALESTINE. Law by Decree of 2016 on the Protection of Juveniles. Article 8. 'Accelerating the Adjudication of Juvenile Cases Juvenile cases are considered urgent cases'.

^[224] United Nations Global Study on Children Deprived of Liberty.

^[225] Juvenile Justice Advocates International report, Children in pre-trial detention: Promoting stronger international time limits, 2018.

^[226] AFFICHARD, J. Normes juridiques, concepts statistiques et fonctionnement des tribunaux africains. La Revue des droits de l'homme. Revue du Centre de recherches et d'études sur les droits fondamentaux, n° 16. April 2019.

^[227] BRILLON, Y. Ethno criminologie de l'Afrique noire. Les Presses de l'Université de Montréal, 1980

^[228] GORSKA, E., et J. B. KLAKLA. Arab customary law and the modern Western idea of restorative justice. The Polish Journal of the Arts and Culture., 2017, p. 20.

^[229] Customary justice, indigenous justice, and other forms of non-state justice.

^[230] COMMITTEE ON THE RIGHTS OF THE CHILD. General Comment No. 24 on children's rights in the child justice system, 2019. Paragraph 102.

^[231] CROOK, R. Règlement alternatif des conflits et tribunaux de district au Ghana. Une hybridation pragmatique. Afrique contemporaine, vol. 250, n° 2, 2014, p. 29–54..

statistics from the Ministry of Justice, the procedural time for a minor offense is one month, two months for a misdemeanor, and three months for a felony. In Jordan, the law stipulates that procedural times may not exceed three months for misdemeanors and six months for felonies. In the Gaza Strip, according to an estimate by the Ministry of Justice, procedural times are estimated at one month for misdemeanors and two months for felonies. In the West Bank, the authorities have data on the duration of the arrest, not on the entire criminal procedure, which can vary depending on the investigation phase. However, the Ministry of Justice estimates that procedural times are one month for misdemeanors and three months for felonies.

It is also important to understand the speed of justice, not only in terms of the time that elapses between a dispute and its resolution but also in terms of the conditions to which the parties are exposed during that time. The use of pre-trial detention in cases involving children is widely criticized, particularly their exposure to violence which is heightened when they

are not separated from adults.^[232] The risk of physical or sexual abuse, torture or coercion, trauma and mental health repercussions, reduced opportunity for social reintegration and an increased risk of recidivism have been associated with a prolonged pre-trial detention, leading to international calls for shorter periods of detention for children and young people.^[233] It is important to point out that the more time passes, the more difficult it is for a child to intellectually and psychologically relate the proceedings of a trial to the offence.^[234] The longer a child is identified as a perpetrator or victim, the more negative and lasting the consequences for his or her social and cognitive development.^[235]

The data gathered and analysed for the countries of focus reveals that in 32% of cases handled by customary justice actors required one meeting with the parties, 28% required two meetings, 21% required three meetings and 19% require more than three meetings. On average, proceedings lasted 11 days, with 50% of cases lasting less than 4 days.

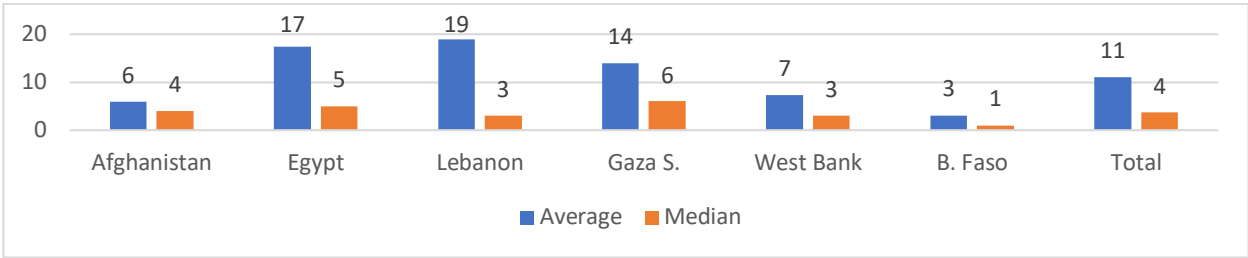


Figure 26. The average and median duration of customary justice procedures of children's cases (number of days)^[236]

^[232] Juvenile Justice in a Developmental Framework: A 2015 Status Report, 12, 20, 31, MACARTHUR FOUNDATION.
^[233] Clinic (IHRLC), International Human Rights Law and Center, University of Minnesota Human Rights and International (JJAI), Juvenile Justice Advocates, Children in Pretrial Detention: Promoting Stronger International Time Limits (A Collaborative Project with Juvenile Justice Advocates International and the University of Minnesota Law School Human Rights Center)
^[234] UNITED NATIONS GENERAL ASSEMBLY. United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules). Resolution 40/33 1985.
^[235] HARPER, E. et COLLIOU, Y. Re-Imagining Customary Justice Systems: Interrogating Past Assumptions and Entertaining New Ones. Hague Journal on the Rule of Law, juin 2022.
^[236] Nous constatons, pour les 91,4% (n=3 558) de cas pour lesquels cette donnée est disponible des différences significatives entre les temps de procédures moyens au Burkina (3 jours), en Afghanistan (5,9 jours), Cisjordanie (7,3 jours) comparativement aux temps moyens de procédures dans la bande de Gaza (14 jours), en Egypte (17,3 jours) et enfin au Liban (18,9 jours).



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5.3 Child participation in customary justice systems

5.3.1 Children’s voices

Allowing the voices of children to be heard in cases that concern them is the most basic form of participation in a justice proceeding, whether formal or customary.^[237]

A child’s right to be heard in legal proceedings is one of the main indicators of child-centered justice, and national legislation, as well as regional and international standards refer to this requirement, particularly in the Convention on the Rights of the Child.^[238] These provisions are further developed in General Comment 24 of the Convention on the Rights of the Child, which states that a child has the right to be heard directly, and not only through a representative, at all stages of the proceedings.^[239] In any judicial or administrative proceeding affecting a child who is capable of communicating, care is needed to ensure that the

views of the child are heard.^[240] In the Islamic Republic of Afghanistan, the law (in force before the takeover by the Taliban in August 2021) provided for the child or his or her legal representatives to be heard during the investigation phase.^[241] The court must hear from the child unless it would be prejudicial to the child in view of his or her condition.^[242] Egyptian law provides for child victims and witnesses to be able to express their views at all stages of the proceedings.^[243] In Lebanon, the law recommends that children be heard at all stages of the proceedings^[244] and specifies that the court must hear the child in private. Burkinabe law allows children to be heard in all proceedings concerning them, taking into account their degree of maturity.^[245] Mauritanian law stipulates that the president of the court must hear the defendant before the trial.^[246]

^[237] GOUTTENOIRE, A. Les modes de participation de l’enfant aux procédures judiciaires. Cahiers de la recherche sur les droits fondamentaux, n° 5, 5 décembre 2006, p. 59–64.

^[238] CRC Article 12.2: ‘For this purpose, the child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate organization, in a manner consistent with the procedural rules of national law’.

^[239] CONVENTION ON THE RIGHTS OF THE CHILD. General Comment No. 24 on children’s rights in child justice systems. 2019. Paragraphs 57 to 64.

^[240] ORGANISATION OF AFRICAN UNITY. African Charter on the Rights and Welfare of the Child. 1990.

^[241] AFGHANISTAN. Juvenile Law (Juvenile Code) – Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.). Article 5.1. ‘Hearing children’s view or their legal representative during investigation and trial’.

^[242] AFGHANISTAN. Juvenile Law (Juvenile Code) – Official Gazette No. 846, published 2005/03/23 (1384/01/03 A.P.). Article 53.1. ‘The juvenile court shall hear the child’s statements unless the hearing is harmful to the psychological and physical wellbeing of the child as per his/her age, health and/or intellectual faculties’.

^[243] EGYPT. Law n° 12 of 1996 promulgated the child law amended by law n° 126 of 2008. Article 116-bis (d)(49). ‘Child victims and witnesses of crime, at all stages of arrest, investigation, trial, and implementation, shall have the right to be heard’.

^[244] LEBANON. Law n° 422 The protection of juveniles in conflict with the law or at risk. Article 43. ‘Child victims and witnesses of crime, at all stages of arrest, investigation, trial, and implementation, shall have the right to be heard’. ‘The court has to listen to juveniles in privacy’.

^[245] BURKINA FASO. Loi portant protection de l’enfant en conflit avec la loi ou en danger. 2014. Article 4. ‘This law guarantees children the right to participate in decisions affecting them. They shall be given the opportunity to express their opinions and to be heard in all judicial and administrative proceedings relating to their situation. The views of the child shall be taken into account having regard to his or her age and degree of maturity’.

^[246] MAURITANIA. Ordonnance n° 2005-015 portant protection pénale de l’enfant. 2015. ‘Before hearing the witnesses, the president questions the accused and receives his statements. The public prosecutor, the civil party and the defense’.

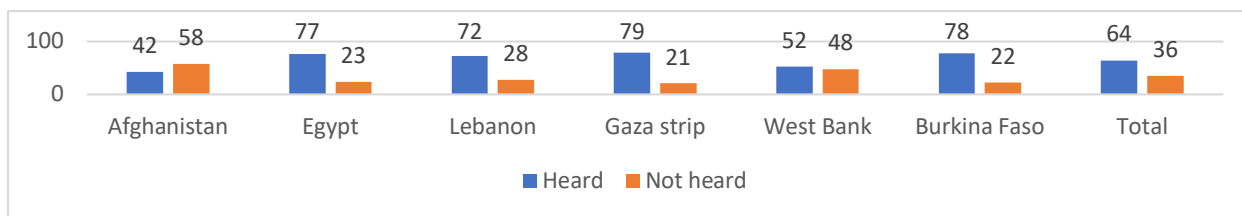


Figure 27. Proportion of children heard during the customary justice process (%)^[247]

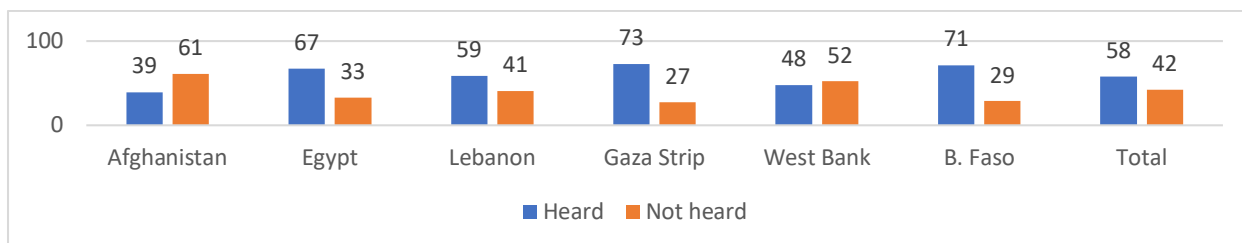


Figure 28. Proportion of children victims heard during the proceedings (%)^[248]

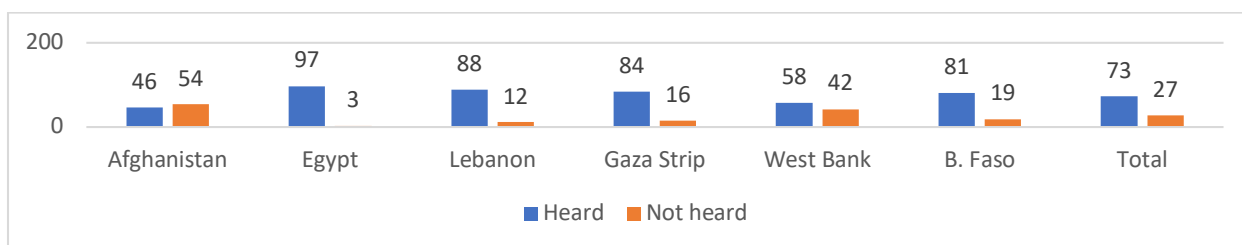


Figure 29. Proportion of children (alleged) offenders heard during the proceedings (%)^[249]

Attempts by the family members and community to resolve a case without involving children or young people may be common practice in some areas.^[250] In Egypt, justice processes involving children allow the parents to speak, and the children to only be heard as witnesses.^[251] In 2014, a study of customary justice proceedings in the Gaza Strip found that when

children and young people are defendants in a dispute, they may provide a statement at the beginning of an informal proceedings ('*Sulh*') and only after an adult has verified it.^[252] Additionally, the same study found that child victims rarely participate in customary proceedings and are instead represented by the adults in their families.^[253]

^[247] Overall, for the 3,341 cases for which this data is available, according to the customary justice actor, in 67% (n=2,225) of cases the child was able to give an account of the facts during the procedure. In 33% (n=1,116) of cases, the child did not talk about the facts during the customary justice process. We note that children are heard more in Mauritania, where 84% (n=309) of them are heard; in Egypt, where 76.7% (n=435) of them are heard; in Lebanon, where 72.1% (n=142) of them are heard; in the Gaza Strip, where 79.2% (n=443) of them are heard; and in Burkina Faso, where 77.9% (n=233) of them are heard. Children's views on the events were least sought in Afghanistan in 57.6% (n=254) of the cases and in the West Bank in 47.7% (n=434) of the cases.

^[248] Of the 1,539 cases of victims for which this data is available, 58% were interviewed during the proceedings. 42% of victims were not interviewed during the procedure.

^[249] Of the 1,363 cases for which this information is available, 73% of the perpetrators were interviewed during the proceedings. 27% of perpetrators were not interviewed during the procedure.

^[250] Colliou, Y., & Hope Burchill, K. *Customary Law & Juvenile Justice*. Terre des hommes, 2016.

^[251] An assessment of the informal juvenile justice system in Assiut, Cairo and Damietta Governorates. Terre des hommes, 2013, p. 39.

^[252] Palestinian Centre for Human Rights, & Terre des hommes. (2014). *Assessment of the Informal Justice System in the Gaza Strip and its Treatment of Children in Conflict with the Law and Child Victims*. Terre des hommes, page 40.

^[253] *Ibid*, pages 37–40.

Overall, girls are far less likely to be heard in customary justice processes,^[254] because their involvement may be perceived as damaging to the family’s reputation^[255] Yet, girls are more likely to participate when they are older,^[256] and older girls may be perceived as having a duty to protect the family’s honour when they are victims of, for example, offenses of a moral and/or sexual nature.^[257]

The conceptualization of childhood and a child’s age, linked with the concept of ‘puberty’ and with the age threshold to withhold ‘criminal’ responsibility, may

be determinants of whether children are heard in customary justice proceedings.^[258] According to a study investigating children’s participation in customary justice processes in Egypt, this might be because younger children are seen as unable to contribute to the proceedings meaningfully.^[259] Generally, most of the young people consulted by customary justice actors tend to be 14 years or older.^[260]

Terre des hommes’ data indicates that, on average, children who were allowed to be heard were 13.6 years old.

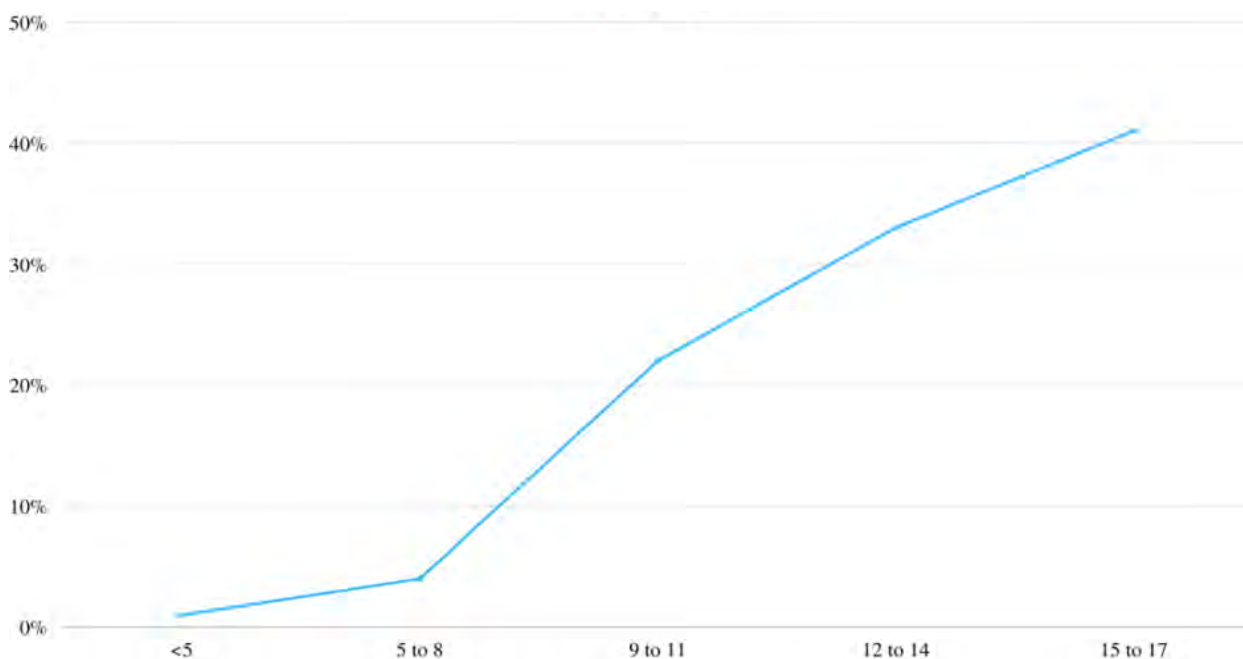


Figure 29. Proportion of children heard by customary justice actors (%) per age segment

Source: Cordua, I. *Too Young to be Heard? A Multi-Country Study on the Participation of Children and Young People in Customary Justice Proceedings.* Leiden University, 2022.

^[254] Terre des hommes. *Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan, and Palestine.* 2020.

^[255] *Ibid.*

^[256] *Ibid.*

^[257] *Ibid.*

^[257] Danish Institute for Human Rights. *Informal Justice Systems: Charting a Course for Human*

^[258] *Rights-Based Engagement.* 2010. Terre des hommes. *Mapping & Analysis of Informal Child Protection and Child Justice Systems in Lebanon,* 2020.

^[259] Hope, K., & Colliou, Y. *Situating the best interests of the child in community-based arbitration of marriage disputes: Reflections from a pilot intervention of Terre des Hommes Foundation in Assiut, Egypt.* DIFI Family Research and Proceedings, 2015.

^[260] Terre des hommes. (2020a). *Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan and Palestine.*

5.3.2 Children’s opinions on the outcome of the case

Taking children’s opinions seriously requires more than simply ascertaining the facts of the case based on a child’s perspective. A child’s right to express their opinion should include their involvement in suggesting ways of resolving the dispute. Philip Milburn points out that the offence or crime committed makes it “impossible for the offender to influence the sentence he or she will receive”.^[261] Contemporary developments in children’s rights, particularly at the international and European level, have put forward the idea that children cannot be subjected to decisions made by adults that affect them, “be they their parents or a judge”, without at least being consulted.^[262] The Munyonyo Declaration stresses the need to give children more opportunities to participate in decisions that affect them and their communities and to promote their role as positive social actors.^[263]

Awareness of the child’s best interest in being involved in certain justice procedures has resulted in a wave of legal texts, giving progressive and remarkable recognition to increasingly important rights for children in this sense.^[264] The child’s right to express his or her opinion is one of the four principles^[265] enshrined in Article 12 of the Convention on the Rights of the Child.^[266] It is important that the views and opinions of the child are sought and considered according to

a child’s age and maturity, so that they are able to have meaningful participation and involvement in judicial proceedings.^[267] A child above the minimum age of criminal responsibility should be considered competent to participate in all stages of the judicial process.^[268] Children’s participation in decisions affecting them has also found its place in domestic law.^[269] For instance, the Burkinabe law allows children to have a say in decisions affecting them.^[270] The data collected showed that children were most often consulted on the outcome of proceedings in Egypt (61% of the time), and only 41% of the time in Burkina Faso. In the Palestinian territories, consultation with children was as low as 12%. A high proportion of consultation does not necessarily translate to meaningful participation, however, as the input of children may not carry as much weight in considerations of proceedings or outcomes, particularly for younger children.^[271] The concern that children are rarely consulted in formal judicial proceedings has been discussed in the literature, particularly in the cultural contexts relevant to this report.^[272] A general review of the juvenile justice system in Afghanistan, likewise, identified infringements on due process for children, including their ability to knowledgeably participate in their trial and sentence.^[273]

^[261] MILBURN, P. De la négociation dans la justice imposée. *Négociations*, vol. 1, n° 1, 2004, p. 27–38

^[262] GOUTTENNOIRE, A. Les modes de participation de l’enfant aux procédures judiciaires. *Cahiers de la recherche sur les droits fondamentaux*, n° 5, 5, décembre 2006, p. 59–64. [journals.openedition.org, https://doi.org/10.4000/crdf.7167](https://doi.org/10.4000/crdf.7167).

^[263] The Munyonyo Declaration on Juvenile Justice in Africa. Defence for Children International. African Child Policy Forum, 24 January 2012, p. 8.

^[264] BOURET, E., et al. *Le mineur dans les procédures judiciaires*. 2008.

^[265] In addition to the child’s right to life, survival, and development; the best interests of the child; the child’s right to express his or her views.

^[266] Paragraph 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

^[267] An important place should be given to the views and opinions of the child according to his age and maturity.

^[268] COMMITTEE ON THE RIGHTS OF THE CHILD. General Comment No. 24 on children’s rights in the child justice systems. 2019. Paragraph 46.

^[269] GOUTTENNOIRE, A. *op. cit.*

^[270] BURKINA FASO. Loi portant protection de l’enfant en conflit avec la loi ou en danger. 2014. Article 4. ‘*This law guarantees children the right to participate in decisions affecting them*’.

^[271] Terre des hommes. (2020b). Mapping & Analysis of Informal Child Protection and Child Justice Systems in Lebanon, pg. 57; Terre des hommes. (2020a). *Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan and Palestine*.

^[272] OECD (2023), *Towards a Child-friendly Justice System in Egypt: Implementing the Sustainable Development Goals*, OECD Publishing, Paris.

^[273] Afghanistan Independent Human Rights Commission (AIHRC), *Justice for children. The situation of children in conflict with the law in Afghanistan*, 26 June 2008.

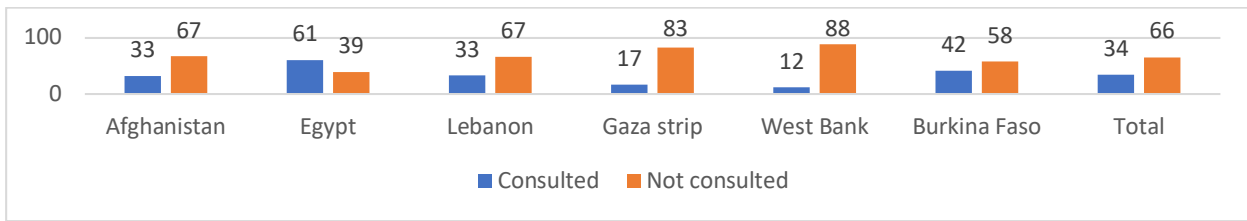


Figure 30. Proportion of children consulted on the outcome of the customary justice process (%)^[274]

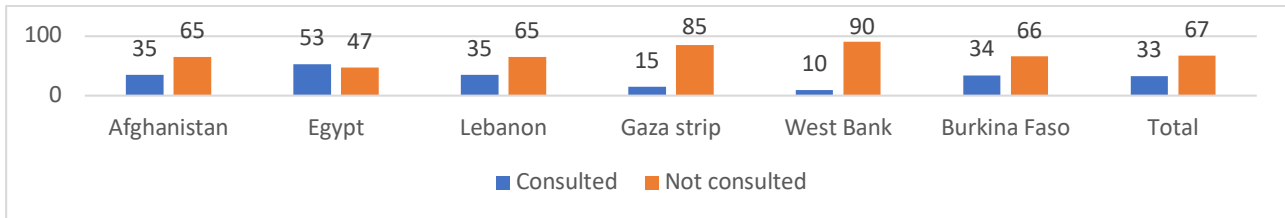


Figure 31. Proportion of children victims consulted on the outcome of the process (%)^[275]

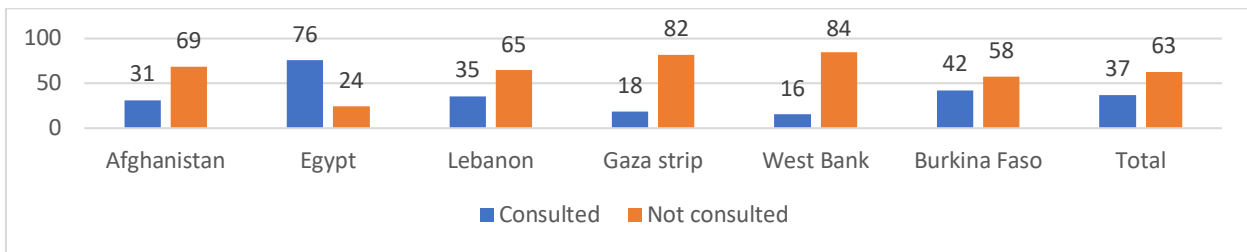


Figure 32. Proportion of children (alleged) offenders consulted on the outcome of the process (%)^[276]

In order for children to exercise this right, additional rights must also be realised, such as the right to freely express oneself without the fear of retaliation or punishment. Children also need access to support that enable the development and articulation of their views, including information in formats and language that are appropriate to their age, stage of development, and abilities.

While the participation of children in justice proceedings has improved, international standards and national legislation are both unambiguous about the different aspects that are required in practice (e.g. in relation to the age and sex/gender of a child and in relation to the various justice stages requiring free, prior and informed consent, without any form of coercion). However, it is still uncertain to what extent this

^[274] Overall, for the 67.9% (n=2,644) of cases for which this information was available as provided by interviewers/data collectors in 38.2% (=1,010) of cases the child's opinion was sought as part of the decision, whereas the customary justice actor stated that the child's opinion had been sought in 34.5% of cases. This shows, in the context of this question, that the customary actors did not over-evaluate this issue in order to give a certain 'image'. We note that in 61.8% (n=2,644) of cases, the child's point of view was not sought. Notable differences were observed in Egypt, where the customary actors stated that in 60.8% (n=556) of cases, the children expressed their opinion, whereas the interviewers stated that 76% (n=406) of them did, and in Burkina Faso, where the customary actors stated that in 42% (n=133) of cases, the children expressed their opinion, whereas the interviewers stated that 59.1% (n=175) of them did.

^[275] Of the 1,638 cases for which this information is available, 33% of victims were able to give their point of view on the outcome of the procedure. 67% of victims were never consulted about the outcome of the process.

^[276] Among the 1,400 cases of authors for which this data is available, we note that 37% of authors were able to give their point of view on the outcome of the procedure. 63% of authors were not consulted on the outcome of the process.



notion of child participation is really and comprehensively taken into account in some societies. One of the characteristics of customary justice systems in many cultural contexts is its patriarchal nature, which is generally seen as leaving little room for children to be fairly and wholly included and represented.^[277] Further, while it is an undeniable benefit of customary justice that the emphasis is on restoration and reconciliation rather than retribution, this does also open the door for more community-focused outcomes that may not

always align with a child's best interests. Having noted these limitations, the participation of children in customary justice proceedings is progressively improving, particularly in comparison to the slow-moving and often punitive and impassive nature of formal courts.^[278] A thoughtful consideration of the progress, as well as ongoing challenges of customary justice processes globally, should be a priority to advance children's rights in the legal system, both to child (alleged) offenders and child victims.

^[277] Danish Institute for Human Rights. (2011). *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*. UN Women, 122.

^[278] *Ibid.*





6. Major findings & recommendations

6. Major findings & recommendations

This seminal report has addressed a major gap in knowledge in the operation of customary justice systems involving children across six global contexts. It is one of the first pieces of research to analyze the role of customary justice actors along with the type of cases and the role of children and their families in such justice processes. Uniquely, the data challenges common misconceptions, as well as illustrating the intersectional nature of customary justice systems and their interface with formal justice systems. The research has implications for future programming and policy as well as identifying critical areas for future research. Findings showcase new evidence and knowledge about customary justice systems and how they relate to children's cases. This evidence comes from the customary actors themselves. Undoubtedly, customary justice mechanisms represent a fundamental aspect of the lived experiences of access to justice for countless children in the countries and territories of focus. Commonalities exist across the six locations, but contextual issues are important in analyzing the data. Therefore, the results are likely to have relevance in similar contexts internationally, but critical contextual issues need to be considered when making any generalizations. As such this highlights the need for further research and programming to expand knowledge on customary justice systems for children globally.

While the importance of engaging with customary justice systems has been argued by many international, regional, and national actors and institutions, there is a dearth of evidence-based practices and actual knowledge of the customary justice systems' scope and functioning, particularly in relation to children's cases. This seminal report elucidates essential information to contribute to and expand on knowledge. It suggests contemporary ways of approaching child justice sector reform, which, to be relevant and useful needs to be cognizant of the disparate customary justice system learnings and practices. Nevertheless, challenges remain in building a comprehensive understanding of customary justice systems that can effectively uphold the best interests of children, while also building initiatives that work alongside all stakeholders to capitalize on strengths and address weaknesses and gaps.

Below is a synthesis of the main contributions to knowledge and discussion from this mixed methods and analytical study of customary justice systems. The aim is to enable new (and better) ways of approaching and contextualizing children's access to justice.



6.1 Children & families, and formal justice actors, resorting to and engaging with customary justice systems: diversity and collaboration

Customary justice systems are the global population's main justice providers.^[279] It is extensively documented that resorting to customary justice systems by different justice seekers is linked to key motivators, such as proximity to the dispute and to the local understanding of the dispute's context; timeliness; access to cheaper justice forums; increased confidence in those resolving the dispute in question; known rules and procedures; and negotiated solutions that are culturally resonant.

This report sheds light on who are the justice parties resorting to customary justice systems. Contrary to a general belief that would imply that customary justice systems are used by those who cannot, for whatever reason, resort to formal justice, evidence shows that in fact children and adults from different backgrounds, positions, and status use customary justice systems as a preferred choice to resolve disputes.

Results show that children in this study were diverse in background and not simply from more vulnerable or disadvantaged backgrounds. For example, children in contact with customary justice systems had a regular school enrolment rate of 78% and a net enrolment rate of 79.7% on average for the countries and territories covered by this study. While the relationship between education and crime or conflict reduction is well-established, the underlying mechanisms of this relationship are complex, since factors such as the quality of education, the availability of economic opportunities, and the strength of social norms against conflict and criminal behavior can moderate that relationship. Also, the school environment itself might produce social inequalities. Due to this wide myriad of factors, a linear relationship between low levels of schooling with potentially conflicting behavior of children would not necessarily occur, as is the case with an association between customary justice systems and children who might belong to more disadvantaged communities or with lower levels of educational access. A similar trend is shown

in relation to children in contact with customary justice systems and their household composition, with 86% of children living with both parents. As per the level of schooling, a variety of factors can impact positively or negatively a relationship between the family environment and the lower or higher likelihood of committing or being involved in an offense. Our evidence shows that customary justice systems hear and resolve cases involving children from a diversity of family backgrounds.

That diversity reaches the customary justice actors themselves. In the countries of focus, 62% of the customary actors affirmed that they were linked to different official institutions and 31% of them identified a profession linked to the state, challenging the notion of 'informality' or that of 'in the margins of state-based systems' often attributed to the type of justice customary actors offer. The data also shows that formal and customary justice systems have degrees of cooperation, but there is still room to enlarge that interface between the different justice systems that coexist: 8% of the cases dealt with by customary justice systems were referred by formal justice authorities and only 2.1% of the cases gathered and analyzed were referred by customary actors to the formal system. The latter percentage can be attributed to the fact that referral only occurred when all other options had been exhausted. The referral to formal justice systems from customary justice systems is generally not a practice that is well accepted within communities.

There is already complementarity between the different justice systems and further avenues for bridging and broadening collaboration. This requires a certain degree of knowledge about customary justice systems, which gives them legitimacy and a relevant role in the justice ecosystem. This is particularly the case when considering their role in cases involving children. These issues are critical in child justice sector reform.

^[279] https://www.sdg16hub.org/sites/default/files/2023-09/diverse_pathways_to_people-centred_justice_sept_2023_0.pdf

6.2 The volume, coverage, and functioning of customary justice systems: beyond only 'an alternative' justice system

The evidence shown in this seminal report speaks for itself: customary justice systems in the countries of focus deal with a variety of offenses affecting children, including disputes over marriage, divorce, child alimony, inheritance, or land property (under civil and personal status categories), serious crimes involving homicide or attempted homicide, thefts, physical aggressions, and sexual assaults (within criminal categories). Hence, there is an ample amalgam of customary justice cases, contrary to what the existing literature on the subject generally suggests, which is that customary justice cases are generally family or property matters, but not (serious) criminal cases, because it is assumed that they are dealt with by formal justice actors.

In fact, while the management and resolution of children's cases in customary justice systems greatly vary across and within contexts, they are certainly not absent from the referral and application of elements enshrined in national legal frameworks. These legal frameworks sit alongside the prevalent application of customs, religious precepts, and social norms. Hence, positive law does not preclude the existence of customary law or references to religious norms and precepts in the administration of justice; and, customary justice systems in some instances combine, without necessarily opposing, the different systems of laws and legal standards in force.

Similarly, customary justice systems function with certain 'procedural pathways' which might vary according to the nature of the offenses they are dealing with. The common goal is always to resolve the case so that the effect of a dispute does not expand beyond the main parties, and so that 'social harmony' in the community is maintained. Terre des hommes' data shows that customary justice actors usually use testimonies of different people concerned with the

dispute/offense in question (51% of cases analyzed) as the main source of investigation. Having said that, it is possible that another type of evidence will be requested and assessed together with the testimonies (21% of cases analyzed). In some instances, customary justice actors sought legal support to advise them during the investigation of a case (8% of the cases). The cases also revealed findings regarding where the hearings are held or where the witnesses who are asked to provide testimony are asked to appear. Certain rules apply: a neutral place will generally be suggested, as is the case in Egypt where hearings may be held in the house of the arbitrator.^[280] In Gaza, the tribal judge may ask the parties to swear an oath to speak the truth regardless of the location of the hearing in order to encourage neutrality.^[281] In some cases (where the 'honour' of the victim's family might be in question) hearings can be conducted in private. In 38% of the cases analyzed, customary justice actors used a written document at the end of the process to record the outcome, formalizing and documenting the decision in order to avoid any uncertainty.

The above features of customary justice illustrates that such processes are not only an 'alternative' justice system but a fundamental system in the context of legal pluralism. As such, they come with certain advantages and innovative elements that can be considered by formal justice systems (be it criminal, civil, etc.). They also, however, have limitations and challenges, in the same way as formal justice systems. As a result, both systems require ongoing analysis and reform to improve and meet the changing needs of communities. It is important to capitalise on the evidence provided, by investing in further research, and by granting customary justice systems a '*place at the table*' in the agenda of access to justice for all.

^[280] Terre des hommes – Lausanne Foundation. Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan, and Palestine. Edition 2020.

^[281] *Ibid.*

6.3 Unpacking and improving child-centered processes in customary justice systems: the right of children to be heard in justice proceedings

A child-centered approach to justice demands that justice seekers are the primary focus. This calls for children to be heard meaningfully, both by providing their narrative of accounts and their views about the justice outcome or solution. Being able to participate in this way requires that children are well informed about the justice process and feel safe in engaging with the process without coercion, violence, or retaliation. Children's participation is one of the four core principles of the Convention on the Rights of the Child (Article 12, Right to be heard).

While children's participation in justice proceedings has improved in the last decade, the notion of child participation and acting in a child's best interest remains ambiguous, and not sufficiently comprehensive when implemented within plurality justice systems. Customary justice systems are generally assumed to lack that participative option for children. The data presented in the seminal report in fact shows that customary justice systems, while still far from providing the due place to children in terms of participation in the conflict resolution process, do not ignore their relevance in the process. Interestingly, in

67% of the 3,341 cases analyzed, the child was able to give an account of the facts during the proceeding. In relation to obtaining the views of a child about the outcome of a case, out of the 67% of cases mentioned, data collectors recorded 38,2% of cases where the child's opinion was sought as part of the decision, whereas the customary justice actors stated that the child's opinion had been sought in 34.5% of cases. This confirms that customary justice actors did not over-estimate how often they sought a child's opinion about an outcome. The data indicates that, on average, children who were allowed to be heard were 13 years old and above. Children accused as offenders as opposed to child victims were more likely to be heard and to be given the opportunity to express their views about the outcome of the conflict resolution process.

Progressively exploring avenues to grant children comprehensive participation in justice processes, both customary and formal, is still a challenge, but also an opportunity for further cross-learning and improvement within both those systems.



6.4 An unprecedented 'momentum' to reinforce customary justice systems within the Child Rights' and Sustainable Development Goal 16' agendas

International recognition of customary justice mechanisms is not new. This report brings focus to the search for effective justice practices that can, on the one hand, situate customary justice systems as undeniably relevant to the advancement of accessible and effective justice. It also reinforces the collaborative opportunities that exist between customary and formal justice systems rooted in evidence, development, and evaluation of convergent justice solutions.

Indeed, both the International Human Rights order and more specifically the international Convention on the Rights of the Child have acknowledged customary justice systems in several official documents: the United Nations Economic and Social Council Guidelines on Children in the Criminal Justice System (1997); the General Comment No. 32 of the Human Rights Committee – Article 14: Right to equality before courts and tribunals and to a fair trial (2007); the Secretary-General's report on Strengthening and coordinating activities in the field of the rule of law (2008); the report of the UN High Commissioner for Human Rights on Customary and religious justice systems (2013); and the Report of the Special Rapporteur on the independence of judges and lawyers (2015). However, in 2019 the interrelationship between justice systems was clearly acknowledged by the Committee on the Rights of the Child in its General Comment No. 24 on Children's Rights in the Child Justice System, in which the consideration of customary justice systems in justice reform is highlighted as required. The General Comment calls for collaboration based on a "full understanding of the comparative systems concerned and that is acceptable to all stakeholders".^[282] It also emphasises the fact that restorative justice responses for children are often achievable through customary justice systems, which may provide opportunities for learning in the formal child justice system. Furthermore, the Committee on the Rights of the Child has publicized in January 2024 the concept note of its next General Comment No. 27 that will be on Children's Rights to Access

to Justice and Effective Remedies. Paragraph 11 of the concept note indicates that '*the General Comment aims to address the child's rights to access justice in the context of relevant judicial and administrative proceedings, including informal or non-state systems; community-based, social, paralegal support services; customary and religious justice mechanisms; as well as alternative and restorative dispute resolution mechanisms. (...)*'.^[283]

The UN Sustainable Development Goal No. 16 (SDG 16) requires the promotion of "peaceful and inclusive societies for sustainable development, ... [the provisions of] access to justice for all and ... [the building of] effective, accountable and inclusive institutions at all levels".^[284] In 2019 SDG 16 was amended to include a key indicator in the measurement of SDG 16 that considered the proportion of the population accessing "formal and informal dispute resolution mechanisms".^[285] As we move closer to 2030 and as the need to achieve the targets contained in SDG 16 grows even more pressing, there is more focus on customary justice systems and the mechanisms needed to incorporate them into the justice landscapes as a 'valid' justice solution. The Pathfinders Grand Challenge on Justice,^[286] mandated with providing evidence and collaborative efforts to advance SDG 16, along with Cordaid, IDLO, ODI, Tdh and other partners, set up a specific working group on customary justice which just recently published its work: "Diverse pathways to people-centered justice. Report of the Working Group on Customary and Informal Justice and SDG16+".^[287] Tdh also co-chairs the Pathfinders' Working Group on Justice for Children, which members have also published the group's work in 2023 on child-centered justice through a series of policy briefs.^[288]

The data presented in this seminal report complements and reinforces this growing movement to establish and provide child-centered justice for children, while recognizing the need to work collaboratively with plural justice systems.

^[282] Committee on the Rights of the Child. General comment No. 24 (2019) on children's rights in the child justice system, CRC/C/GC/24, 18 September 2019.

^[283] <https://www.ohchr.org/en/documents/general-comments-and-recommendations/draft-general-comment-no-27-childrens-rights-access>

^[284] SDG Indicator 16.3.3: 'Proportion of the population who have experienced a dispute in the past two years and who accessed a formal or informal dispute resolution mechanism, by type of mechanism'. The indicator was approved by the tenth meeting of the Inter-agency and Expert Group on Sustainable Development Goal Indicators (IAEG-SDGs) held from 21 to 24 October 2019 in Addis Ababa.

^[285] *Ibid.*

^[286] <https://www.sdg16.plus/justice>

^[287] https://www.sdg16hub.org/sites/default/files/2023-09/diverse_pathways_to_people-centred_justice_sept_2023_0.pdf

^[288] <https://www.sdg16.plus/justice-in-action/justice-for-children>

6.5 A concluding discussion on 'justice hybridity' as one of the pathways to advance rights-based, accessible, and culturally sensitive justice for children

In light of the information presented above, the following questions remain to be answered: What type of justice reforms are needed to reconcile different legal systems so that children's access to a rights-based, culturally resonant, safe, and diligent justice is protected? Are hybrid approaches, whereby formal and customary or traditional justice systems and actors come together and collaborate, possible? Will such approaches restrict or expand the notion of accessible justice for all?

Reconciling different justice systems, and in this case, bringing together customary and official systems to improve access to justice for children, represents an opportunity to address existing inadequacies in a country or territory's legal system. In order to bridge the gap between formal and customary justice systems and the expectations of justice users and the broader population, some scholars suggest "adopting endogenous approaches ... [that] enshrine traditional methods of conflict resolution and practices of hybridization and normative mixing".^[289]

The concept of 'justice hybridity' calls for a process to be designed to enable 'tangible' collaboration between representatives of at least two distinct legal orders in relation to a judicial or extra-judicial measure. This collaboration needs to be authorized in legislation.

The findings presented in this seminal report go a long way to countering conventional wisdom about the binary justice delivered by traditional or official justice systems. They show that the reality is far more complex. Rather than the cohabitation of different justice systems, where customary justice systems are an established part of the ecosystem of justice, there

needs to be greater consideration of how the formal and customary justice systems can collaborate and how a process of reciprocal incorporation can be established.^[290] The formation of clear institutional and regulatory frameworks aimed at clarifying the role of customary authorities would strengthen the effectiveness and efficiency of the justice system.^[291] Furthermore, a process of hybridization of certain judicial and extrajudicial measures in which customary bodies could express their 'restorative' potential and thus, start constituting the 'lineaments of a hybrid justice' would be necessary.

Restorative justice draws some of its inspiration and techniques from the ancestral practices of certain African peoples, the Maori people of New Zealand/Aotearoa and North American Indians.^[292] Restorative justice refers to methods of resolving disputes that bring together the victim, the offender, and the community. The perpetrators of the offence are made responsible for their actions and the harm done to the victim is 'repaired', while including the community as an integral part of the conflict resolution process.^[293] The community is considered integral because it is seen as also suffering the consequences of an offence and as such it is considered a concerned justice party in the process of resolution. Customary justice conflict management mechanisms have largely inspired restorative practices as we understand them today, such as mediation and other forms of conciliation as highlighted in Chapter 5 of this seminal report. Customary justice systems are deeply rooted in local cultures and history, being a part of the fabric of society. The spontaneous legal order is endogenous to the group, because "it comes from the society in which it is respected".^[294]

^[289] DU BOIS DE GAUDUSSON, J. 'Justice in Africa: new challenges, new actors'. No 250, 2014.

^[290] FOFANA, H. 'Bringing justice closer to litigants. An ethnography of "judicial distance" in Burkina Faso'. Law and Society, 2018/2 No. 99.

^[291] PERROT, C-H. 'Traditional authorities and the modern State in Sub-Saharan Africa at the start of the 21st Century'. Cuadernos de Estudios Africanos, n° 16/17, July 2009.

^[292] LECOMTE, J. 'Restorative Justice'. Revue du MAUSS, vol. 40, n° 2, 2012.

^[293] Danish Institute for Human Rights. (2011). *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement*. UN Women, 122.

^[294] OTIS, G. 'The production of autochthonous law: behavior, command, teaching'. Revue générale de droit, vol. 48, n° 1, juillet 2018.

The aim is to turn the complexity of reconciling customary and formal justice systems into an opportunity, by focusing on key elements that guarantee and provide access to justice forums to justice seekers, specifically to children. Instead of justifying or attempting to mitigate questionable practices and harmful effects of customary justice on children's rights, we need to identify these practices and reshape and remedy them. Any amendments need to be grounded in evidence to understand the root causes and rationale of those practices and effects, and to avoid adopting inappropriate generalisations.

Indeed, customary rules and norms are not simply old, outdated, and maintained practices. They are, above all, standards that are commonly adopted and respected through common practice. Customary justice systems evolve to remain relevant over time and renegotiate their legitimacy vis-à-vis the community members they serve; it is paramount to recognise this versatility to see the potential for the delivery of improved justice outcomes for children.

While a number of legal anthropology scholars highlight the need to approach the law 'in the plural' and advocate for exploring forms of hybridization of conflict management, their scholarship remains conceptual rather than specific, lacking any detail about what types of practices could be the subject of hybrid development. The coexistence of different normative systems and the way in which forms of justice are negotiated have rarely been addressed, often because customary justice systems have not yet fully been considered as a credible and legitimate catalyzer to address limitations faced by judicial institutions.

There is, therefore, an opportunity to address the building blocks of those barriers by acknowledging that "the general and abstract rule that prevails in Western countries does not apply to all countries".^[295] The question of cultural^[296] lativism is paramount

when exploring the application of international standards relating, in particular, to children's rights. In recent years, and in certain contexts, there has been a growing body of research around the emergence of 'neo-traditional justice', where the keepers of the traditions are socially, professionally, and sometimes politically active players, who advance the piloting of hybrid practices of justice.

The experimental initiatives of 'justice hybridity', designed and implemented by Terre des hommes in Burkina Faso and in the West Bank, used the practice of delegated criminal mediation and showed promising results. In both contexts, comprehensive work to coordinate and collaborate with the justice actors of both systems occurred. Existing research in the field informed the initiative and was used to assist with the drafting of new legislation. Improving the capacity and technical expertise of those involved in the implementation of the initiative was also a priority. The initiative has been in place since 2017, making it possible to establish the practice of delegating juvenile penal mediation from the public prosecutor's office to customary justice actors. Where the fundamental principles of the process have been enshrined in the legal framework, the mediation is led by customary justice actors and recorded and registered in the prosecutor's office. Mediation in criminal cases is first and foremost part of a restorative justice process that avoids formal legal proceedings and that encourages dialogue and the search for a solution between the perpetrator and victim. The advantages of delegated mediation are undeniable. In both contexts, there has been an unprecedented decrease in the number of children held in pre-trial and post-sentence detention since delegated mediation was introduced. It has resulted in a significant reduction in the backlog of cases at a prosecutorial level. A tailored hybrid justice response has met the expectations of the justice parties and addressed the limitations of the previous justice system.

^[295] EBERHARD, C. et NDONGO, A. 'Rereading Amadou Hampâté Bâ for an African approach to law. Thoughtful images of the pyramid and the network'.

^[296] ROULAND, N. 'Legal anthropology'. Presses Universitaires de France, 1990.

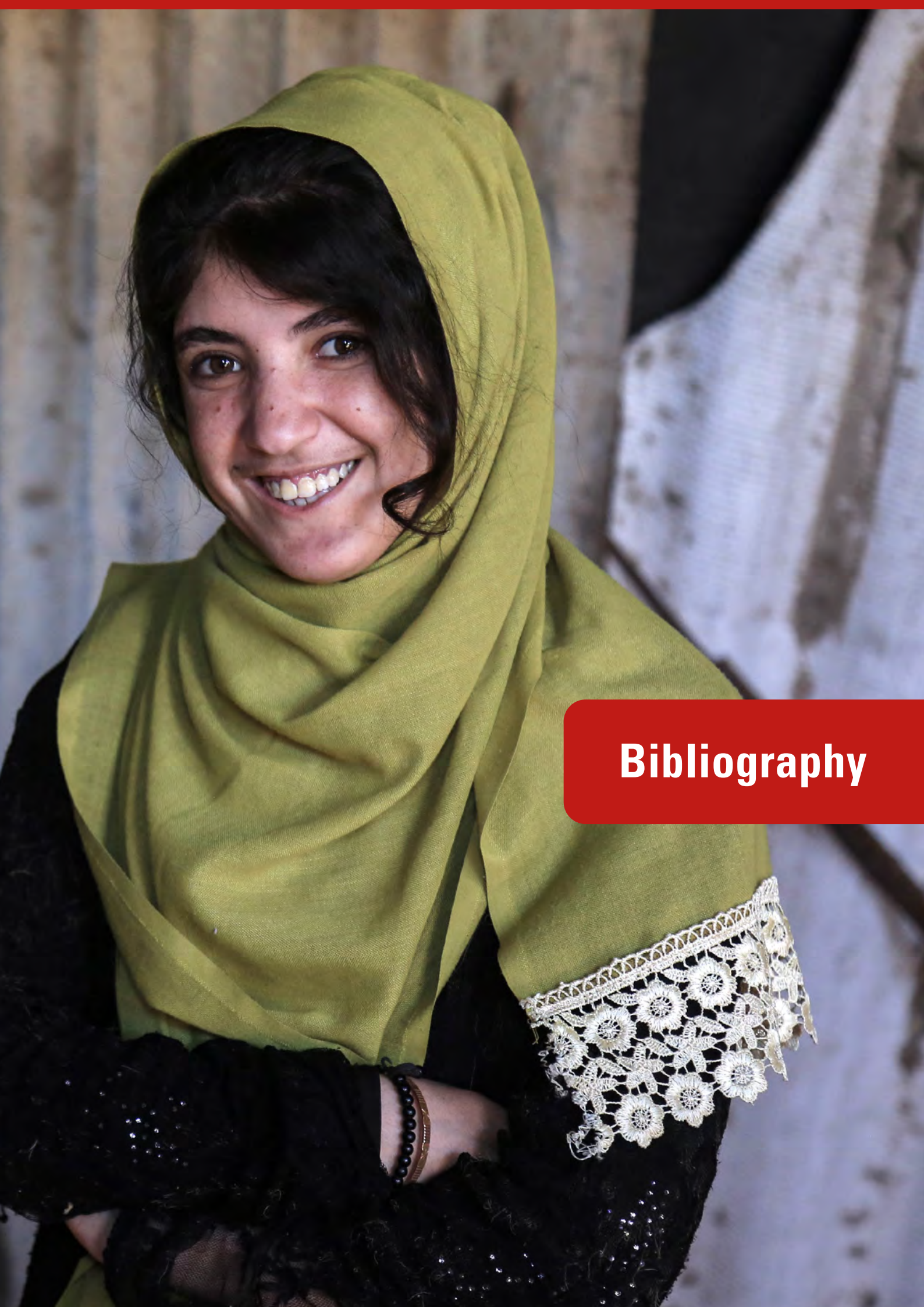
In view of the present and future challenges of justice, the plurality of justice systems (of which customary justice systems are already a fundamental player) should not only be encouraged but also implemented in a way that avoids existing harmful traditional and formal justice practices. In an international children's rights context that now favors the convergence between justice systems, a judicious reconciliation

of official and customary legal orders for the benefit of child-centered justice is a credible and legitimate option. In addition to the adjustment of national normative frameworks, this reasoned convergence of customary conflict management mechanisms should be based on principles that support the hybridisation of specific judicial measures, such as delegated criminal mediation.



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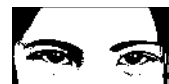


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