United Nations Development Programme Indonesia

Strengthening Access to Justice and the Rule of Law in Conflict-Affected Provinces: Process Lessons Learned while Designing a Rights-Based Approach to Programming

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Author/s: Upala Devi Banerjee¹, Chris Morris and Ewa Wojkowska²

¹ Upala Devi Banerjee, currently Asia-Pacific Coordinator of the UN Inter-agency Lessons Learned Project, based at the Office of the United Nations High Commissioner for Human Rights (OHCHR) in Bangkok, structured and edited the case study and undertook an analysis of the rights-based aspects of the case study based on the primary materials received from the other authors.

² Ewa Wojkowska is the Programme Officer of United Nations Development Programme (UNDP) Indonesia’s Access to Justice Project under the Governance Programme; and Chris Morris is an International United Nations Volunteer (UNV) Project Officier in UNDP Indonesia’s Access to Justice Project under the Governance Programme.
LIST OF ABBREVIATIONS USED:

BAPPENAS: Indonesia’s National Development Planning Agency
DGTTF: Democratic Governance Thematic Trust Fund
FGDs: Focus Group Discussions
GB: Great Britain
HRBAP: Human Rights-Based Approach to Programming
MDGs: Millennium Development Goals
NGOs: Non-governmental Organizations
OHCHR: Office of the United Nations High Commissioner for Human Rights
PCGs: Provincial Consultative Groups
PSPK: Center for Village and Regional Studies
SURF: Sub-Regional Facility
UDHR: Universal Declaration of Human Rights
UNDP: United Nations Development Programme
UNVs: United Nations Volunteers
1. Background and Rationale:

Access to Justice in Indonesia - Country and Programme Context: The Indonesian justice system is currently facing a number of challenges. While the reform era has brought new opportunities for the country to develop a more equitable and transparent justice system, many key problems persist. The formal justice system - consisting of the courts, police, Attorney General’s Office, the attendant public prosecution service, the special commissions and the private sector legal professions - are each important partners to the legal reform process that require upgrading and improvement, especially if marginalized and disadvantaged groups of people are to have recourse to fair and equitable access to justice. Entrenched poverty across the archipelago further complicates this setting, leaving judges, court officials, police and other law enforcement officials open to manipulation and corruption. Furthermore, areas of ongoing social conflict serve to exacerbate deficiencies in Indonesia’s judicial system, as many citizens feel that local violence destroys any opportunity for free and fair dispute resolution, while others contend that violence is their only recourse/option.

Each of these political, economic and social issues presents a major challenge to Indonesia’s justice system. Thus, improving access to justice for all Indonesian citizens is an essential precondition for sustained human development and to help raise people out of poverty.

In Indonesia, justice is meted out through a range of channels. Traditional (adat) justice systems remain the central source of dispute resolution for many. The informal, community-based mediation, negotiation and reconciliation methods that have marked Indonesian adat systems have historically played a central role in meting out justice to many citizens. The adat mechanisms cannot, however, always provide the most balanced, rights-based approach to dispute resolution, wherein citizens can claim access to justice to reconcile disputes as a matter of their right. Indeed for many, traditional norms serve to bolster local biases and prejudices without adequate checks and balances. Women in particular, under such systems, frequently fail to secure the fair and impartial consideration required for lasting dispute resolution.

Strengthening the formal justice system is thus a critical component to Indonesia’s reform process and to improving access to justice for all citizens beyond local remedies. The Government of Indonesia is taking important steps to boost national justice institutions through such processes as hosting the National Law Summit, setting up the National Action Plan on Human Rights, and via the establishment of new institutions such as the Judicial Commission and the Anti-Corruption Commission. It is hoped that through work with both the traditional adat mechanisms and such formal justice systems as mentioned above, Indonesian citizens would be guaranteed access to better, more equitable dispute resolution mechanisms.

Policy and Legal Framework: The policy and legal framework and the status of (and access to) rights of disadvantaged and marginalized groups of people in the country have been discussed at length in the other paper on Indonesia – “Ensuring Sustainable Livelihoods – Using Rights-Based Tools for Implementing Pro-Small Farmers’ Oriented Policies in Klaten district, Central Java, Indonesia – An OXFAM Great
Britain (GB) - Indonesia Case Study” - and which is included in this volume of case studies.

Access to various Human Rights Issues under the Justice Framework: The following provides a brief overview of some of the key justice challenges in Indonesia, which are to be addressed if disadvantaged and marginalized groups are to access justice in a fair, equitable and timely manner.

- As mentioned elsewhere in the paper, the first challenge relates to the entrenched corruption and lack of accountability and transparency of the key justice systems in the country in delivering justice. Though the Constitution provides for an independent judiciary, the courts, in practice, remain subject to influence, including by the Executive branch - this can have far-reaching effects on the ability of disadvantaged/marginalized peoples to access justice.

- Systemic challenges from within the judicial system that hampers lack of access to justice are further exacerbated by prevailing social and cultural norms and these have an overarching impact, especially on vulnerable groups like women and ethnic minorities. For instance, even though women and men share the same literacy rates, go though the same mean years of schooling and comprise roughly an equal proportion of the labor force, women and men do not share equal rights in Indonesia. In general, women do not share equal access to property and land rights and are rarely seen on par with their male counterparts under the adat laws. In conflict situations, women are frequently the targets of violent crime and exploitation.

- Moreover, a general lack of access to economic rights and to other entitlements -, such as access to land, water and property rights as well as disputes arising out of environmental and natural disasters - have proven to be a catalyst for numerous disputes and conflicts across Indonesia. Lack of clear regulations and laws, complications arising from the dual use of traditional and formal justice systems, as well as frequent corruption has made access to such entitlements a central issue of concern.

- The Government of Indonesia, has, in recent years, moved towards devolving power to the provinces, under an increasingly decentralized framework. This shift of power downwards to the provinces, though a welcome development (especially under a rights-based framework, where leadership and governance decisions are handled locally) has led to a new set of challenges in ensuring that disputes are handled fairly. The United Nations Development Programme (UNDP) Indonesia-initiated Access to Justice project (which is the subject of study in this paper) will thus be working in some of the areas most affected by the move towards a decentralized Government, analyzing the effects of these changes and working with local partners to ensure that key local justice issues are not neglected in this shift of power.

Understanding the above-mentioned challenges and how they relate to each other is the first step in the process towards developing an effective programme that works to improve citizen’s access to justice. Such challenges can be more effectively dealt with if citizens are well capacitated to demand and receive access to justice from both the traditional and formal justice systems as a matter of right.
UNDP Indonesia, in partnership with Indonesia’s National Development Planning Agency (BAPPENAS) and the Centre for Village and Regional Studies at Gadjah Mada University (PSPK), is currently implementing a project entitled ‘Strengthening Access to Justice and the Rule of Law’. This paper looks at how this project: i) works towards building a programming approach that is rights-based and that can more effectively develop such capacities of disadvantaged and marginalized communities (especially those who have been exposed to conflict situations) to confront the deficiencies in the basic law systems; ii) how institutions from the local to national levels can be better fortified to deal with demands made by the communities and; iii) what the process lessons learned are while developing such a human rights-based approach to programming (HRBAP). Many of the project activities on the ground are yet to be implemented and rights-based outcomes yet to be determined. Many of the techniques that have been developed under a rights-based programming framework and that are to be used also remain untested and this necessarily limits the extent to which meaningful lessons learned can be extracted. However, it is hoped that process lessons learned even while developing a HRBAP will be of interest to other agencies that are committed to developing such a programming approach.

2. The Study of United Nations Development Programme Indonesia’s Designing of a Rights-Based Programming Approach under the Access to Justice and Rule of Law Program

Case Study/Project Context: As mentioned in the preceding sections, undertaking programming to enable access to justice for disadvantaged and marginalized groups is a priority for UNDP Indonesia’s Governance Programme under the Access to Justice Project. Such a commitment is a part of the agency’s broader focus on support to Indonesia’s governance reform and poverty alleviation. UNDP defines “access to justice” as the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and which is in conformity with human rights standards. Articles 7 and 8 of the Universal Declaration of Human Rights (UDHR) enshrine access to justice as a fundamental human right by guaranteeing, respectively: i) the right to equality before the law and the equal protection of the law without any discrimination; and, ii) the right to an effective remedy by a competent national tribunal for acts violating the fundamental rights granted by the constitution or by law. Promoting greater enjoyment of these rights is the key long-term aim of UNDP Indonesia’s Access to Justice Assessment, and in doing so, it is hoped that there may be a flow-on effect to other areas. Indeed, access to justice is much more than simply a right in itself – it is also a key means for realizing the enjoyment of a whole range of other rights.

Through partnerships at the most local through to the national levels, the Access to Justice Project seeks to address the main obstacles and opportunities Indonesian citizens face in their efforts towards accessing effective and more durable justice. In

3 UNDP worldwide is committed with overseeing progress towards the Millennium Development Goals (MDGs). Access to justice for poor, vulnerable and marginalized groups is a key component to this global drive, helping to ensure that the right to free and fair dispute resolution is central on the Indonesia development agenda.
cooperation with a wide range of partners - including non-governmental organizations (NGOs) and academia - the Project is providing key knowledge, recommendations and support to both Government bodies and community level actors engaged in the justice system. This Project - ‘Strengthening Access to Justice and the Rule of Law’, with networks in each of the five focus provinces - Maluku, North Maluku, Central Sulawesi, Southeast Sulawesi and West Kalimantan - as well as via cooperation with regional and international counterparts, is investigating current circumstances related to justice, major obstacles to access and key opportunities for improvement. With the exception of Southeast Sulawesi, all the other four focus provinces share a recent history of significant conflict, which has manifested itself along ethnic or religious lines.

The Project operates in two phases - the first phase focuses on capacity development of various stakeholders, identification of claim-holders and duty-bearers and data collection and analysis; the second phase seeks, through pilot projects, to improve civil society capacities for demanding and building better response mechanisms and towards presenting policy recommendations for Government action. Accessing and integrating the perspectives and experiences of women will be a critical component to the design and implementation of the Project. It is planned that the Project will lead to the development of a longer-term Access to Justice Programme, supported by UNDP Indonesia.

Box 1: UNDP Indonesia’s Governance Programme and the Access to Justice Project –

Promoting good governance - including ensuring the rule of law and eradicating corruption - is essential to the achievement of sustainable development. UNDP’s Governance Programme is committed to supporting Indonesia in improving the management of its public resources and enhancing public sector accountability. The Access to Justice Project is a key component to this process, developing greater public awareness about the needs for, and requirements of, a working legal system and of good governance more broadly.

UNDP’s Access to Justice Project in Indonesia is part of a regional effort taking shape across Asia to address the chief justice issues in a developmental context. Projects in Nepal, India, Sri Lanka and Cambodia are already underway and are in tandem with UNDP Indonesia’s own project design and implementation. The Indonesian Access to Justice Project is quite unique, for its depth of research and focus on the capacity development of local actors under an overarching HRBAP framework.

Stakeholders Involved: UNDP Indonesia was responsible for the initial project design of the ‘Strengthening Access to Justice and the Rule of Law’ Project, with inputs from the UNDP Sub-Regional Facility (SURF) and the UNDP Oslo Governance Centre, and further fine-tuning as a result of consultations with BAPPENAS and PSPK. While not initially conceived as a project that would explicitly apply a HRBAP, the language of the Access to Justice Project document and the subsequent development of the Project have attempted to incorporate this to the greatest extent possible as
programme staff have increased their understanding of the concepts and methods involved. At a more practical level, the researchers employed to conduct the assessment were given the freedom to help develop the research strategy and methodology, while working within the broader rights-based framework.

**Objectives of the Project:** The “Strengthening Access to Justice and the Rule of Law” Project aims to identify and assess key factors obstructing access to justice for disadvantaged groups in the five above-mentioned predominantly conflict-affected provinces of Indonesia, thereby providing a basis for developing a longer-term programme on scale to improve access to justice for such poor, marginalized and conflict-affected communities. A rights-based approach is being incorporated in the project design, planning, implementation and monitoring/evaluation phases so as to seek outcomes that protect and promote the rights of the communities in the five focus provinces.

**Monitoring to Ascertain Rights-Based Outcomes:** This Project was initiated in early 2004. Monitoring is ongoing and two international United Nations Volunteers (UNVs) have been recruited to constantly monitor process, activities and outputs. The design of the programme envisages that communities will be capacitated (through training activities) to undertake actively periodic monitoring of the activities and in the final evaluation of outcomes.

3. Process:

**Addressing Power Equations – Rights-Based Programming Strategies to be Used:** In each of the five provinces, two districts, four sub-districts and two villages in each sub-district (40 villages in total) have been chosen according to a set of criteria designed to ensure the selection of research locations with varying characteristics. The Project starts with developing local capacities, identifying the claim-holders and duty-bearers, undertaking assessments to address the information gaps, identify relevant entry points and fortify response options, designing (and implementing) pilot projects and convening Provincial Consultative Groups (PCGs) – all with active participation of all stakeholders (the communities, the local partners and the Governmental national developmental planning agency).

The assessment is the first step in a longer-term Access to Justice Programme. The design and implementation of a rights-based strategy and the balance of power equations (between the duty-bearers and stake-holders) engendered through such a process, will serve as the basis for the development of the broader Access to Justice Project to be supported by UNDP Indonesia. Through its focus on capacity development of the provincial team members, the assessment aims to develop a community of practitioners to engage in access to justice activities in the future programme and beyond.

The rights-based programming strategies consists of the following steps:
The steps are elaborated in length below:

- **Undertaking recruitment, training and capacity building of local partners and researchers:** Initial training on rights-based principles and approaches were undertaken with Project partners - BAPPENAS and PSPK - so as to co-opt them as equal partners who are actively involved in designing and implementing a rights-based programming strategy. Subsequently, UNDP – together with these partners - identified the team members through local searches and field interviews. Multi-disciplinary teams of seven local researchers with either academic or NGO backgrounds - reflecting ethnic, religious and gender diversities - have been recruited in each province to carry out the assessments that will firstly identify claim-holders and duty-bearers, help determine key entry points and help shape the Project.

Team members are each local to the province in question, and generally come from NGO and/or academia backgrounds. Every team member brings a diverse set of skills, experience and local knowledge to the task of surveying the provincial justice conditions. Some are technical experts; others have explicit training in law. One member of each team is a gender specialist. As a whole, the teams are working to help illuminate some of the most complex justice issues facing Indonesia.

The local researchers were trained in Access to Justice concepts, assessment and research methods and the underlying principles of the HRBAP. For most, conflict is a defining characteristic of the local society that they live in and a component in dispute resolution. Securing fair, impartial rulings was, thus, a particularly important test in
settings where sectarian violence has taken root and local leaders have taken sides. Through such capacity development, many researchers are gaining the analytical skills that will further serve them in future endeavors of this kind.

- **Identifying the duty-bearers and the claim-holders in the five Project sites/provinces:** At the initial stage of designing the assessment, duty-bearers and claim-holders had no involvement in the process design. The primary reason for this is that at the time when the assessment was designed, the claim-holders and duty-bearers were unknown/unidentified, and the time and expense involved in locating them would have been resource extensive in relation to the overall assessment budget. Given the disadvantaged nature of the claim-holders and the overall politically sensitive scenario that this Project aims to work with and in, they are also the least likely to have identifiable representatives capable of providing inputs on their behalf. Likewise, before the main obstacles obstructing these groups from accessing justice are known, decisions as to which formal justice sector institutions to involve would be based on little more than guesswork, while attempting to involve yet-to-be-identified duty-bearers from the informal justice sector would be equally problematic.

Considering the above, it is clear that the first step of the assessment was to identify these claim-holders and duty-bearers. UNDP had has no working definition with which to identify the targeted claim-holders – hence, ‘criteria of disadvantaged groups’ for the purposes of this Project were therefore developed by the local researchers in partnership with UNDP and PSPK. They included factors such as: i) the non-fulfilment of basic rights of claim-holders to adequate access to food, healthcare, education and other Government services; ii) discriminatory treatment by Government or other community members; and iii) individuals’ inability to participate in decision-making affecting their futures. It may be that a majority of the community in certain areas fits some or all of these criteria – in this case, only the most disadvantaged groups were selected.

*Initial identification of disadvantaged groups was achieved through a combination of field observations, analysis of existing data, in-depth interviews with key informants and focus group discussions (FGDs) with participants comprising a general cross-section of the community. There was some risk that due to their very nature, members of marginalized and excluded groups may somehow ‘slip through the net’ and not be invited to participate in these initial FGDs; but it is hoped that by employing a two-pronged approach (involving a second round of FGDs to identify these groups) the chances of these groups not being included in latter stages of the assessment are minimized.*

*After specific disadvantaged groups were identified, a second round of FGDs, surveys and in-depth interviews were conducted with members of these groups where they were encouraged to reflect both on what obstacles currently prevent them from accessing justice, and also on what justice mechanisms, if any, currently work best for them. Additional participation and empowerment methods are being developed and tested, leading to the development of a comprehensive participation plan. Analysis of the unfulfilled rights underlying their claims will then identify the formal and informal justice institutions that bear a corresponding duty to defend and facilitate the enjoyment of those rights.*
Undertaking assessments in the focus areas in the five provinces: As mentioned elsewhere, local researchers were recruited and capacitated to undertake the assessments in focus sites in the five provinces. It is hoped that an assessment of the strengths and weaknesses of all the judicial institutions under Phase One will reveal the factors enabling or limiting the fulfilment of their duties. All justice mechanisms identified are also being analysed to determine the extent of their compliance with international human rights standards.

Designing pilot Project activities in collaboration with the disadvantaged groups and members of the informal justice sector: Guided by the results of the assessments to date, locally engaged facilitators are bringing together targeted disadvantaged groups and justice institutions under Phase Two of the Project to design a number of small-scale pilot projects aimed at either reducing one or more obstacles that currently prevent them from accessing justice, or alternatively strengthening resolution mechanisms that already enjoy some degree of success. This activity could be termed as one of the most important activities in this Project - especially under a HRBAP framework - as it brings together duty-bearers and claim-holders on a common platform to debate and dialogue on what activities best suits the demands of the communities in accessing informal justice mechanisms. The focus will therefore be divided between strengthening the capacity of disadvantaged groups to claim and realize their rights and assisting duty-bears to defend and facilitate the enjoyment of those rights. In the case of duty-bearers, it is anticipated that at this stage, the primary focus will be on those operating in the informal justice sector.

Aside from any immediate improvements to the local situation (in changing power equations and enabling disadvantaged groups to access the local informal justice mechanisms through activities designed in collaboration with the duty-bearers), the overall purpose of these small-scale projects is to experiment with different approaches to find those with the greatest chances of succeeding in the longer-term Access to Justice Project intended to be developed on scale on the basis of this particular Project. It is to be noted that the type of activity may vary depending on the needs of the community, the level and degree of participation of the community and the degree and willingness of collaboration/cooperation of duty-bearers in responding to the demands of the claim-holders.

Convening Provincial Consultative Groups (PCGs): PCGs are also being convened (comprised of key justice sector stakeholders at the provincial level) at the mid and end-points of the assessments. These forums will be used to inform relevant parties (mainly duty-bearers) about the progress of the larger Access to Justice Project assessment, seek their inputs on its future direction, and build support from key justice sector actors for future programming in this area. In contrast to the focus on informal justice actors with the pilot projects, it is expected membership of these consultative groups will be weighted more heavily towards duty-bearers from the formal justice sector, as well as educational institutions and NGOs active in the legal arena.

Changing Power Equations – Using the Rights-Based Approach: Throughout its activities, the Project will pursue a rights-based approach to understanding and securing local justice. And a beginning has already been made via the design of
rights-based programming strategies that are bringing together claim-holders and duty-bearers on a common platform to discuss and design strategies that will enable claim-holders to access justice and duty-bearers to deliver their obligations. Under such an approach, understanding the roles, responsibilities, capacities and obstacles faced by both duty-bearers and claims holders helps to clarify how access to justice can be improved in even the most challenging settings. The Access to Justice Project seeks to bolster people’s awareness of justice services, and to build the capacity of justice providers to improve dispute resolution. In areas where conflict has destroyed both the local resources and the social fabric, this work is proving especially critical to the community’s well being.

**Capacity/Role of Duty-bearers (including the Judiciary/Related Frameworks) in Addressing Demands:** As can be gleaned from the preceding sections, despite not being initially conceived as a project explicitly applying a rights-approach, the normative direction of UNDP Indonesia’s Access to Justice Assessment has been significantly guided by the principle characteristics of such an approach. This is most clearly demonstrated by the employment of an analytical programming approach that focuses on bringing together and developing the capacities of both claim-holders and duty-bearers to claim and deliver specific human rights.

4. Outcome (Results): Changes that have Occurred as the Result of Application of using the Rights-Based Approach: This case study focuses on lessons learned while designing programming strategies under a rights framework. Implementation of the strategies and the outcomes are not under the purview of this paper, as such outcomes will take a while to be achieved and documented.

However, an important and immediate outcome that has already emerged and which is actually an activity under the current HRBAP framework is in bringing together duty-bearers and claim-holders on a common platform to debate and dialogue on what activities best suits the demands of the communities in accessing informal justice mechanisms in the focus sites in the five provinces. Such an activity is rooted in the principles of participation (as it brings together duty-bearers and claim-holders on a common platform and thus assists in changing inequitable power equations) but also in accountability (as duty-bearers are now legally accountable to deliver equitable and timely justice and such a mechanism holds even more significance under the decentralized framework).

The second immediate outcome has been that the holding of FGDs with participants comprising a general cross-section of the community through a combination of field observations, analysis of existing data and in-depth interviews with key informants have actually led to helping build their empowerment levels. Such FGDs have enabled these marginalized groups to actually participate and dialogue with the duty-bearers on a common platform to discuss their needs and what the best methods/means are to access justice in such conflict scenarios.
5. The Value Added of Using Rights-Based Tools:

Positive Lessons Learned

- **A donor willing to invest in a relatively untested approach is key to designing (and achieving outcomes) HRBAP strategies:** Most donor initiatives focusing on the justice sector in Indonesia focus on the formal justice system and its institutions, primarily at the central level. This Project, however, is attempting to complement such initiatives by working to identify and assess key factors obstructing access to justice for disadvantaged groups at the local level in five predominantly conflict-affected provinces of Indonesia. The start up funds, which came from the UNDP Democratic Governance Thematic Trust Fund (DGTTF) were instrumental in starting the design process for the Project, and led to the design of a much broader and comprehensive process (complemented by other resources), which will provide a basis for developing a longer-term programme to improve access to justice for poor, marginalized and conflict-affected communities in Indonesia.

- **Committed programme staff willing to test HRBAP strategies:** Designing and implementing a HRBAP strategy requires a committed programme staff that is willing to invest time and energy (as rights-based strategies are very resource inducive in terms of time taken to achieve viable outcomes). In this case, there exist a committed UNDP Indonesia Access to Justice Project staff under the umbrella of the larger UNDP Indonesia Governance Programme who was willing to invest and take risks in programming to develop such a strategy that was not tried and tested before in such a programme context in the country. Management support is also key, in terms of allowing Project staff to engage in such activities.

- **Using the enabling policy framework to legally access rights:** Indonesia’s move towards devolving power to the local levels (though fraught with attendant risks like no corresponding budget to support such devolution, corruption at the lower levels of the bureaucracy, and so on) has broader rights-based ramifications. The Project made use of such a decentralized policy framework to design activities wherein disadvantaged groups could legally access and use the local informal justice systems and make such systems accountable in delivering justice.

Challenges in Implementing the Rights-Based Approach: Process Lessons Learned

- **Identifying local partners who are well-capacitated to work on a rights-based approach a key:** It is a well-documented fact that working under a rights-based framework, besides being resources intensive –human, managerial, funds and time involved – also requires working with a local partner who either has the experience/capacity in undertaking HRBAP or is willing to invest in the shared objectives of how a rights approach can help achieve developmental outcomes. In this case, PSPK and the provincial university legal departments seemed to be the logical choice for this role and they were approached to gauge their interest in working under such an approach. However, while explaining the significant role that was envisioned for these local partners, there was a simultaneous realization that capacities of these
partners, through vigorous training on rights-based principles and programming approaches needed to be built (and this holds true if UNDP seeks to work with any local, indigenous organisations in the country) and was the key if any rights-based programming strategy could be developed and used. This was the initial major challenge that the Project had to face and had to immediately start work on.

➤ **Making distinctions between partnerships and mere “contractors” imperative:** The HRBAP that the Project is attempting to apply is relatively untested and required capacity building of PSPK and its local partners. A major programming process lesson learnt for UNDP is that it is not only important for the agency to develop capacities but also to be clear and open about whether an implementing partner is really a ‘partner’ (working together into the development and overall direction of the Project) or merely a ‘contractor’ (whose role is limited to the practical implementation of a project completely designed by others).

➤ **Facilitating meaningful participation of stakeholders to access justice and claim rights a challenge, especially in a conflict setting:** One of the key challenges that remain is how to facilitate the meaningful - and not merely tokenistic - participation of disadvantaged groups (especially in this current project scenario where work involves soliciting access of disadvantaged groups to justice in a conflict setting) so as to enable them to claim their rights in the remainder of the larger Access to Justice Project (apart from the planned pilot projects). At this stage, it is therefore more realistic to view this Project as the preparatory stage for a larger and longer-term Access to Justice Project, with much greater participation of claim-holders and duty-bearers in the project design and implementation made possible through the knowledge accumulated during this “Strengthening Access to Justice and the Rule of Law” Project that has designed and is now using these HRBAP strategies.