

THE PROBLEM WITH THE DUTY TO ADJUDICATE:  
 HOW MEDIATIONS CAN PROMOTE  
 INTERNATIONAL HUMAN RIGHTS

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## I. INTRODUCTION

If Americans discovered that a gold mine in the United States was employing young children, there would be an uproar. There would be calls for action against the company, parents, community, and government. Prosecuting those responsible would be the only reasonable solution. However, while working with Timap for Justice<sup>1</sup> in rural Sierra Leone,<sup>2</sup> I dis-

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1. "Timap for Justice is a pioneering effort to provide basic justice services in Sierra Leone. Because of a shortage of lawyers in the country and because of Sierra Leone's dualist legal structure, Timap's frontline is made up of community-based paralegals rather than lawyers. We presently employ over 70 staff who work in 19 paralegal offices across Sierra Leone as well as in the capital Freetown." *Our Work, TIMAP FOR JUSTICE*, <http://www.timapforjustice.org/work/> (last visited May 1, 2013).

covered first-hand that even in cases of clear human rights violations,<sup>3</sup> resolving abuses is often a gray area.

When Timap paralegals and I learned that young children were working in a gold mine in Mayatha, a tiny village in Northern Sierra Leone, calling the police or lawyers was not an option. Although Sierra Leonean laws limit the use of child labor,<sup>4</sup> the formal court system is relatively inaccessible to the population. Additionally, impoverished villages and parents need children to contribute to their community and family. The government is unlikely to press the issue or enforce existing laws, as it relies on foreign investors—some of whom place little importance on human rights and prioritize profits instead. A divisive prosecution may hamper future relations between the mining company and the community who depends on them. Furthermore, it would be hypocritical for members of the international community to have higher expectations for Sierra Leone's human rights than they had for their own societies during similar stages of development. Finally, in most villages a developed justice system does not exist. Justice may remain a pipedream if those responsible for exploiting young children for intense manual labor are not held responsible via adjudication.<sup>5</sup>

Proponents of adjudications offer numerous reasons why prosecutions should be the preferred—and potentially exclusive—method for resolving international human rights abuses. Adjudications seem to be the best instrument through which to administer two of the primary goals of criminal justice: retribution and deterrence. Under the theory of retribution, violators of human rights are morally culpable and therefore must be punished for their wrongdoings; deterrence holds that this punishment will prevent people from committing similar

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2. I will be using Sierra Leone as an example because of my experience as a legal intern for Timap and its role in using innovative solutions to promote and protect human rights.

3. The Convention on the Rights of the Child protects children from economic exploitation. Convention on the Rights of the Child art. 32(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

4. Child Right Act, 2007, § 32 (Sierra Leone), available at <http://www.sierra-leone.org/Laws/2007-7p.pdf>.

5. For the purposes of this paper, I define “adjudications” as formal, adversarial judicial processes. Similarly, “prosecutions” are criminal adjudications.

crimes. Supporters of adjudication point to its precedent-setting capability, which can further influence deterrence. For instance, in transitional justice settings, adjudications can provide victims with a sense of justice and finality<sup>6</sup> while combating impunity.<sup>7</sup> Moreover, some human rights advocates maintain that adjudications are not simply the *preferred* method—they are the *required* method for confronting human rights violations,<sup>8</sup> especially the gravest abuses,<sup>9</sup> for the aforementioned reasons.

Not only do advocates of adjudication note its advantages, they also cast doubts on the advisability and effectiveness of informal dispute resolution mechanisms—specifically mediations<sup>10</sup>—for resolving human rights violations. Mediation-based punishment is often less severe than punishment under adjudications<sup>11</sup> and also tends to be more difficult to enforce.<sup>12</sup> Critics of mediation contend that victims should not

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6. See *International Online Training Program on Intractable Conflict: Criminal Prosecution*, UNIV. COLO. CONFLICT RESEARCH CONSORTIUM, <http://www.colorado.edu/conflict/peace/treatment/crimpros.htm> (last visited May 1, 2013) (“Criminal prosecution of human rights abusers gives the victims some sense of finality and justice.”).

7. Elisabeth Malkin, *Ex-Dictator is Ordered to Trial in Guatemalan War Crimes Case*, N.Y. TIMES (Jan. 28, 2013), <http://www.nytimes.com/2013/01/29/world/americas/ex-dictator-is-ordered-to-trial-in-guatemala-for-war-crimes.html>. See also Thomas Escritt, *Libya Must Hand Over Gaddafi Spy Chief—Hague Judges*, REUTERS (Feb. 7, 2013), <http://uk.reuters.com/article/2013/02/07/uk-libya-icc-senussi-idUKBRE9160MY20130207> (discussing ICC efforts to extradite Abdullah al-Senussi).

8. See generally ANJA SEIBERT-FOHR, *PROSECUTING SERIOUS HUMAN RIGHTS VIOLATIONS* (2009) (discussing the extent to which prosecutions are necessary for the protection of human rights).

9. See Juan E. Mendez, *The Inter-American System of Protection: Its Contributions to the International Law of Human Rights*, in *REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* 122 (Samantha Power & Graham Allison eds., 2000) (discussing how the Inter-American Court’s establishing that states have a duty to investigate, prosecute, and punish certain crimes has influenced the international community’s willingness to institute universal jurisdiction for certain crimes).

10. While there are many forms of alternative dispute resolution (ADR), I will focus on mediations due to my experiences at Timap.

11. Incarceration, for example, is generally not a remedy in mediations.

12. PAMELA DALE, *WORLD BANK’S JUSTICE FOR THE POOR, DELIVERING JUSTICE TO SIERRA LEONE’S POOR: AN ANALYSIS OF THE WORK OF TIMAP FOR JUSTICE* 42 (2009) (“Enforcement difficulties are not confined to the work of *Timap* or other human rights organizations, as traditional authorities inter-

be placed in any situation where they will have to confront the person who breached their rights due to the psychological trauma many victims experience under such circumstances.<sup>13</sup> They also attest that, while the interest of victims is considered in both adjudications and mediations, the state—not the victims—should be the final decision-maker regarding justice issues. Furthermore, when parties resolve an issue through mediation, discussions and resolutions are generally private; this privacy fails to create social norms, thus keeping vulnerable persons at risk. Finally, mediations can be especially dangerous when there is a power imbalance between the perpetrator and the victim. Examples of this include mediations between a corporation and a worker, a man and a woman, or when children are involved. To sum, those skeptical of using mediations to resolve human rights claims can point to its many potential pitfalls.

Yet there are serious issues with the current mechanisms for resolving human rights resolutions and enforcing remedies. As the obligation to prosecute human rights abuses emerges as an accepted norm, it is important to examine the consequences of that duty. In this Note, I expose the potential drawbacks to considering adjudication as the *only* option for remedying human rights abuses. Furthermore, I discuss the use of mediations as an alternative or complement to adjudications. I contend that mediations should be used more widely to improve human rights enforcement and protect vulnerable persons from future violations. Mediations can help fill the gaps that currently exist with adjudications as the default enforcement mechanism. For example, people are generally most susceptible to human rights violations in states with a weak rule of law,<sup>14</sup> which in turn correlates to limited access to

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viewed in the course of this study expressed difficulties ensuring compliance similar to those faced by *Timap*.”).

13. Rose Garrity, *Mediation and Domestic Violence* (1998), available at [http://www.biscomi.org/documents/MEDIATION\\_AND\\_DOMESTIC\\_VIOLENCE.html](http://www.biscomi.org/documents/MEDIATION_AND_DOMESTIC_VIOLENCE.html) (arguing that using mediations for domestic violence subjects the victim to the perpetrator’s terrorism).

14. See G.A. Res. 67/1, ¶ 5, U.N. GAOR, 67th Sess., U.N. Doc. A/67/L.1 (Sept. 19, 2012) (affirming the link between human rights, the rule of law, and democracy).

justice.<sup>15</sup> Mediations can improve access to justice in states that are struggling to enforce international human rights norms. In fact, they may even be preferable under some circumstances due to their greater availability and their ability to promote human rights appreciation in developing nations as well as focus on the needs of both the victim and the perpetrator. I will examine how mediations can be used to address circumstances like the previously described child labor abuses in Mayatha. I argue that mediations should be an acceptable and, in some circumstances, even the preferred method to remedy human rights abuses. I will illuminate the advantages, disadvantages, and feasibility of using mediations as a method of confronting human rights abuses. However, this Note does not argue that mediations are an acceptable means to resolve *all* human rights abuses; instead, it contends that stakeholders should examine mediations as a potential tool to provide justice and human rights protections to people around the world.

Beginning in Part II, I will examine the existing mechanisms for and mentalities toward addressing human rights abuses, including why adjudications are often favored over mediations. Then, Part III will discuss the theoretical advantages of mediations and how states could meet their duty to protect human rights through mediations. Part IV will delineate how mediations have been used globally, best practices and safeguards for mediating, and finally, how the international community and state actors can promote the use and implementation of mediations. I will conclude in Part V by summarizing the discussions in this Note as well as recognizing the important role that mediations can play in improving global human rights.

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15. See U.S. INST. FOR PEACE & U.S. ARMY PEACEKEEPING AND STABILITY OPERATIONS INST., GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION 86 (2009) (arguing that there is no access to justice where citizens fear the system and the justice system is inaccessible or incomprehensible); *In Focus: Strengthening Women's Access to Justice*, U.N. WOMEN, <http://www.unwomen.org/news-events/in-focus/strengthening-womens-access-to-justice/> (last visited Nov. 4, 2013) (calling on governments to increase access to justice for women, because "the rule of law often rules women out").

## II. EXISTING MECHANISMS FOR ADDRESSING HUMAN RIGHTS VIOLATIONS

The modern conception of international human rights as a body of law originated after World War II.<sup>16</sup> In 1948, the U.N. General Assembly adopted the Universal Declaration on Human Rights (UDHR), the foundational document for international human rights.<sup>17</sup> Many of the principles in the UDHR have become customary international law (CIL)<sup>18</sup> through their incorporation in constitutions<sup>19</sup> and the creation of regional and global human rights charters<sup>20</sup> and treaties.<sup>21</sup> The broad topic of state obligations under international human rights treaties extends beyond the scope of this Note;<sup>22</sup> for the purposes here, it is enough to recognize that states have some level of obligation to protect the human rights of their people.<sup>23</sup>

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16. *A Short History of Human Rights, in HUMAN RIGHTS HERE AND NOW* (Nancy Flowers ed., 1998), available at <http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-1/short-history.htm>.

17. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

18. See Vojin Dimitrijevic, *Customary Law as an Instrument for the Protection of Human Rights* 8–9, 14 (ISPI, Working Paper No. 7, 1998) (exploring how principles and rights of the UDHR became a part of CIL). See also *A Short History of Human Rights*, supra note 16 (stating that the UDHR is a part of CIL).

19. *A Short History of Human Rights*, supra note 16.

20. E.g., African Charter on Human and Peoples' Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 59; Statute of the Inter-American Commission on Human Rights (1979); Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), Nov. 4, 1950, 213 U.N.T.S. 221.

21. E.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

22. See, e.g., Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1950 (2002) ("Once a state has accepted such an obligation, the argument continues, the obligation becomes binding and a nation must comply with it."); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999) (arguing that is appropriate for judges to apply customary international law, including human rights treaties).

23. See Rhonda Copelon, *The Indivisible Framework of International Human Rights: A Source of Social Justice in the U.S.*, 3 N.Y. CITY L. REV. 59, 66–67 (1998) (discussing the obligations of states under the ICCPR). See generally Rolf Kühnemann & David Bergman, *Module 9: Obligations of States and Nonstate Actors*,

The duty to prosecute grave human rights violations such as genocide, crimes against humanity, and war crimes is arguably a CIL norm.<sup>24</sup> Accordingly, the International Criminal Court (ICC) or, in specific instances, an ad hoc tribunal,<sup>25</sup> has jurisdiction<sup>26</sup> over these abuses if domestic courts are unable or unwilling to prosecute.<sup>27</sup> Therefore, this Note will not focus on the gravest human rights violations for which prosecution is mandatory. Instead, I will examine more prevalent human rights abuses that afflict the developing world: abuses against women, children, laborers, and other marginalized groups.<sup>28</sup>

### A. Adjudication: The Default Method

As I previously mentioned, states are responsible for protecting their peoples' human rights<sup>29</sup> and are required to provide remedies and promote justice if abuses occur.<sup>30</sup> Concurrently with this responsibility has come the emerging norm that states should resolve abuses through adjudication.<sup>31</sup> Adju-

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in CIRCLE OF RIGHTS: ECONOMIC, SOCIAL & CULTURAL RIGHTS ACTIVISM: A TRAINING RESOURCE (International Human Rights Internship Program & Forum Asia 2000), available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module9.htm> (providing an overview of states' obligations to protect human rights).

24. Jan Wouters, *The Obligation to Prosecute International Law Crimes* (2005), available at <http://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>.

25. See U.N. Charter art. 29 (allowing the Security Council to establish subsidiary organs).

26. Generally, the ICC will take jurisdiction over such crimes if (1) the crimes occur within the jurisdiction of a state party; (2) the crime is committed by a citizen of a state party; and (3) the Security Council refers a crime to the ICC Prosecutor. Rome Statute of the International Criminal Court arts. 12–13, July 17, 1998, 2187 U.N.T.S. 90.

27. *Id.* art. 17.

28. See generally Francesca Klug, *Human Rights and Victims*, LSE CENTRE FOR THE STUDY OF HUMAN RIGHTS (June 2003), [http://www.lse.ac.uk/humanRights/articlesAndTranscripts/Human\\_rights\\_victims.pdf](http://www.lse.ac.uk/humanRights/articlesAndTranscripts/Human_rights_victims.pdf) (discussing vulnerable victims of human rights abuses).

29. Copelon, *supra* note 23, at 66–67.

30. See Jacob Abiodun Dada, *Judicial Remedies for Human Rights Violations in Nigeria: A Critical Appraisal*, 10 J.L. POL'Y & GLOBALIZATION 1, 2 (2013) (noting that the Nigerian Constitution provides a wide range of adjudicatory, judicial remedies for human rights violations in order to comply with its international obligation).

31. See Anja Seibert-Fohr, *The Fight Against Impunity Under the International Covenant on Civil and Political Rights*, 6 MAX PLANCK YEARBOOK U.N. L. 301,



dication advocates assert that if human rights abuses are not formally adjudicated, perpetrators go unpunished. This argument holds that, without adjudications and the attached punishment, the state is not meeting its obligation to protect the human rights of its people. The emphasis on promoting accountability in international law has made adjudications the default method for resolving human rights abuses.

Furthermore, human rights advocates can present several reasons why adjudication is the proper mechanism to resolve human rights abuses. First, it is the state's duty to prevent and protect the human rights of its peoples, and adjudications are the dispute resolution system most controlled by the state. Because states are the primary actors in protecting human rights, they should be the ones who condemn and punish violations. Other dispute resolution methods can place too much power in the hands of victims or other private actors.<sup>32</sup> Second, human rights violations are often accompanied by enormous power imbalances: corporations subjecting laborers to horrible working conditions, male spouses abusing their wives who have little influence due to cultural and gender norms, guardians or others with authority forcing children into labor, or governments treating religious or ethnic minorities unequally. Ideally, a court of law is an institution wherein all men, women, and organizations are treated fairly and equally. Thus, state-run adjudications theoretically level the playing field for justice to be served.<sup>33</sup> Third, adjudications may better disseminate norms to the public than other forms of dispute resolution. Court hearings and rulings are generally public and have

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324 (2002) (“[I]t is consistent to frame the duty to prosecute as an objective duty of general human rights protection.”). See also Press Release, Org. of Am. States, IACHR Reminds Haiti of its Ongoing Duty to Investigate and Prosecute Human Rights Violations, (Jan. 19, 2011), available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2011/003.asp](http://www.oas.org/en/iachr/media_center/PReleases/2011/003.asp) (reminding Haiti that it must prosecute its former president).

32. See Erin Ann O'Hara & Maria Mayo Robbins, *Using Criminal Punishment to Serve Both Victim and Social Needs*, 72 L. & CONTEMP. PROBS. 199, 212–16 (2009) (discussing concerns of victim-offender-mediations).

33. Alfred W. Meyer, *To Adjudicate or Mediate: That is the Question*, 27 VAL. U. L. REV. 357, 379 (1993) (discussing the argument that “public, rule-based adjudication protects fundamental, individual rights; promotes justice by reducing the advantage of the rich over the poor and the strong over the weak”).

a uniquely authoritative precedent-setting ability,<sup>34</sup> which means that adjudications may have a greater societal impact than other mechanisms.<sup>35</sup> This relates to the particularly high importance of precedent setting in common law countries such as Sierra Leone. For example, the recent conviction of nine women for performing female genital mutilation (FGM) in Côte d'Ivoire<sup>36</sup> received international media attention, while mediations related to FGM would remain confidential; this attention may result in adjudications having a greater public impact than mediations. If the public is informed about human rights norms and the punitive consequences of violating them, people's actions may better conform to human rights standards. Fourth, adjudications still may be the best way to satisfy traditional criminal justice goals such as retribution and deterrence.<sup>37</sup> In order to provide retribution and deterrence, incarceration may be necessary, and legitimate incarceration, which is almost always state-operated, necessitates a fair adjudication.

These are just a few of the primary arguments that advocates of human rights adjudication have set forth. These reasons also explain why adjudication has become the default method for resolving human rights abuses. Additionally, proponents of adjudications can easily point to weaknesses in other methods, which I will address next, in order to cement their claim that adjudications should be the default method of resolving human rights violations.<sup>38</sup>

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34. Precedent only plays a minor role in civil legal systems.

35. See Meyer, *supra* note 33, at 379 (noting that adjudications develop a "body of precedent essential for the settlement of disputes in a pluralistic society").

36. *9 Ivory Coast Women Sentenced over Genital Mutilation*, ASSOCIATED PRESS (July 20, 2012), <http://bigstory.ap.org/article/9-ivorian-women-sentenced-over-genital-mutilation>.

37. O'Hara & Robbins, *supra* note 32, at 208 (identifying retribution and deterrence as major criminal justice objectives of the state).

38. See Caroline Rees, *Mediation in Business-Related Human Rights Disputes: Objections, Opportunities and Challenges* 5–6 (Harvard Kennedy Sch. Corp. Resp. Initiative, Working Paper No. 56, 2010) (discussing objections of human rights advocates to mediations and the preference for adjudications).

## B. *Perceived Disadvantages of Mediations*

Because the mediation field is so broad, I am focusing on mediations that can remedy human rights abuses that marginalized persons experience on a regular basis. I examine the apparent drawbacks of using mediations to resolve these types of everyday human rights abuses. Mediations have been used as a step in settling major international and domestic conflicts, and the United Nations has even provided guidelines on these types of mediations.<sup>39</sup> However, mediations have remained a controversial topic in the transitional justice field.<sup>40</sup> In the past, mediations were primarily used between political leaders who were guilty of grave human rights abuses, and immunity was often granted if the leader would step down.<sup>41</sup> Granting immunity fueled sentiments against the use of mediation as a transitional justice mechanism, since transitional justice is grounded in the struggle to end impunity. On the contrary, other transitional justice scholars recognize mediation as a useful tool<sup>42</sup> due to its focus on restorative justice<sup>43</sup> and its

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39. U.N. Mediation Support Unit, *Guidance for Effective Mediation* (Sept. 2012), <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/UN%20Guidance%20for%20Effective%20Mediation.pdf>.

40. *See generally Fact Sheet—EEAS Mediation Support Project—Transitional Justice in the Context of Peace Mediation*, E.U. EXTERNAL ACTION SERVICE (Nov. 2012), [http://eeas.europa.eu/cfsp/conflict\\_prevention/docs/2013\\_eeas\\_mediation\\_support\\_factsheet\\_transitional\\_justice\\_en.pdf](http://eeas.europa.eu/cfsp/conflict_prevention/docs/2013_eeas_mediation_support_factsheet_transitional_justice_en.pdf) (discussing the issues and complications of using mediations during transitional justice).

41. *See, e.g.*, CHARLES T. CALL, INT'L PEACE INST., UN MEDIATION AND THE POLITICS OF TRANSITION AFTER CONSTITUTIONAL CRISES 8 (2012), *available at* [http://www.ipinst.org/media/pdf/publications/un\\_1.PDF](http://www.ipinst.org/media/pdf/publications/un_1.PDF) (noting that mediations after the post-election violence in Kenya stopped the rising ethnic conflict, but continued impunity). *See generally* Christoph Leonhard Fuchs, *Head of State Immunity in the Case of Grave Violations of Human Rights* (Aug. 9, 2010) (unpublished Bachelor thesis, University of Twente), *available at* [http://essay.utwente.nl/60344/1/BSc\\_C\\_Fuchs.pdf](http://essay.utwente.nl/60344/1/BSc_C_Fuchs.pdf) (discussing issues involved in head of state immunity).

42. Although there are debates over the use of mediations to establish peace—albeit while potentially restricting justice—that discussion is beyond the scope of this Note.

43. “Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior.” *Restorative Justice*, U.S. DEP'T JUSTICE OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, <http://www.ojjdp.gov/mpg/progTypesRestorative.aspx> (last visited Aug. 7, 2013).

ability to “maximize[] the autonomy, sovereignty and dignity of the conflict actors involved.”<sup>44</sup>

Mediations, peaceful settlements, or compromises between two disputants through the objective intervention of a third party<sup>45</sup> are generally based on five principles: voluntariness, informed consent, self-determination, impartiality, and confidentiality.<sup>46</sup> Mediations have traditionally been used in non-criminal situations, such as family, workplace, or commercial disputes.<sup>47</sup> However, in order for mediations to resolve human rights abuses, some of these principles must be altered. The most problematic principles are those that relate to mediation’s ability to achieve traditional criminal justice goals, with which proponents of adjudications often find fault. This section will explore mediation elements that adjudication proponents perceive as downfalls.

Some principles of mediation directly conflict with what human rights advocates consider to be ideal with respect to resolving human rights violations. First, a form of dispute resolution that is voluntary seems backwards because perpetrators should be brought to justice whether or not they voluntarily participate in resolving the abuse. Next, informed consent can be an issue if victims and perpetrators are encouraged to mediate problems without being informed of other justice options. Additionally, since mediation resolutions are privately determined—which significantly enhances the parties’ autonomy—they can appropriate the state’s monopoly on administering justice. Moreover, if mediators are completely impartial and passive, mediations may not properly protect and promote human rights law because victims and perpetrators may be unaware of their rights under the law. Furthermore, mediation confidentiality could perpetuate communities’ ignorance of the legal consequences of violating human rights. Finally,

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44. LARS KIRCHHOFF, LINKING MEDIATION AND TRANSITIONAL JUSTICE 5 (2007), available at [http://www.peacemediation.de/pub/Kirchhoff\\_TJ.pdf](http://www.peacemediation.de/pub/Kirchhoff_TJ.pdf).

45. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

46. *Principles of Mediation*, BOSTON DISPUTE RESOLUTION SERVICES, [http://www.bostonresolution.com/BDRS\\_services\\_mediation\\_principles.html](http://www.bostonresolution.com/BDRS_services_mediation_principles.html) (last visited Nov. 1, 2013).

47. *International Online Training Program on Intractable Conflict: Mediation*, UNIV. COLO. CONFLICT RESEARCH CONSORTIUM, <http://www.colorado.edu/conflict/peace/treatment/mediatn.htm> (last updated July 20, 1999).

these principles can be construed as misaligned with a justice system based on the rule of law “in which the laws are public knowledge, are clear in meaning, and apply equally to everyone.”<sup>48</sup> These flaws illustrate the need to alter or supplement the five principles of mediation in order to make mediations an appropriate mechanism for resolving human rights abuses.

Next, critics of using mediations tend to point to the increased role of the victim in mediations than in adjudications. Some argue that it is unfair and unwise to use a form of justice that forces victims to directly confront perpetrators<sup>49</sup> since such victim-perpetrator interactions may aggravate the damages already inflicted.<sup>50</sup> This criticism is especially prevalent with respect to domestic violence contexts, where victims may suffer from battered person syndrome.<sup>51</sup> Even proponents of mediations have opined that even if the victim forgives the perpetrator, the formal justice system must still condemn and prosecute the illegal actions.<sup>52</sup> This indicates the concern of both sides regarding the victim’s role in the process.

Finally, one of the greatest disadvantages of mediations is the lack of international support for the mediation programs.<sup>53</sup> The majority of the funding that the United Nations, donor states, and non-governmental organizations (NGOs) allocate for rule of law and human rights capacity-building programs is reserved for courts and education initiatives. In fact, in the rare times that the United Nations has addressed infor-

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48. Thomas Carothers, *The Rule-of-Law Revival*, 77 FOREIGN AFF. 95, 96 (1998).

49. See, e.g., Garrity, *supra* note 13 (explaining that in mediations, the victim is made to feel responsible for the abuser’s behavior).

50. While adjudications will often involve victims confronting perpetrators, mediations require a higher level of victim-perpetrator interaction.

51. See generally Karla Fischer et al., *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. Rev. 2117 (1993) (criticizing the practice of mediation against the background of the culture of battering).

52. Ilyssa Wellikoff, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO J. CONFLICT RESOL. 1 (2004) (noting that criminal prosecutions should accompany victim-offender mediations), available at <http://cardozoocr.com/issues/volume-5-1/note-1/>.

53. See EWA WOJKOWSKA, UNDP, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE 5 (2006), available at <http://www.democraciaejustica.org/cienciapolitica3/sites/default/files/doingjusticeewawojkowska130307.pdf> (discussing the UNDP’s lack of support for informal justice mechanisms).

mal justice systems, it has generally done so with a view to decrying corruption and the systems' lack of compliance with international norms.<sup>54</sup> Furthermore, although a few U.N. agencies have recently begun to notice the potential of informal justice systems, there are no official guidelines on how to create effective mediation programs.<sup>55</sup> History has shown the United Nations' disinterest in promoting informal justice, which continues today. Until international actors expand their focus to include different forms of justice, mediation initiatives will fail to maximize their potential.

### C. *Problems with Existing Mechanisms*

Although there are advantages to adjudicating human rights violations and disadvantages to mediating, there are significant limitations in all existing processes for resolving human rights abuses. As I previously mentioned, the human rights movement has made great strides over the last century. However, while most states are now aware that failing to protect their people's human rights can have numerous negative repercussions, improvements must be made regarding the availability of recourse for violations. This section addresses these current holes in promoting human rights.

#### 1. *Insufficient Access to Justice*

"It is well understood that there can be no legal right without a remedy and, further, that the remedy must be accessible if it is to be meaningful."<sup>56</sup> Along these lines, the UDHR states that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>57</sup> This notion of one's right to a remedy relates to one's access to justice.<sup>58</sup> Thus, the lack of a remedy has compromised access

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54. *Informal Justice*, UNITED NATIONS RULE OF LAW, [http://www.unrol.org/article.aspx?article\\_id=30](http://www.unrol.org/article.aspx?article_id=30) (last visited Oct. 29, 2013).

55. See, e.g., FERGUS KERRIGAN ET AL., UNDP, *INFORMAL JUSTICE SYSTEMS: CHARTING A COURSE FOR HUMAN RIGHTS-BASED ENGAGEMENT* (2012).

56. Faisal Bhabha, *Institutionalizing Access-to-Justice: Judicial, Legislative and Grassroots Dimensions*, 33 QUEEN'S L.J. 139, 139 (2007).

57. Universal Declaration of Human Rights, *supra* note 17, art. 8.

58. Although I contend that "competent national tribunals" should include informal justice mechanisms, the international human rights community has focused mainly on formal—generally adjudication-based—resolu-

to justice throughout developing countries. Much of the developing world's population is unable to receive protection regarding their human rights because developing countries simply lack an adequate route toward a remedy. I contend that the four primary reasons for insufficient access to justice are: infrastructure, human capital, speed, and money.

First, I will discuss infrastructural problems in the developing world, which struggles to obtain the justice that many take for granted in the developed world. If a person has their rights violated in the United States they can call the police, contact a lawyer, or access a number of alternative options to try to resolve the issue. These resources are neither common nor accessible in many parts of the developing world. In Sierra Leone—especially the rural areas—there is poor access to phones, so contacting the police or a lawyer can be prohibitively difficult. In addition, formal courts are often physically inaccessible<sup>59</sup> due to the relative absence of motor vehicles and abysmal roads. It took one traveler seven hours to reach the courts in Magburaka, which were only 30 miles away from his village.<sup>60</sup>

The developing world suffers from a dearth of lawyers who can help resolve human rights disputes. In 2006, Timap calculated that Sierra Leone, which currently has a population of approximately 6 million people, had only 100 practicing lawyers.<sup>61</sup> Thus, even if victims of human rights abuses can access the courts, they may not find a lawyer or anyone with legal knowledge available to assist them. Furthermore, only lawyers are allowed to represent a client in court in Sierra Leone; consequently, if adjudication is the primary means of remedying human rights abuses, many cases will fall to the wayside simply due to the sheer lack of lawyers. This is worrisome since, as a result, it is nearly impossible to provide persons accused of crimes with necessary legal counsel—an important component

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tion systems. See WOJKOWSKA, *supra* note 53, at 8 (discussing the international community's focus on formal justice systems).

59. Although courts are set up to be between one and forty-five miles from all villages, this can be an extraordinary distance. BRAIMA KOROMA, LOCAL COURTS RECORD ANALYSIS SURVEY IN SIERRA LEONE 4 (2007).

60. *Id.* at 14.

61. Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, 31 YALE J. INT'L L. 427, 436 (2006).

of a fair trial. In fact, only five to ten percent<sup>62</sup> of Sierra Leonean criminal inmates receive any legal counsel.<sup>63</sup>

The speed of current legal systems in the developing world is also concerning, as adjudications take significantly longer than other dispute resolution processes.<sup>64</sup> Especially in developing nations, court systems are inefficient and overly bureaucratic, and transportation and communication channels are often poor.<sup>65</sup> The slowness of adjudications can discourage people from bringing cases altogether,<sup>66</sup> which creates a class of victims without remedies. Finally, nearly all of the developing world's population is, by definition, poor, and adjudications are a very expensive form of dispute resolution<sup>67</sup> for both states and participants.<sup>68</sup> When adjudications are the primary tool for resolving human rights abuses, it is inevitable that most cases will not be pursued. It can be difficult to navigate the bureaucratic court systems without a lawyer, which most

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62. U.S. STATE DEP'T, 2010 HUMAN RIGHTS REPORT: SIERRA LEONE 7 (2011).

63. We take for granted that even those accused of the most horrendous crimes are granted access to counsel in the United States; Gideon guarantees are not present in Sierra Leone. *See id.* (discussing the lack of legal counsel in Sierra Leone).

64. *See also Government and Institutional Reform: Improving Access to Justice for Marginalized People in Bangladesh*, EUROPEAID (2012), [http://ec.europa.eu/europeaid/documents/case-studies/bangladesh\\_access-to-justice\\_en.pdf](http://ec.europa.eu/europeaid/documents/case-studies/bangladesh_access-to-justice_en.pdf) (noting that more informal local courts in Bangladesh are quicker than the formal justice system); WOJKOWSKA, *supra* note 53, at 5 (discussing the potential for informal justice systems to be quicker than formal justice systems).

65. *See* Nancy Cantalupo et al., *Domestic Violence in Ghana: The Open Secret*, 7 GEO. J. GENDER & L. 531, 581 (2006) (discussing the inefficiencies in Ghana's courts systems, particularly when bringing domestic violence cases).

66. *See A New United Nations Security Council Resolution (United Nations S/RES/2106 (2013)) Aimed at Sending a Strong Message to Perpetrators of Sexual Violence in Conflict and Post Conflict Situations Has Been Unanimously Adopted by the UN Security Council, Paving the Way for Governments to Punish Perpetrators of Violence as Well as Ending Impunity*, SIERRA HERALD (June 24, 2013), <http://www.sierraherald.com/unsc-newresolution-onsexualviolence.htm> (discussing the slowness of the legal system and how many people cannot afford to go to trial).

67. Although an atypical trial, the nine-year trial of Charles Taylor came with a \$250 million price tag. Justin Sandefur, *Was the Charles Taylor Trial Worth the Price Tag?*, RELIEFWEB (May 31, 2012), <http://reliefweb.int/report/sierra-leone/was-charles-taylor-trial-worth-price-tag>.

68. KERRIGAN ET AL., *supra* note 55, at 76 (noting that the costs of adjudications can cause people to choose informal justice mechanisms).



people cannot afford. Thus, while the funding of adjudications by the state may result in cases with major societal impact, adjudications will remain largely unaffordable for the populace. However, the Committee on Economic, Social and Cultural Rights has emphasized that the objective of the International Covenant on Economic, Social and Cultural Rights is to protect vulnerable groups within society.<sup>69</sup> When considering how to protect the human rights of peoples across the world, pro-poor policies should be at the forefront.<sup>70</sup>

Clearly, not enough is being done to provide access to justice to poor and marginalized people. As I stated above, there is no legal right without a remedy, and the remedy must be accessible in order to be meaningful.<sup>71</sup> At this point, even though the international community has been promoting human rights around the globe, without access to remedies, those rights are meaningless.

## 2. *All or Nothing Dilemma*

*“I wanted my husband to stop beating me, not to be stuck in prison.”* – Timap Client

Another problem with adjudications with respect to protecting human rights is its all-or-nothing character. If adjudication is the only way that human rights abuses can be resolved, cases may not be brought forward at all.<sup>72</sup> I witnessed this dilemma during my time working in the Magburaka office of

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69. *The Human Rights Protection of Vulnerable Groups*, ICELANDIC HUMAN RIGHTS CENTRE, <http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/humanrightsconceptsideasandfora/Undir-flokkur/> (last visited Aug. 7, 2013).

70. See Jeremy Perelman, *The Way Ahead: Access-to-Justice, Public Interest Lawyering, and the Right to Legal Aid in South Africa: The Nkuzi Case*, 41 STAN. J. INT'L L. 357, 397 (2005) (noting that legal aid programs that assist the poor are scarce).

71. Bhabha, *supra* note 56.

72. By all or nothing, I mean that either cases are brought through formal adjudications or not brought at all. This dilemma is a problem when victims refuse to bring forth a case because they are concerned by the resolution options that formal systems provide. For example, if a corporation has violated child labor laws, but the parents of the children worry that their jobs will be endangered if an adjudication occurs and there are no other remedies available, the parents may take no action.

Timap when Mariama<sup>73</sup> came into our office regarding her husband, who was in prison because she had pressed domestic violence charges. Mariama told us she just wanted her husband to stop beating her—she did not want him to be imprisoned. Two weeks into his imprisonment, he was still awaiting trial and she could not afford to bail him out, which compromised her family's quality of life as they relied on him for living expenses.

While some people claim that mediations provide imperfect justice,<sup>74</sup> I believe they are still a critical avenue for justice. With respect to Mariama, who did not want adjudication's all-or-nothing justice, if her husband beat her again, she may reconsider reporting the crime to the police and consequently receive no justice. Different causes can be cited for Mariama's dilemma: the psychological toll of domestic violence on the victim, customs and policies that advantage men, socioeconomic reliance of women on men in developing nations.<sup>75</sup> There is little debate that culture affects the "acceptance" of domestic violence,<sup>76</sup> that domestic violence rates are high in developing states,<sup>77</sup> or that domestic violence violates human rights norms and principles.<sup>78</sup> However, placing adjudication as the blanket response to domestic violence is the truly imperfect solution—especially when the only other option besides

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73. Names have been changed throughout to protect client confidentiality.

74. See, e.g., Fischer, *supra* note 51 (discussing the imperfections of mediation in the context of domestic violence and the culture of battering).

75. See generally NAT'L INST. JUST., *THE CRIMINALIZATION OF DOMESTIC VIOLENCE: PROMISES AND LIMITS* (1995), available at <https://www.ncjrs.gov/pdffiles/crimdom.pdf> (describing complications associated with the criminalization of domestic violence).

76. See generally FERNANDO MEDEROS, MELISSA INST., *DOMESTIC VIOLENCE AND CULTURE: MOVING TOWARD MORE SOPHISTICATED ENCOUNTERS* (2004), available at [http://www.melissainstitute.org/documents/eighth/domestic\\_violence\\_culture.pdf](http://www.melissainstitute.org/documents/eighth/domestic_violence_culture.pdf) (discussing domestic violence's connection to culture).

77. Michael Koenig et al., *Individual and Community Level Determinants of Domestic Violence in Rural Bangledash 1* (Hopkins Population Ctr. Papers on Population, WP 99-04, 1999), available at <https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/969/WP99-04.pdf>.

78. Lenora M. Lapidus, *Realizing the UDHR Requires Ending Violence Against Women*, ACLU (Dec. 09, 2008), <http://www.aclu.org/blog/human-rights-womens-rights/realizing-udhr-requires-ending-violence-against-women>.

alternative dispute resolution (ADR) processes would be to do nothing.<sup>79</sup>

A similar dilemma exists regarding FGM, which 80–90% of females in Sierra Leone have undergone.<sup>80</sup> This practice has been widely condemned by the United Nations and international human rights actors. In spite of this, a bill promoted by international human rights advocates prohibiting the practice that went before the Sierra Leonean legislature was withdrawn after politicians realized they would likely lose reelection if the bill passed.<sup>81</sup> Simeon Koroma, co-founder and director of Timap, commented that international human rights advocates can help develop norms against FGM in Sierra Leone.<sup>82</sup> He noted that first steps had already been taken to make the practice safer<sup>83</sup> and that measures were being implemented to ensure the practice would only be performed on females over the age of eighteen years.<sup>84</sup> Such small steps found favor with the community, and Koroma noted that this had generally decreased support for the practice across the country; yet there was a huge backlash when Western actors attempted to *ban* the cultural practice.<sup>85</sup> He noted that inter-

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79. A common criticism of the West is that it overlooks the time period that was necessary to achieve its current state of human rights. This observation could be noted in the way domestic violence is treated in the United States. While domestic violence is still a widespread problem, there are services for victims and couples that were nowhere to be seen a century ago. There was no light switch that turned domestic violence from allowable to banned—as many Sierra Leoneans, including Timap paralegals, said had occurred there.

80. U.S. STATE DEP'T, SIERRA LEONE: REPORT ON FEMALE GENITAL MUTILATION (FGM) OR FEMALE GENITAL CUTTING (FGC) (2001), available at <http://www.unhcr.org/refworld/topic,45a5fb512,46556aac2,46d5787cc,0,,,SLE.html>.

81. *Sierra Leone: The Political Battle on FGM/C*, IRIN (Dec. 17, 2012), <http://www.irinnews.org/report/97066/SIERRA-LEONE-The-political-battle-on-FGM-C>.

82. Interview with Simeon Koroma, Co-founder and Dir., Timap for Justice, in Freetown, Sierra Leone (Aug. 7, 2012).

83. *Id.*

84. *Leaders in Sierra Leone Sign Female Genital Mutilation Agreement*, FEMINIST DAILY NEWS (Apr. 17, 2009), <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=11646>.

85. Interview with Simeon Koroma, *supra* note 82. See also *Sierra Leone: The Political Battle on FGM/C*, *supra* note 81 (noting how politicians believe that calling for an immediate ban of FGM would be suicidal for their political careers).

national human rights advocates often put too much emphasis on “what *ought* to happen” instead of “what *is* happening” to victims. FGM is yet another example of a human rights violation that may not be resolvable through primary mechanisms that require one to adjudicate or forego justice completely.

### 3. *Adjudications: A Foreign Form of Dispute Resolutions*

In many developing nations, upwards of 80% of legal disputes are resolved via informal justice mechanisms.<sup>86</sup> These informal mechanisms can take many forms—from mediations and arbitrations to local chiefs unilaterally deciding disputes. Accordingly, while informal justice has been scarcely used in the developed world,<sup>87</sup> it has a long and diverse history in non-Western cultures. For example, informal justice has been used in Islamic law,<sup>88</sup> in Native American law,<sup>89</sup> and across Africa, Asia, and Latin America.<sup>90</sup> However, traditionally, international agencies like the United Nations, Western states, and NGOs that promote rule of law initiatives have remained critical of informal justice mechanisms. One of the few U.N. documents on mediations warns:

The process used and outcomes produced by such systems can raise concerns with regard to their compliance with international norms and standards. Corruption and abuse of power, as well as a lack of accountability, are common problems. Usually decisions are neither formally enforceable nor recorded, and tend to reinforce social hierarchies and discriminatory practices, such as the exclusion of women. In some instances, they contribute to perpetuating gross

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86. *Informal Justice*, *supra* note 54.

87. The developed world does use ADR, but it is often state-run or regulated.

88. WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATION* 162 (2009).

89. EVAN R. SEAMONE, *BRINGING A SMILE TO MEDIATION’S TWO FACES: HOW ASPIRING MEDIATORS MIGHT JUMP-START THEIR CAREERS FOLLOWING LAW SCHOOL* (2000), available at <http://www.uiowa.edu/~cyberlaw/elp00/Evan/mediation/origin.html>.

90. Tilmann J. Röder, *Informal Justice Systems: Challenges and Perspectives*, THE WORLD JUSTICE PROJECT (Jan. 28, 2013), <http://worldjusticeproject.org/blog/informal-justice-systems-challenges-and-perspectives>.

human rights abuses such as forced marriage and extrajudicial killing.<sup>91</sup>

While the concerns addressed here are warranted at times, many concerns could be raised about formal justice systems around the world, including those in the United States.<sup>92</sup> Instead of dictating what legitimate justice systems must look like, international human rights advocates should consider the ways that informal justice systems can positively impact human rights abuse victims by providing an accessible, flexible form of redress.

Furthermore, adjudications can actually harm interpersonal and intergroup relationships in post-conflict communities. Timap paralegals have warned of the risks of requiring Sierra Leoneans to use formalized Western-style justice systems. Adjudications are inherently adversarial: one side wins and the other side loses; however, due to cultural views of justice in the developing world, both sides rarely leave feeling that justice has been served. Some people with whom I spoke in Sierra Leone—where a brutal civil war ended a decade before my time there—see adversarial justice as potentially detrimental to their fragile communities and less formalized justice systems. Moreover, because of its lack of focus on reconciliation, Western-style justice potentially exacerbates pre-existing divisions within communities and the country as a whole.<sup>93</sup>

Instead of paternalistically pressuring developing nations to adopt judicial systems like those used in Western states, international actors must understand existing informal justice systems in order to fully promote international human rights norms. Fortunately, as I will discuss in Part IV, some U.N. bodies and other international actors are beginning to work with informal justice mechanisms.<sup>94</sup>

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91. *Informal Justice*, *supra* note 54.

92. Incarceration rate, poor prison conditions, high costs, and inadequate representation are just a few of many concerns with formal justice systems.

93. See Maru, *supra* note 61, at 448–49, 470 (noting that Timap and Timap paralegals focus on mediations to promote reconciliation and social harmony instead of adversarial approaches).

94. See KERRIGAN ET AL., *supra* note 55, at 7 (discussing how international actors can engage with existing informal justice systems to promote human rights).

### D. *Implications of Poor Human Rights Records*

States have many reasons to push for improving human rights, which often stretch well beyond altruistic sentiments. For instance, countries with poor human rights records generally have poor rule of law, correlating to poor development.<sup>95</sup> Corporations may be more apt to invest in countries with better human rights records because of pressures at home,<sup>96</sup> and also because a stable local government provides a better investment climate.<sup>97</sup> Furthermore, eligibility for foreign aid has been determined by a state's measure on certain indicators,<sup>98</sup> which have included a state's human rights record and the strength of its rule of law. For example, the Millennium Challenge Corporation (MCC) initiative includes rule of law, corruption, and human rights in its eligibility assessment. Under these parameters, Haiti was deemed ineligible for aid<sup>99</sup> from the MCC because of its failure to meet civil liberty, government effectiveness, rule of law, corruption, and other economic criteria.<sup>100</sup> Finally, poor enforcement and appreciation

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95. See G.A. Res. 67/1, *supra* note 14, ¶¶ 5, 7 (discussing the links between human rights, the rule of law, and development).

96. For example, corporations have suffered from consumer boycotts over poor labor conditions. See generally THE DANISH INST. FOR HUMAN RIGHTS, DECISION MAP: DOING BUSINESS IN HIGH-RISK HUMAN RIGHTS ENVIRONMENTS (2001), available at [http://www.humanrightsbusiness.org/files/Publications/doing\\_business\\_in\\_highrisk\\_human\\_rights\\_environments\\_\\_180210.pdf](http://www.humanrightsbusiness.org/files/Publications/doing_business_in_highrisk_human_rights_environments__180210.pdf) (finding that businesses face calls to “do no harm” and to “suspend their operations in certain countries, or to take a stand on the human rights conditions”); LUCY AMIS ET AL., HUMAN RIGHTS: IT IS YOUR BUSINESS, IBLF (2005), available at [http://commdev.org/files/1154\\_file\\_Human\\_Rights\\_It\\_Is\\_Your\\_Business.pdf](http://commdev.org/files/1154_file_Human_Rights_It_Is_Your_Business.pdf) (describing the costs to companies of customer boycotts because of the company's association with a human rights scandal).

97. See Merle David Kellerhals Jr., *Human Rights Essential for Global Security and Stability*, IIP DIGITAL (Dec. 6, 2011), <http://iipdigital.usembassy.gov/st/english/article/2011/12/20111206165125elrem0.4030115.html#axzz2L1PdJFJ8> (discussing the “human dimension to security”).

98. About MCC, MILLENNIUM CHALLENGE CORPORATION, <http://www.mcc.gov/pages/about> (last visited July 5, 2013); *Standard Foreign Assistance Indicators*, U.S. DEP'T OF STATE, <http://www.state.gov/f/indicators/> (last visited July 5, 2013).

99. *Millennium Challenge Corporation (MCC) Compact Eligible Countries*, HENRY J. KAISER FAMILY FOUNDATION, <http://kff.org/global-indicator/mcc-compact-eligible/> (last visited July 5, 2013).

100. *Haiti FY13*, MILLENNIUM CHALLENGE CORPORATION (Oct. 25, 2012), <http://www.mcc.gov/documents/scorecards/score-fy13-haiti.pdf>.

of human rights by both state and non-state actors can spread, causing instability within and across communities and nations. This is particularly problematic since lack of appreciation for and under-protection of human rights have been noted as major causes of conflict.<sup>101</sup> Thus, it is important to realize that weaknesses in human rights resolution mechanisms have consequences beyond the individual level. In order to expand the resolution of human rights abuses, *all* available mechanisms that can improve human rights must be contemplated. With this in mind, next, I will discuss the role that mediations can play in improving the current mechanisms for resolving human rights violations.

### III. HOW MEDIATIONS CAN IMPROVE HUMAN RIGHTS

#### A. *Advantages of Mediations*

While the critiques discussed in Part II may be valid, adopting best practices and implementing safeguards can alleviate most, if not all, of the downsides of using mediations. I contend that mediations can provide an accessible, efficient, and successful mode for resolving human rights abuses. In fact, mediation is a mechanism that lines up with forms of justice traditionally used in many developing nations. This section addresses some of the ways that mediations can improve or complement current mechanisms for resolving human rights abuses.

#### 1. *Improved Access to Justice*

In Part II, I described the inaccessibility and resulting inadequacy of courts and formal justice systems as resolution mechanisms.<sup>102</sup> Mediations, however, can provide a much more accessible form of justice due to their ability to complement current formal justice systems,<sup>103</sup> create community-based mediation programs,<sup>104</sup> and allow many individuals to

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101. See generally Oskar N.T. Thoms & James Ron, *Do Human Rights Violations Cause Internal Conflict?*, 29 HUM. RTS. Q. 674 (2007) (arguing that human rights violations are a cause of internal conflict).

102. See *supra* at Part II.C.1.

103. ANDREW WOOLFORD & R.S. RATNER, *INFORMAL RECKONINGS: CONFLICT RESOLUTION IN MEDIATION, RESTORATIVE JUSTICE AND REPARATIONS* 8 (2008).

104. *Id.* at 9; *infra* Part IV.

train to become mediators.<sup>105</sup> Because of these capabilities, mediations may be able to better enhance and expand access to justice throughout the developing world.

First of all, mediators can use existing informal justice mechanisms to promote human rights. Well-trained mediators could use these existing systems to advocate for human rights conformance by educating informal justice administrators and advising victims on their legal options. Ideally, this would also result in informal justice systems further complying with international human rights norms.

Next, mediations are significantly more affordable<sup>106</sup> than adjudications.<sup>107</sup> Consequently, many mediation clinics can be established on a limited budget in even the most remote and underserved areas, making justice physically more accessible as well. Also, formal justice systems may require victims and perpetrators to pay assorted court fees or pay for their own lawyers.<sup>108</sup> On the other hand, mediations are a cheap—if not free—source of justice.<sup>109</sup> As such, the affordability of mediations for both states and individuals improves victims' access to justice.

Mediations can also improve access to justice by expediting the process, which is especially critical in countries where the backlog of cases in the formal judicial system would take centuries to clear.<sup>110</sup> Since mediations are quicker than adjudications, and training paralegals and community members to act as mediators is easier than training the staff required for

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105. Most mediator training programs require significantly less time than law school and are significantly cheaper.

106. See KERRIGAN ET AL., *supra* note 55, at 294 (noting that village courts are more affordable than other formal or informal justice mechanisms).

107. Adjudications are even more expensive when accused perpetrators are given adequate due process and representation.

108. See KERRIGAN ET AL., *supra* note 55, at 76 (discussing the excessive cost of state courts).

109. *Id.* at 64–66 (discussing community mediations in Malawi, Nepal, and Bangladesh).

110. See e.g., *Indian PM Plea on Justice Backlog*, BBC News (Aug. 17, 2009), [http://news.bbc.co.uk/2/hi/south\\_asia/8204607.stm](http://news.bbc.co.uk/2/hi/south_asia/8204607.stm) (discussing India's judicial backlog); EUROPEAID, *supra* note 64 (noting Bangladesh's large judicial backlog and the potential of informal justice to improve access to justice).



adjudications,<sup>111</sup> more cases can be handled. The quicker and more accessible legal remedies resulting from mediations allow more people to receive justice. To sum, mediations enhance access to justice by complementing existing mechanisms; increasing the number of qualified people who can disperse justice via short and cheap training programs; and allowing states, organizations, and individuals to fund wide-reaching mediation-based justice.

## 2. *Focus on Reconciliation*

*“The goal often is not just to punish the perpetrator, but to compensate the victim for their loss, to prevent the accused from committing the crime again, and to reintegrate both the victim and offender back into the community. The type of justice promoted by these systems may be the most appropriate option for people living in a close-knit community whose members must rely on continued social and economic cooperation with their neighbours.”*<sup>112</sup>

Many states plagued by human rights abuses have histories rife with conflict. As one such state, Sierra Leone is still recovering psychologically<sup>113</sup> and physically<sup>114</sup> from its decade-long civil war. Due to its focus on communal reconciliation, mediation may be a more beneficial form of dispute resolution in post-conflict societies like Sierra Leone.

Sierra Leone’s population is roughly 60% rural.<sup>115</sup> Rural populations particularly stand to benefit from forms of justice that help community members maintain their social and eco-

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111. Maru, *supra* note 61, at 429 (noting that paralegals who administer mediations can be laypeople with basic legal training); *id.* at 442 (discussing Timap’s two-week training program, followed by on-going professional development, for mediators).

112. WOJKOWSKA, *supra* note 53, at 17.

113. See *The Impact of Civil War In Sierra Leone*, CHILD FUND (Mar. 15, 2013), <http://www.childfund.org/the-impact-of-civil-war-in-sierra-leone/> (discussing the psychological and emotional scars from the Civil War on children and families).

114. See *Sierra Leone’s Long Recovery from the Scars of War*, 88 BULL. WORLD HEALTH ORG. 725 (Oct. 2010), available at <http://www.who.int/bulletin/volumes/88/10/10-031010/en/> (discussing the damage the civil war did to infrastructure and health services).

115. *Country Profile: Sierra Leone*, UN DATA, <http://data.un.org/CountryProfile.aspx?crName=SIERRA%20LEONE> (last visited Nov. 7, 2013).

conomic connections with each other. Specifically with respect to the developing world, scholars have warned of the dangers of using adjudication due to its adversarial quality.<sup>116</sup> This may be why people in the developing world tend to prefer informal justice systems, which are non-adversarial and reconciliation-focused.<sup>117</sup> In Africa, the concept of Ubuntu—which has values including “group solidarity, conformity, compassion, respect for human dignity, humanistic orientation and collective unity”<sup>118</sup>—prevails and also factors into ways that mediation can help heal Sierra Leone. As Ubuntu focuses on restorative justice, mediations and informal justice may be better aligned with Ubuntu than adversarial forms of justice.<sup>119</sup>

In post-conflict societies, harmony and reconciliation are especially important aspects of judicial remedies.<sup>120</sup> In some circumstances, mediations can better provide justice by seeking to restore or improve the status of the victim and concentrating on preventing future abuses. The ability of informal justice systems to emphasize reconciliation, restoration, compensation, and reintegration, which can be preferable to the focuses of the formal criminal justice system, has been noted

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116. See generally Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996) (arguing that the adversarial system is inadequate for accomplishing certain goals of a dispute resolution system).

117. See Maru, *supra* note 61, at 448 (noting how mediations are similar to customary law in their focus on reconciliation and community cohesion); KERRIGAN ET AL., *supra* note 55, at 10 (listing focus on reconciliation, restoration, compensation, and reintegration as reasons people prefer informal justice mechanisms).

118. Amanda Dissel, *Restoring Harmony: Piloting Victim Offender Conferencing in South Africa* 1 (Paper presented at the “Effective Restorative Justice Conference,” 2002).

119. See *id.* at 19 (stating that Ubuntu and restorative justice emphasize a “communal approach to dealing with conflict”).

120. Although mediation’s role in transitional justice is beyond the scope of this paper, looking at the Gacaca Courts—which practiced a form of mediation—after the Rwandan genocide can be informative. See generally Phil Clark, *Hybridity, Holism, and “Traditional” Justice: The Case of the Gacaca Courts in Post-Genocide Rwanda*, 39 GEO. WASH. INT’L L. REV. 765 (2007) (providing an overview of the Gacaca Courts). The Gacaca Courts have been noted for their ability to promote reconciliation and forgiveness within communities. The Justice and Reconciliation Process in Rwanda: Background Note by Outreach Programme on the Rwanda Genocide and the United Nations (Apr. 2013), <http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml>.

by U.N. bodies including U.N. Women.<sup>121</sup> To sum, mediation may be better for resolving human rights abuses than adjudication because it prioritizes community reconciliation alongside individual healing.

### 3. *Focus on Interests of Victims*

The adversarial system in adjudications can accomplish norm-creating objectives at the larger as well as the individual level. With respect to the latter, prosecutions can provide victims with the sense that justice has been fulfilled and that the violator of their rights has been punished.<sup>122</sup> But adjudications often leave victims wanting for a more holistic resolution. On the other hand, mediations provide victims with a larger role in determining the scope and specifics of the resolution.

Mediations provide victims a pivotal role in determining the justice they receive.<sup>123</sup> Mediators who have been trained in customary, domestic, and international law can be helpful advocates for persons who have had their rights violated. Mediators provide victims with an idea of the different resolution options that are available to them.<sup>124</sup> For example, mediations can administer compensatory justice, often requiring perpetrators to compensate victims monetarily.<sup>125</sup> This in turn can help victims move on from past suffering to brighter futures. Additionally, the opportunity that victims have to confront their perpetrators face-to-face can provide restorative justice and give victims the sense that justice has been served.<sup>126</sup> Furthermore, the reconciliatory nature of mediations can provide a better foundation for victims' future interactions with the community and perpetrators—which would be especially

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121. KERRIGAN ET AL., *supra* note 55, at 10.

122. *International Online Training Program on Intractable Conflict: Criminal Prosecution*, *supra* note 6.

123. See Dissel, *supra* note 118, at 4, 14 (noting mediation's ability to promote reconciliation and just results for victims).

124. See KERRIGAN ET AL., *supra* note 55, at 75 (noting the importance of informal justice providers informing victims of the varied remedial options available to them); Mike Perry, *Beyond Dispute: A Comment on ADR and Human-Rights Adjudication*, 53 DISP. RES. J. 50, 56 (1998) (discussing how providing victims with knowledge of their rights can help bring about just settlements).

125. Dissel, *supra* note 118, at 14 (noting informal justice's ability to compensate for wrongdoings).

126. *Id.* at 4.

important in remedying abuses that stigmatize or marginalize victims. Finally, mediations may resolve the all-or-nothing dilemma by supplying victims with remedies outside of the realm of prosecutions.<sup>127</sup>

#### 4. *Consideration of Perpetrators*

While the concerns of victims are important, so is rehabilitating perpetrators. Mediations give perpetrators the opportunity to attempt to make amends for wrongs they committed. In this manner, mediations may provide participants with remedies more favorable to both parties than adjudicatory or criminal penalties. Mediations can require perpetrators to perform community service and undergo sensitivity training or other rehabilitative services in order to deter future abuses to an extent that adjudications cannot due to their prohibitive costs. Mediations may also be able to hold higher-level perpetrators accountable more adequately than formal justice systems can. Such an example can be seen through mediation's potential to improve corporate policy following instances of corporate perpetration of human rights abuses.<sup>128</sup> If corporate human rights abuses are adjudicated, it is possible that low-level employees may become scapegoats.<sup>129</sup> However, if mediations are used, stakeholders with policymaking power may be more likely to compromise to compensate victims and effectuate policies to prevent future abuses.<sup>130</sup>

Perpetrators are generally protected in states with a strong rule of law because they provide due process and fair trials for defendants.<sup>131</sup> In many states, in order to have a fair

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127. It should be clarified that in saying that mediations can provide better justice for victims of human rights violations, mediations must remain voluntary. *Supra* note 46 and accompanying text. If victims were forced to mediate instead of adjudicate, great injustice might be done. Part IV will further discuss voluntariness in mediations.

128. *See* Rees, *supra* note 38, at 17 (noting the potential of mediations to improve corporations' interactions with communities).

129. For example, when Timap confronted businesses for labor law violations and threatened litigation, the businesses usually blamed abuses on individual employees and said they had fired those responsible. This tactic did little to improve corporate policy.

130. *See* Rees, *supra* note 38, at 16, 18 (noting mediations' ability to identify systemic issues within corporations).

131. *See generally Right to Fair Trial*, U.N. COUNTER-TERRORISM IMPLEMENTATION TASK FORCE, [http://www.un.org/en/terrorism/ctif/proj\\_righttotrial](http://www.un.org/en/terrorism/ctif/proj_righttotrial).

criminal trial, a defendant *must* have representation.<sup>132</sup> However, developing nations often lack the resources to provide the due process required under international human rights law.<sup>133</sup> Consequently, throughout much of the developing world, defendants are not guaranteed the right to counsel—even in criminal matters.<sup>134</sup> Thus, if the only option to resolve human rights abuses is adjudication, states are faced with a Catch-22: Either they meet their obligation to adjudicate human rights abuses but fail to respect defendants' human rights, or they fail to comply with adjudication safeguards and do nothing at all. Regarding the former option, the defendant's human rights are violated if he does not have representation at his trial.<sup>135</sup> Furthermore, in many states like Sierra Leone, only lawyers can represent clients in courts, precluding even trained paralegals and mediators from assisting with court procedures. Through mediations, victims and perpetrators can justly resolve their dispute while minimizing the potential violation of the defendant's human rights. Thus, mediations can be more just not only for victims, but also for perpetrators.

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shtml (last visited July 12, 2013) (requiring countries to maintain rule of law based courts that respect all guarantees of due process when dealing with persons alleged to have committed terrorism-related offences).

132. See e.g., African Comm'n on Human and Peoples' Rights [ACHPR], *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, ACHPR DOC/OS(XXX)247 (Oct. 24, 2011), available at <http://www.achpr.org/instruments/fair-trial/> (listing the rights of defendants in Africa, including representation).

133. See generally *Right to Fair Trial*, *supra* note 131 (describing due process guarantees under international human rights law).

134. See, e.g., Beny Gideon Mabor, *Lack of Legal Representation Jeopardizes Right of Fair Trial in South Sudan*, SUDAN TRIB. (Sept. 27, 2012), <http://www.sudantribune.com/spip.php?article44019> (discussing the alarming lack of representation for indigent criminal defendants in South Sudan).

135. Advocates for defendants' and prisoners' rights may further criticize the deplorable conditions of prisons as violating human rights. See generally *Sierra Leone: Annual Report 2012*, AMNESTY INT'L, <http://www.amnesty.org/en/region/sierra-leone/report-2012> (last visited Nov. 11, 2013) (discussing the poor conditions of Sierra Leone's prisons).

## 5. *Alignment with Traditional Justice Systems*

As discussed, adjudications often conflict with informal—also known as “customary”<sup>136</sup>—justice mechanisms prevalent throughout the developing world.<sup>137</sup> Consequently, mediations may be easier and more effective to implement in communities with existing informal justice systems because they better align with the principles of informal justice.<sup>138</sup> Mediations offer two advantages in countries with already-established customary systems. First, community familiarity with informal justice systems may encourage those whose rights have been violated to go to a mediator. Secondly, mediators can combine their knowledge of informal justice mechanisms with international human rights law to ensure that abuses are redressed in order to help promote human rights appreciation. Justice systems and cultures in developing nations may better absorb human rights norms via grassroots mechanisms than via adjudications, which may seem colonial or paternalistic to inhabitants of the developing world.<sup>139</sup> Consequently, the similarities between mediations and customary justice may popularize mediation-based initiatives and, in turn, entrench international human rights norms.

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136. For a general overview of African customary law, see Manfred O. Hinz, *Traditional Governance and African Customary Law: Comparative Observations from a Namibian Perspective*, in HUMAN RIGHTS AND THE RULE OF LAW IN NAMIBIA 59 (Nico Hom & Aton Bösl eds., 2008).

137. See generally *id.* (discussing the tension between traditional African customary law and modern monism); RAJA DEVASISH ROY, MINORITY RIGHTS GRP. INT’L, TRADITIONAL CUSTOMARY LAW AND INDIGENOUS PEOPLES IN ASIA (2005), available at [www.minorityrights.org/download.php?id=131](http://www.minorityrights.org/download.php?id=131) (discussing the status and application of customary law in indigenous communities in Asia); Lloyd Fallers, *Customary Law in the New African States*, 27 L. & CONTEMP. PROBS. 605 (1962) (examining the operation of African customary law during the movement towards post-colonial independence).

138. The principles of informal justice are reconciliation, restoration, compensation, and reintegration. KERRIGAN ET AL., *supra* note 55, at 10.

139. See *supra* note 82 and accompanying text (discussing the reduction of FGM in Sierra Leone through evolving standards as opposed to immediate outlawing).

### B. *Satisfying Human Rights Obligations*

International human rights obligations have their roots in the UDHR,<sup>140</sup> which has been widely accepted as CIL,<sup>141</sup> thus placing certain obligations on states.<sup>142</sup> Additionally, the International Covenant on Civil and Political Rights (ICCPR), which was greatly influenced by the UDHR and is a foundation of international human rights law, obligates states to guarantee a remedy for any violations of the rights therein.<sup>143</sup> For the purposes of this Note, my argument does not require proof that mediations are an acceptable mechanism for states to resolve human rights abuses;<sup>144</sup> however, an analysis of how mediations align with the UDHR and how they could be an adequate way for states to meet their human rights obligations will inform my discussion of mediation as a remedy.

Articles 7 and 8 of the UDHR speak most directly to the rights to protection from abuses and the right to remedies for rights violations, respectively:

#### Article 7.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

#### Article 8.

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the

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140. See *supra* note 18 and accompanying text (discussing that the UDHR has achieved the status of customary international law).

141. See *supra* note 18 and accompanying text for a discussion of the UDHR's place in CIL.

142. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 352–53 (1995/1996) (discussing that the UDHR is the legal and political basis for states' human rights obligations, which are generally enforced via the U.N. Charter).

143. KERRIGAN ET AL., *supra* note 55, at 89.

144. States are obligated to protect against human rights abuses. *States Have a Duty to Protect Against Human Rights Abuses*, COMMONWEALTH (Mar. 18, 2010), <http://www.thecommonwealth.org/news/221499/180310johnruggiehumanrightstalk.htm>.

fundamental rights granted him by the constitution or by law.<sup>145</sup>

These two articles provide a useful checklist for how mediations can satisfy a state's duty to prevent and remedy human rights abuses. Next, I will explore Articles 7 and 8 in greater depth.

1. *All Are Equal Before the Law and All Receive Equal Protection of the Law*

In order to satisfy their human rights obligations, states must ensure that all individuals are equal before the law. Timap's co-founder and U.S. attorney Vivek Maru notes that the adversarial system's concept "that a neutral decision-maker is more likely to arrive at a balanced view if each side has a zealous advocate than if all sides attempt a degree of neutrality"<sup>146</sup> has not come to fruition in Sierra Leone, where all are not seen as equal before the law; instead, the "biggest arm" is victorious.<sup>147</sup> One of the key principles of mediation—impartiality<sup>148</sup>—can ameliorate the deficiencies of the adversarial system by ensuring that all, including the perpetrator,<sup>149</sup> are considered to be equal and treated equally before the law. When Timap performs mediations, they do not treat the party bringing the complaint more favorably than the respondent such that they do not arbitrarily treat the parties unequally.<sup>150</sup> Maru states that Timap conceives of its "ultimate duty as being toward the entire community and toward basic principles of justice and democratic equality."<sup>151</sup> Mediations would help realize this duty by treating all parties equally before the law.

Justice mechanisms must also ensure that the law equally protects everyone. Because informal justice has been deemed to exacerbate societal inequalities and entrenched power structures,<sup>152</sup> some scholars and practitioners worry about the

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145. Universal Declaration of Human Rights, *supra* note 17, arts. 7–8.

146. Maru, *supra* note 61, at 456.

147. *Id.*

148. *Principles of Mediation*, *supra* note 46.

149. As mentioned earlier, many developing nations do not or cannot provide due process protections and representation for all persons accused of crimes. *Supra* note 133 and accompanying text.

150. Maru, *supra* note 61, at 456.

151. *Id.*

152. *Informal Justice*, *supra* note 54.



ability of informal systems to equally distribute justice.<sup>153</sup> However, if mediators were trained in customary, domestic, and international law and norms, they would be able to use this knowledge during mediations to ensure that both parties know and understand their rights. Additionally, adjudications do not necessarily inform parties of their legal rights because of a lack of access to competent counsel, thus allowing the “biggest arm” to win,<sup>154</sup> regardless of whether or not the law is actually in their favor. By informing both parties of their legal human rights and remedy options,<sup>155</sup> mediations can provide equal protection of law.

## 2. *Everyone Has the Right to an Effective Remedy*

Human rights are meaningless without an effective remedy.<sup>156</sup> Mediation can provide an effective remedy because it is accessible and the parties are only bound by resolutions they find effective. Additionally, mediations may provide more effective remedies than adjudications simply because they are *actually* accessible with respect to time, location, cost, and resources. Furthermore, trained mediators can ensure that agreed upon remedies align with human rights norms. For example, Timap has affirmed its staunch opposition to domestic violence by ensuring that mediation resolutions would never “require a husband to beat his wife sparingly, or only when justified.”<sup>157</sup> However, for some human rights violations, mediations may not provide an effective remedy. For instance, if a human rights abuse is grave enough, it must be resolved through formal channels.<sup>158</sup> If mediation is being considered as an option for resolving a conflict, victims must be informed of the remedies it can provide so they can determine if it is a proper dispute resolution mechanism for their case. To sum, if a case is appropriate for mediation and a victim is aware of the

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153. *Id.*

154. Maru, *supra* note 61, at 456.

155. *See id.* at 468 (discussing the role of paralegals in the Paralegal Advisory Services in informing clients of their rights and available remedies).

156. *Ubi jus, ibi Remedium*: there is no right without a remedy. *See generally* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004) (discussing the principle of *Ubi jus, ibi Remedium*).

157. Maru, *supra* note 61, at 456 (internal quotation marks omitted).

158. *See, e.g., id.* at 452 (noting that rape cases would never be mediated).

remedies it can provide, mediation would offer an accessible, effective remedy for all parties involved.

### 3. *By the Competent National Tribunals*

The last requirement—that hearings be held before a “competent national tribunal”—may be the most difficult requirement for mediations to satisfy with respect to qualifying as an acceptable mechanism for resolving human rights abuses. Adequate training could satisfy the “competent” requirement.<sup>159</sup> The “national” requirement could be satisfied by the state endorsing and regulating qualified mediators—even if they are not necessarily state employees. The “tribunals” requirement should be interpreted broadly, and not through the traditional point of view that mandates judges who graduated from law school administer justice. Interpreting “tribunal” as such could bar plea bargains, arbitrations, and other forms of effective dispute resolution—including mediations. Although mediators are not judges, they are trained to hear disputes, which is the essential duty of a judge. Therefore, a broad interpretation of “tribunal” that embraces the mediator as a type of “judge” would allow mediation to qualify as an acceptable resolution mechanism.

Furthermore, given the high level of corruption in formal justice systems throughout the developing world,<sup>160</sup> it would be unwise to classify some formal judiciaries as “competent.” I contend that mediations conducted by impartial facilitators can at least be an effective temporary solution to resolving human rights abuses while formal justice mechanisms fix their current deficiencies. With safeguards, properly implemented mediations would become acceptable stepping-stones for states to align their justice system with their international human rights obligations. Moving forward, mediations may even satisfy a states’ duty to protect its people’s human rights.

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159. See *infra* Part IV for further discussion on training standards for mediators.

160. See generally EDGARDO BUSCAGLIA, U.N. OFFICE FOR DRUG CONTROL & CRIME PREVENTION, JUDICIAL CORRUPTION IN DEVELOPING COUNTRIES: ITS CAUSES AND ECONOMIC CONSEQUENCES (2001), available at <http://www.unodc.org/pdf/crime/gpacpublications/cicp14.pdf> (discussing judicial corruption in the developing world).

Mediations can provide remedies that conform to international human rights norms. Conducted successfully, they can provide effective remedies and prevent further abuses from occurring. Moreover, mediations are optional and do not foreclose the possibility of adjudication.<sup>161</sup> Thus, if a victim finds that mediation does not provide effective remedies, he or she can bring his or her case forward via adjudication. Since mediations satisfy the UDHR's remedy requirements in addition to many aforementioned advantages, mediations should be accepted as a way for states to resolve certain human rights abuses.

#### IV. HOW TO IMPLEMENT MEDIATIONS

In Part III, I discussed the theoretical advantages that mediations have over adjudications with respect to resolving human rights abuses. In this Part, I will first address existing mediation programs, their accomplishments, and challenges they face. Next, I will explore best practices and safeguards that can be instituted to ensure that mediations are effective. I will then address the ways in which state actors can promote mediations. Finally, I will conclude this Part by discussing how the international community can promote the use of mediation as a means of improving human rights in developing states with poor human rights records.

##### A. *Organizations Conducting Mediations to Resolve Human Rights*

There are a number of organizations, both international and domestic, that implement mediations to resolve human rights abuses. This section identifies a few of those organizations that execute and promote different types of mediations. These examples are neither exhaustive nor necessarily exemplars; instead, I am using them to illuminate that mediation is not only theoretically effective as a resolution mechanism—it is practical as well.

##### 1. *Soros Open Society Justice Initiative*

Open Society Justice Initiative (OSJI) is one of the leading NGOs in promoting community-based mediations and has

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161. If adjudication is accessible.

funded access to justice programs around the world.<sup>162</sup> OSJI attempts to promote access to justice through a “human rights framework” in which:

(a) Individuals and their communities need to be educated and informed about their rights; (b) these individuals and their communities need to develop the capacity for demanding such rights; and (c) widespread violations of human rights within a community should be addressed through long-term strategic solutions rather than solutions only for individual cases.<sup>163</sup>

OSJI views community-based mediators as strong administrators of justice. It first delved into community paralegal programs by funding and implementing Timap for Justice in Sierra Leone.<sup>164</sup> While OSJI supports other mediation initiatives that hope to promote the rule of law, I will analyze Timap due to my experience there.

Timap paralegals seek to both resolve local conflicts and educate communities on their rights in order to make larger systemic impacts on the community. When Timap paralegals notice trends in the types of cases being addressed in mediations, they plan and facilitate community dialogues and sensitizations to manage these concerns.<sup>165</sup> For example, in communities where domestic violence is prevalent, Timap holds discussions with community leaders, husbands, wives, and other stakeholders. These community dialogues both address community members’ concerns and aim to educate all stakeholders about domestic and international human rights laws and norms. The Kenyan Human Rights Commission has similarly complemented mediations with other techniques under the view that “[w]hile individual disputes may be mediated in confidence, issues that the Commission believes raise systemic concerns may be made the subject of a public inquiry and a

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162. OPEN SOC’Y JUSTICE INITIATIVE, COMMUNITY-BASED PARALEGALS: A PRACTITIONER’S GUIDE 5 (2010), available at <http://www.opensocietyfoundations.org/sites/default/files/paralegal-guide-20101208.pdf>.

163. *Id.* at 13.

164. Timap was modeled after community-based paralegals used in South Africa. *Id.* at 5.

165. See Maru, *supra* note 61, at 442 (discussing how mediators organize community dialogues based on prevalent community problems they notice in mediations).

resulting report to the government.”<sup>166</sup> These experiences suggest that mediations have a broader impact when they are supplemented by community dialogues and education.

One of Timap’s primary ambitions is to empower community members to advocate for their rights.<sup>167</sup> Legal empowerment has been defined as “the use of legal services and related development activities to increase disadvantaged populations’ control over their lives.”<sup>168</sup> While it is difficult to measure the impact of local justice initiatives on empowerment,<sup>169</sup> Pamela Dale noted that Timap has, at least to some extent, accomplished its goals “to help people achieve concrete solutions to justice problems; and . . . increase the accountability and fairness of both traditional and formal governmental institutions.”<sup>170</sup>

Timap provides a model for leveraging the possibility of adjudication to persuade perpetrators to mediate disputes. Timap has two or three staff attorneys, including co-founder Simeon Koroma. These attorneys can persuade perpetrators of human rights violations to mediate using Timap paralegals or face the significantly more grave consequences resulting from adjudication. Timap co-founder Maru has described the importance of retaining adjudication as a justice option because:

We don’t want to say, “Know your rights! And good luck getting them enforced.” Instead, we want to say “Know your rights! And those who violate rights should listen to our paralegals when they advocate and negotiate, because if they do not, we will take

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166. Rees, *supra* note 38, at 16.

167. Timap means “stand up” in Krio, one of Sierra Leone’s most widely spoken languages. OPEN SOC’Y JUSTICE INITIATIVE, *supra* note 162, at 5.

168. Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative 3* (Carnegie Endowment for Int’l Peace Paper No. 41, 2003), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1367&prog=zgp&proj=zdr1>.

169. See Christopher Gibson & Michael Woolcock, *Empowerment and Local Level Conflict Mediation in Indonesia: A Comparative Analysis of Concepts, Measures, and Project Efficacy 4* (World Bank Policy Research Working Paper No. 3713, 2005) (discussing the difficulty in measuring empowerment).

170. See DALE, *supra* note 12, at 1. See also *id.* at iv (noting an overwhelmingly positive survey’s indication that Timap had met, to at least some extent, its primary goals).

them to court.” Our ability to stand by the second message is crucial for the efficacy of the program.<sup>171</sup>

Thus, through combining the use of paralegals trained in community dialogue and education as well as local, domestic, and international law with formal adjudication-based justice, Timap has been able to positively impact the rule of law in Sierra Leone.

## 2. *Malawi Village Mediation Programme*

In 1998, Malawi instituted a mediation program for confronting human rights abuses.<sup>172</sup> The Malawi Village Mediation Programme (MVMP) was created to help provide justice for the 85% of Malawians who live in rural areas beyond the reach of formal judicial systems.<sup>173</sup> To this end, MVMP has instilled practices to ensure that human rights issues are addressed during disputes. For example, if juveniles are involved in disputes, MVMP ensures that their rights—as defined in the Convention on the Rights of the Child<sup>174</sup>—are respected and that they are not intimidated into settling a dispute.<sup>175</sup> In addition, if a dispute is between a man and a woman, MVMP ensures that women have an equal opportunity for protection, thus upholding the principle of equality before the law.<sup>176</sup> Therefore, MVMP attempts to protect not only the substantive rights of people by advocating and mediating for human rights, but also their procedural rights.

MVMP complements the formal justice system, which can be rendered more effective and efficient by diverting cases suitable for mediation to MVMP.<sup>177</sup> As a result of its efforts, MVMP reduces backlog in the formal system, diverts certain offenders from overcrowded prisons, and prevents the escalation of conflicts by redressing harms quickly. By principle, MVMP does not contradict formal or customary justice sys-

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171. Maru, *supra* note 61, at 452.

172. INCLUSIVE CITIES OBSERVATORY, MALAWI: THE MALAWI VILLAGE MEDIATION PROGRAMME: PROMOTING SOCIAL COHESION AND PROTECTING RIGHTS I (2010), available at [http://www.uclg-cisdp.org/sites/default/files/Malawi\\_2010\\_en\\_FINAL.pdf](http://www.uclg-cisdp.org/sites/default/files/Malawi_2010_en_FINAL.pdf).

173. *Id.*

174. Convention on the Rights of the Child, *supra* note 3.

175. INCLUSIVE CITIES OBSERVATORY, *supra* note 172, at 4.

176. *Id.*

177. *Id.* at 5.

tems; instead, it supports both systems in order to legally empower more individuals.

Finally, MVMP exemplifies international coordination efforts to improve the rule of law globally. MVMP was inspired by the Madaripur Mediation Model in Bangladesh,<sup>178</sup> piloted by the Danish Institute of Human Rights (DIHR) and the Dispute Resolution Centre (DRC) in Kenya, and is implemented by the Malawian NGO. Additionally, MVMP has received funding from Irish Aid and other assistance from an International Advisory Group.<sup>179</sup> In 2004, MVMP utilized these sources to create the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, which is a guide to mediation best practices.<sup>180</sup> The African Commission on Human and Peoples' Rights and the U.N. Economic and Social Council endorsed the Lilongwe Declaration. Thus, MVMP has worked to normalize and regulate forms of mediation. Designing uniform mediation best practices like this can help cement mediation's role in combating human rights abuses on a global scale.

### 3. *BASES Community*

Another effort worth examining is the online BASES Community. BASES Community does not conduct mediations; instead, it is "a collaborative work space for sharing information and learning about how dispute resolution between business and society works around the world."<sup>181</sup> The website, BASESwiki, is an initiative of the U.N. Secretary-General's Special Representative on Business and Human Rights and the Harvard Kennedy School and is supported by OSJI and other

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178. Madaripur is one of the first NGOs to use mediations to resolve human rights conflicts. Both Timap and MVMP model their practices on Madaripur. For more information about Madaripur, see *Profile of MLAA, MADARIPUR LEGAL AID ASSOCIATION*, <http://www.mlaabd.org/glance.html> (last visited Oct. 30, 2013).

179. INCLUSIVE CITIES OBSERVATORY, *supra* note 172, at 6–7.

180. *How Malawi Put Access to Justice on the U.N. Agenda*, NAMATI (May 24, 2012), available at <http://www.namati.org/newsposts/malawi-justice-un-agenda/>.

181. *Using Accountability Mechanisms*, BUS. AND HUM. RTS. DOCUMENTATION PROJECT, <http://www.bhrd.org/fe/infopage.php?page=am> (last visited Nov. 18, 2013).

NGOs.<sup>182</sup> BASESwiki intends to provide NGOs, states, the international community, and other stakeholders with information that can be used to improve both access to justice and the practice of non-judicial mechanisms with respect to resolving disputes among companies, individuals, and communities.<sup>183</sup>

Mediations between companies and individuals may raise more concerns than disputes between individuals. Power imbalances; the likelihood that victims will be paid off, thus hampering systemic change; and the lack of transparency in negotiations can be particularly problematic with respect to resolving violations committed by companies.<sup>184</sup> Informative databases such as BASESwiki could help NGOs support organizations that positively impact human rights. BASES can document mediations' successes and failures in resolving conflicts with companies, which can allow future initiatives to easily research and improve upon past mediations. Furthermore, showing international commitment to hold companies accountable for human rights abuses may persuade companies to change their policies and compensate and reconcile victims. Thus, resources like BASESwiki could become powerful tools for establishing norms on the use of mediations among companies, individuals, and communities. Overall, it is a positive sign that the international community, particularly the United Nations, is exploring new ways to provide justice to the most underserved populations in the developing world.

### B. *Best Practices and Safeguards*

Increasing the use of mediations can substantially impact the promotion of human rights globally. However, informal justice mechanisms also have the potential for abuse, corruption, and ineffectiveness.<sup>185</sup> With that in mind, I will now explore a few of the best practices and safeguards for effective mediations. Then, the final two sections of Part IV will address

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182. *Calling ADR Experts to Support BASESwiki*, INT'L BAR ASS'N, [http://www.ibanet.org/ENews\\_Archive/IBA\\_24May\\_2010\\_Enews\\_BasesWiki\\_update\\_May\\_2010.aspx](http://www.ibanet.org/ENews_Archive/IBA_24May_2010_Enews_BasesWiki_update_May_2010.aspx) (last visited Nov. 18, 2013).

183. *BASESwiki: A Dispute Resolution Community*, PEACE & COLLABORATIVE DEV. NETWORK, <http://www.internationalpeaceandconflict.org/forum/topics/baseswiki-a-dispute-resolution#.Uoo08JRxt6t> (last visited Nov. 18, 2013).

184. See Rees, *supra* note 38, at 4 (reviewing these three challenges to mediation).

185. *Informal Justice*, *supra* note 54.



initiatives that states and international actors can take to promote the implementation of mediations.

### 1. *Mediations Must Ameliorate Power Imbalances*

One of the gravest concerns with respect to implementing mediations is the existence of power imbalances among parties.<sup>186</sup> Fortunately, there are numerous ways to try to level imbalances. First, mediators can undergo sensitivity trainings to better understand inherent power imbalances in various relationships to ensure that mediations align with the UDHR's prescription that people are "equal before the law."<sup>187</sup> Second, creative solutions can be used to ensure that parties are on even ground. In one instance when Timap was conducting mediations between community members and a company accused of illegal land grabs, the company wanted to bring a lawyer to the mediations. However, Timap said it would only allow this if the company paid for the community members' attorney as well.<sup>188</sup> A third option, which is similar to ensuring that parties are informed of their rights, would be reliance on the biased mediator. A biased mediator is one biased in favor of the law—not against either one of the parties. As such, his or her role can result in more balanced mediations by apprising both parties of the legal status and consequences of their actions. This is not a comprehensive list; therefore, successful human rights mediation services must consider all relevant options and think creatively in order to address power imbalances most effectively.

### 2. *Mediations Must Inform Parties of All Their Rights and Options*

As stated above, mediators must ensure that victims and perpetrators are always aware of all laws governing their mediations. In addition to this, victims and perpetrators must be informed of their rights, potential remedies, and all applicable laws *before* mediations begin. This practice conforms to general principles dictating that mediations should be voluntary and

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186. See generally Rees, *supra* note 38, at 13–15 (discussing power imbalances as a threat to mediation).

187. *Supra* text accompanying notes 146–60.

188. Interview with Simeon Koroma, *supra* note 82.

self-determined.<sup>189</sup> Thus, this mediation best practice will guarantee that parties have reasonable expectations before they enter into mediation.

### 3. *Mediations Should Be Accompanied by Community Dialogues and Sensitizations*<sup>190</sup>

Because mediations typically do not possess the public impact and precedent-setting capability of adjudications, they must be supplemented with other tools. Trained mediators should conduct community dialogues, educate marginalized groups about their rights, provide sensitizations, and use mobile clinics to ensure that human rights norms are dispersed within and across communities. This will allow the work of mediators in resolving human rights disputes to have a long-lasting impact that extends outside the mediation room.

#### C. *How States Can Promote Mediations*

States can promote the use of effective mediations in their countries in several ways. States can pass legislation in order to promote and fund, place limitations on, provide guidelines for, and evaluate the effectiveness of mediations. If states want to utilize mediations to satisfy their international obligation to protect human rights, they must play an active role in ensuring their effectiveness.

#### 1. *States Should Pass Legislation Promoting and Funding Mediations*

Legal aid bills are an important starting point for states hoping to make mediations an integral part of promoting and protecting human rights. In 2012, Sierra Leone's government clearly demonstrated that it promoted the use of mediations and other informal justice mechanisms to promote human rights by passing its Legal Aid Bill.<sup>191</sup> This law solidified the prevalent role of paralegals in administering justice in Sierra

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189. *Supra* note 46 and accompanying text.

190. "Sensitizations" are processes used by Timap where paralegals meet with community members and inform them of their human rights and the mechanisms available to protect those rights. To read more on Timap sensitizations, see DALE, *supra* note 12, at 46–47.

191. Sonkita Conteh & Lotta Teale, *New Legal Aid Law in Sierra Leone Embraces the Role of Paralegals*, OPEN SOCIETY FOUNDATIONS (May 11, 2012),

Leone. Legal aid bills such as this can lay the groundwork for creating enforcement and accountability mechanisms, improving institutional organization, and distributing program funding. Furthermore, legal aid bills can render mediation services and regulations therein more transparent. Transparency and increased regulation of mediation practices may encourage international organizations and NGOs to fund these efforts.

Mediations can also be used as leverage against violators, so states should explore this application when drafting legal aid bills. For example, a legal aid bill could specify that if a perpetrator refuses to mediate an abuse upon request by a victim, the dispute will be fast-tracked through the formal justice system. This could potentially expedite the path to justice without pressuring victims to mediate. Thus, incorporating mediations into legislation can contribute to holding perpetrators accountable for abuses.

## 2. *States Should Clarify Abuses for Which Mediations are Appropriate*

The state has the singular role of clarifying which categories of human rights abuses can and cannot be resolved via mediation. Mediation services should also circumscribe the scope of their work; Timap has regulated itself regarding abuses it will not mediate.<sup>192</sup> However, in order to promote consistency throughout the country, the state must decide which types of abuses are appropriate to mediate. There are certain crimes<sup>193</sup> that are so grave that the state has a duty to condemn them via prosecutions. State-issued guidelines delineating the types of cases that should be diverted to the formal justice system will ensure that cases receive befitting treatment.

## 3. *States Should Train Mediators*

The state can promote effective mediations by confirming that paralegals and community members are qualified to conduct mediations. This does not necessarily mean that states

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<http://www.opensocietyfoundations.org/voices/new-legal-aid-law-sierra-leone-embraces-role-paralegals>.

192. See Maru, *supra* note 61, at 456 (noting Timap's policy to never mediate rape cases).

193. These include murder, rape, and torture.

need to lead certification programs; instead, mediators must simply know how to conduct mediations according to a general, uniform set of principles and must be familiar with local, domestic, and international laws. Further, mediators must receive training in interpersonal skills and on important societal issues in order to safeguard against perpetuating existing social biases and imbalances.

Timap exemplifies mediator training in practice. Timap provides paralegals with a foundational legal education before allowing them to conduct mediations. Afterward, paralegals continue to receive education on substantive laws and mediation techniques. Timap, in collaboration with the OSJI-funded NGO Namati,<sup>194</sup> has used its success in training mediators to compile best practices and publish a paralegal manual.<sup>195</sup> This manual can potentially help educate mediators on substantive laws and mediation best practices—it could even be used as a model internationally.

Dictating exactly what entails proper training lies outside the scope of this Note. Consequently, states could—and should—experiment with many options; for example, they could sponsor trainings, implement qualifying exams, or require a certain amount of professional development hours. Overall, human rights mediators must be adequately trained in order to ensure the protection of victims' rights, perpetrators' rights, as well as overall compliance with human rights law.

#### 4. *States Can Compile Mediation Records*

The state may be the most effective at regulating human rights NGOs<sup>196</sup> that conduct mediations, especially if there is a mediator certification process involved. In order to help moni-

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194. Namati is an international legal empowerment NGO that is also funded by Open Society Justice Initiative. For more information on Namati, see *About us*, NAMATI, <http://www.namati.org/about/> (last visited Nov. 12, 2013).

195. Mohamed Kabbah Turay, *Timap Launches Paralegal Manual*, SIERRA EXPRESS MEDIA (Sept. 7, 2012), <http://www.sierraexpressmedia.com/archives/47278>.

196. Because mediations provide a more cost effective way for states to meet their international obligation, they should be responsible for ensuring that human rights mediations operated by NGOs are in compliance with international principles.

tor and regulate such programs, states should spearhead initiatives to collect mediation statistics and gather feedback from mediation participants. Well-documented records can be used to establish best practices and implement safeguards. Finally, accurate records demonstrating the effectiveness of mediations and their impact on access to justice can be used to garner support from the international community, which in turn could lead to the expansion of mediation programs domestically and internationally.

#### D. *How the International Community Can Promote Mediations*

International organizations and NGOs are well-positioned to effectively promote human rights via mediations. International and transnational actors, including the United Nations, World Bank, and Soros Initiative, have provided a significant amount of funding for rule of law initiatives. Because international actors have the resources to evaluate the effectiveness of mediations compared with other forms of dispute resolution, they can determine when mediation would be an appropriate form of recourse. Furthermore, international organizations are uniquely situated to compare and contrast the different forms of mediation used around the world and then effectuate new mediation schemes. In this section, I will explore the ways that international actors can promote the use of mediations in resolving human rights abuses.

##### 1. *International Actors Should Evaluate Mediations*

International organizations, especially the United Nations, which comprises states, may be the best-suited actors for evaluating the successes and failures of mediation programs. While states tend to exhibit bias when assessing their own justice systems, international organizations can independently and impartially analyze the effectiveness of mediations in each state and also advise states on how to improve their mediation programs. Because individual mediation-based resolutions cannot be made public due to their confidential nature, it is especially important for international agencies to monitor the large-scale impact that mediations have on human rights appreciation. As discussed next, a compilation of best practices can facilitate the international community's monitoring of mediations.

## 2. *International Actors Should Compile Best Practices*

After evaluating mediation programs worldwide, international organizations can develop guidelines for mediation best practices. Mediation programs within a single country, let alone throughout various parts of the globe, may have different implementation techniques. International actors can monitor these different techniques in order to determine which mediation strategies are most effective. By comparing and contrasting different mediation methods, international organizations can glean best practices and consequently publish and distribute guides to NGOs planning to start community-based mediation programs. Furthermore, a broad analysis of international mediation practices may provide guidance on how to implement appropriate safeguards against common concerns, such as power imbalances between the disputing parties.

## 3. *International Actors Should Fund Initiatives*

Mediation provides a cheaper, more accessible form of dispute resolution than adjudications.<sup>197</sup> If international agencies, which provide funding for improving the rule of law in developing states, shift their attention and funding from formal to informal justice—in particular, mediations—more people would have the opportunity to access justice and resolve their human rights claims. By funding mediations in the developing world, international organizations can also infuse international human rights principles into established informal justice initiatives.<sup>198</sup> Of course, international organizations should not stop funding adjudications; instead, international actors should recognize that adjudication is not always the best way to resolve human rights abuses. While some abuses should be adjudicated, others may be better resolved through mediation. Essentially, the international community must recognize that adjudication should not be the default method for resolving human rights abuses.

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197. See OPEN SOC'Y JUSTICE INITIATIVE, *supra* note 162, at 7 (noting the benefits of paralegal services as opposed to traditional attorney-driven litigation).

198. See generally Allison D. Kent, Note, *Custody, Maintenance, and Succession: The Internalization of Women's and Children's Rights under Customary Law in Africa*, 28 MICH. J. INT'L L. 507 (2007) (discussing how customary legal institutions can internalize international human rights norms).

Finally, international actors may be best-positioned to hold NGOs accountable with respect to their mediation implementation. International organizations can determine which NGOs are actually helping vulnerable communities resolve human rights disputes, and then direct funds to those organizations. Although money is not a silver bullet for improving access to justice in the developing world, the provision of aid for mediation programs can further this cause. As such, I believe that funding successful mediation programs will promote access to justice, the rule of law, and the effective resolution of human rights abuses.

## V. CONCLUSION

In this Note, I have contended that mediation has the potential to satisfy the state obligation to protect the human rights of its citizens because, under certain circumstances, it can be used to resolve human rights abuses. In fact, in some instances, mediation may even be the preferred method of doing so. While adjudication is often the default method for resolving human rights abuses, mediations have many advantages over adjudications. Mediations are favorable because they improve access to justice, place the emphasis on the best interest of both the victim and the perpetrator, focus on community reconciliation and unity, and complement existing formal and informal justice mechanisms. In spite of these benefits, various challenges regarding mediation as a means of resolving human rights abuses remain. However, many of these obstacles may be overcome by instituting guidelines for best practices and safeguards, as well as involving state and international actors in improving the accessibility and execution of mediation programs.

Of course, mediations play only one part in improving the respect of human rights. However, they can complement existing justice systems in order to make human rights remedies more accessible, therefore improving the rule of law globally. Thus, it is essential that NGOs, states, and the international community work together to ensure that mediations are effective and uniform on a global scale. The possibilities for using mediations to improve human rights around the world have, unfortunately, barely been explored. As a result, stakeholders have not fully considered the advantages and potentialities of

using mediation as a tool of international human rights. In order to ensure that the most vulnerable groups—including the children working in the Mayatha mines—receive remedies for any and all violations of their human rights, all possible resolution mechanisms, especially mediations, must be explored.