

Justicia Transicional

El término justicia transicional es habitualmente utilizado en referencia a mecanismos *ad hoc* aplicados –en general pero no siempre– en contextos pos-conflicto para tratar violaciones de los derechos humanos y del derecho internacional humanitario durante conflictos armados. Los mecanismos pueden variar, sin embargo, son diseñados para sancionar a los individuos responsables de los crímenes cometidos, para la reparación de víctimas de las violaciones perpetradas por actores armados, para promover procesos de reconciliación social entre sectores polarizados de la población, y para esclarecer las causas del conflicto y los actos violentos (por medio de una comisión de la verdad, por ejemplo). Conjuntamente, estos esfuerzos tienen el objetivo de prevenir la repetición del conflicto.

Esta edición de Múltiples incluye artículos sobre el trabajo de la Iniciativa para el Estado de Derecho de la Asociación de Abogados de los Estados Unidos, el análisis de los esfuerzos de la Misión de Apoyo al Proceso de Paz en Colombia de la Organización de los Estados Americanos en el ámbito de justicia transicional en relación a buenas prácticas internacionales, el uso de mecanismos alternativos de justicia para tratar violencia basada en género en el contexto pos-conflicto, y justicia transicional en países caracterizados por pluralismo jurídico.

JGG agradece a todos los contribuyentes y lectores por su colaboración desde 2007. Esta edición de Múltiples será la última que incluye el análisis de un tema por varios autores. Les invitamos a responder la encuesta en línea sobre el formato que aplicaremos en Múltiples en el futuro.

Transitional Justice

The term transitional justice is often used to refer to special mechanisms applied generally but not always in a post-conflict context in order to address grave violations of human rights and international humanitarian law. The mechanisms may vary but are designed to bring perpetrators to account, to redress victims for violations committed by state and non-state armed actors, to promote reconciliation among polarized sectors of the population, and to clarify the causes of the conflict and the crimes committed (through truth commission for example). All of these efforts together are aimed at preventing repetition of the conflict.

This edition of Múltiples includes articles about the work of the American Bar Association's Rule of Law Initiative, an analysis of the transitional justice efforts of the Organization of American States' Mission to Support the Peace Process in Colombia against international good practice, the use of alternative approaches to address sexual violence against women in post-conflict situations, and transitional justice in countries characterized by legal pluralism.

JGG would like to thank all contributors and readers alike for their support since 2007. This Múltiples will be the last edition that provides extensive analysis by various contributors on one topic. We invite you to respond to our survey questionnaire on the future format for Múltiples.

Índice/Contents

- 2 How the rule of law is critical to the survival of post-conflict societies
- 4 Contribuyendo a la Paz y la Construcción de Estado a través de Buenas Prácticas en materia de justicia transicional: la misión de apoyo al proceso de paz de la OEA en Colombia
- 8 Alternative Transitional Justice Approaches to Address Sexual Violence against Women in Post-conflict Situations
- 11 Transitional Justice and Post-Conflict Justice Reform in Contexts of Legal Pluralism
- 14 Just Governance Group News

How the rule of law is critical to the survival of post-conflict societies

Jennifer Tsai

While the rule of law has many definitions, the **definition by the United Nations Secretary General** is perhaps the one most frequently invoked: “a principle of governance in which all persons, institutions, entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” Whatever definition is used, because values that are inherent to rule of law are critical to a functioning state, a major goal for governments in a post-conflict state is to reestablish key elements of the “rule of law.” The challenge is how to promote the rule of law in post-conflict countries, where immediate security and humanitarian challenges require resources and impose limits on reformers. The post-conflict period is also critical for long-term rule of law reform in that it is a moment when donors are most willing to provide funding and attention to support transitional justice. Therefore, it is vital to make the most of this opportunity.

National governments and the international community have distinguished two approaches: transitional justice and

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ABA ROLI is a rule of law organization working in over 60 countries in Africa, Asia, Central and Eastern Europe, Latin America, the Caribbean, the Middle East and North Africa. It traces its origins to 1990, with the creation of the ABA's Central European and Eurasian Law Initiative and the opening of its first overseas office in Sofia, Bulgaria, in 1991. The ABA launched sister initiatives in Asia in 1998, and in Africa, Latin America, and the Caribbean in 2000. In 2003, the ABA launched its Middle East program. In 2006, these regional programs were consolidated into a single entity now known as ABA ROLI. Today, ABA ROLI has approximately 500 professional staff working in the United States and abroad, including a cadre of short- and long-term expatriate volunteers who typically spend from three months to two years in the field providing technical assistance.

rule of law reconstruction. Most of the measures to build the rule of law in post-conflict societies derive from one of these approaches, but unfortunately these approaches are rarely properly coordinated or integrated with each other. The first approach, transitional justice, assumes that conflicts, particularly those in which large-scale human rights abuses were committed, have such a profound effect on societies that one must first deal with the consequences of conflict and human rights violations in order to reestablish the rule of law and achieve long-term peace. “Transitional justice” therefore refers to a range of strategies that countries have used to address the consequences of human rights violations, assist victims and, ultimately, help establish the rule of law. Less concerned with the impact of conflict and human rights violations on society is rule of law reconstruction, which focuses on creating the laws and institutions that the national government or the international community considers vital to protecting the rule of law. The central assumption is that, if a post-conflict society has good laws, well-trained judges and new court buildings, it will be able to establish the rule of law.

The construction of the rule of law can be viewed as having four dimensions: normative (the creation and promotion of laws and regulations); political (an effort to balance power between elites and marginalized groups); cultural (the promotion of certain societal values necessary for the rule law, such as respect for laws and regulations); and institutional (the strengthening of the institutions that nurture the normative, political and cultural dimensions of the rule of law). Transitional justice approaches emphasize the immediate or short-term measures that do not contribute to long-term institution building or to creating the legal frameworks a country needs in the long-term. For example, the creation of specialized, sometimes international, jurisdictions diverts resources from efforts to reconstruct the national judicial system. Transitional justice approaches thus lack normative and institutional dimensions. Rule of law reconstruction's focus on institutions and laws neglects two important elements of the rule of law: political and cultural. The rule of law depends as much on the way power is distributed in the political system or the country and the beliefs and values that people hold as it does on the quality of the laws or on the institutions that apply them.

The American Bar Association Rule of Law Initiative (ABA ROLI) attempts to minimize the shortcomings of both the transitional justice approach and rule of law construction approach, and integrate the best elements of both in the following ways. We take a long-term perspective, recognizing that nurturing the normative, political, cultural and institutional conditions necessary for the rule of law is necessarily a project of “**profound social**



A mobile court in the Democratic Republic of Congo (ABA-ROLI)

change.” Even short-term transitional justice interventions should be considered as one part of a long-term project to respond to victims’ needs and strengthen the rule of law.

A Holistic, Interdisciplinary Approach

A wide range of transitional justice strategies are needed to respond to victims’ priorities and to address the impact of human rights violations on the conditions necessary for the rule of law. It is therefore important to ensure coordination among the different sectors and disciplines working in the transitional justice field, and to think creatively about how to integrate non-traditional sectors into transitional justice programming.

A program in eastern Democratic Republic of Congo (DRC) is a prime example that warrants careful study and analysis. In the DRC, ABA ROLI supports the prosecution, in accordance with fair trial standards, of perpetrators of serious human rights violations. ABA ROLI provides specific training to justice sector actors on investigating and prosecuting serious human rights violations. We have trained military judges, prosecutors and lawyers on prosecuting international crimes, which are incorporated into the DRC’s military penal code, and ABA ROLI-supported mobile courts have prosecuted senior members of the Congolese army for international crimes. Most notably, ABA ROLI facilitated a military mobile court in February 2011 that tried and convicted Lieutenant Colonel Kibibi and eight of his subordinates for the New Year’s Day attacks in Fizi. Kibibi – the highest commanding officer ever tried and convicted for rape in the DRC – was found guilty of ordering mass rapes and of crimes against humanity. He and his subordinates were sentenced to 10–20 years in prison. ABA ROLI also recently supported the prosecution for international crimes of 39 members of the Congolese national army accused of committing a mass rape in the village of Minova during the M23 rebel takeover of Goma in November 2012. Of the 39 defendants, 2 were convicted of war crimes and 24 others received sentences for violations under the military penal code.


ABA ROLI also supports efforts to try human rights violations that occur in the context of conflict, but which are not tried as international crimes. In the DRC, since our program began in 2007, ABA ROLI has supported 76 mobile courts that have heard 1,046 cases of sexual and gender-based violence. ABA ROLI also operates 22 legal aid clinics in eastern DRC that provide legal counseling and representation to victims of sexual and gender-based

violence and, since January 2008, ABA ROLI has partnered with Congolese civil society groups to provide 16,380 survivors with legal counseling.

Community Participation and Local Strategies

Victims’ priorities, and the normative, political, cultural and institutional conditions necessary for the rule of law, are unique to each community, whose experiences of the past (and present circumstances) are likely to vary widely. It is therefore important for transitional justice programs to avoid imposing a single, inflexible regional or national strategy, and to provide space for local communities to develop and implement their own strategies.

Communities that have experienced human rights violations should be involved in the design, implementation and evaluation of transitional justice programs. Amplifying the voice of communities makes it more likely that transitional justice strategies will be responsive to local priorities. Participation also increases the legitimacy of transitional justice programs, and addresses the loss of agency that can result from victimization. Where communities are unable to participate directly in transitional justice mechanisms, they should be given access to information about the mechanisms and its activities.

ABA ROLI has developed a guide, titled “Community Participation in Transitional Justice,” which discusses how participatory research techniques can be used to involve local communities in the creation and conduct of transitional justice policies that are responsive to their needs and priorities. Participatory research offers a way for local communities to work together to scrutinize transitional justice policies and to discuss how their community could try to influence policymaking. ABA ROLI also provides financial and technical support to civil society organizations that are participating in the design and implementation of transitional justice mechanisms. In Mali, for example, ABA ROLI has assisted civil society organizations to form a Transitional Justice Coalition, which acts as both a coordination mechanism for civil society programming and which advocates for civil society’s priorities to be addressed in government transitional justice strategies. ABA ROLI has also provided training on core transitional justice principles to influential Malian policymakers, community leaders and civil society activists. 

Resources Consulted

United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary General*. 23 August 2004.

De Grieff, Pablo and Roger Duthie, *Transitional Justice and Development: Making Connections*. International Center for Transitional Justice, Social Science Research Council. New York, 2009.

Contribuyendo a la Paz y la Construcción de Estado a través de Buenas Prácticas en materia de justicia transicional: la misión de apoyo al proceso de paz de la OEA en Colombia

Kimberly Inksater y Paola Jiménez

Nota editorial:

El presente artículo constituye un resumen de un documento preparado por las consultoras de JGG para el Inter-regional Democracy Resource Centre coordinado por el Instituto Internacional para la Democracia y la Asistencia Electoral IDEA. El documento será publicado a lo largo del presente año. Para más información visite: <http://www.idea.int/democracdialog/>.

En el año 2004, durante el gobierno del Presidente Álvaro Uribe Vélez, la Organización de Estados Americanos fue invitada a monitorer el proceso de Desarme, Desmovilización y Reintegración de grupos paramilitares en el contexto del proceso de negociación conocido comúnmente como los Acuerdos de Santa Fe de Ralito, configurándose la Misión de Apoyo al Proceso de Paz en Colombia MAPP-OEA. A partir de este año, el mandato de la Misión ha sido extendido en varias ocasiones integrando diversas funciones de monitoreo a los mecanismos de justicia transicional implementados en Colombia así como las acciones de reparación que se han venido desarrollando para las víctimas de todos los grupos involucrados en el conflicto armado.

El presente artículo constituye un análisis del papel de la Misión de Apoyo al proceso de Paz desarrollado por la Organización de Estados Americanos (OEA) en Colombia y, en particular, del impacto que han tenido sus acciones en materia de justicia transicional en el fortalecimiento del Estado y la democracia.¹ Con

¹ Para identificar estas acciones las autoras revisaron los 18 informes trimestrales presentados por la Misión ante el Consejo Permanente de la OEA. Adicionalmente, se revisaron varios informes especializados de la Misión en materias asociadas a la justicia

este objetivo en mente, se aborda en primer lugar un breve marco conceptual sobre los principales conceptos, normas y buenas practicas asociadas a la construcción de paz, el fortalecimiento del Estado y la Justicia Transicional. Posteriormente, se hace una breve referencia al contexto del conflicto armado y el mandato de la MAPP-OEA. Una tercera sección presenta un balance de estas acciones en relación con las buenas practicas identificadas, resumiendo algunas conclusiones sobre su impacto en la construcción de la paz y la democracia en Colombia.

Buenas Prácticas Internacionales en torno al Fortalecimiento del Estado y la Democracia

Colombia ha sido catalogado como un *Estado en situación de fragilidad y conflicto*, lo cual hace referencia a la existencia de brechas que si bien no implican una debilidad institucional generalizada o una pérdida total de control sobre el territorio, si implican vacíos de gobernabilidad y presencia en territorios específicos.

Los análisis desarrollados para caracterizar los Estados frágiles o en situación de conflicto armado hacen referencia en general a tres

transicional así como el informe final de la evaluación externa realizada en el año 2013.

dimensiones asociadas con esta fragilidad. La **capacidad**, en primer lugar, hace referencia al grado en que las instituciones estatales son capaces de proveer o regular la disponibilidad de bienes públicos esenciales. En segundo lugar se encuentra la **autoridad**, concepto que hace referencia a la capacidad del Estado de mantener control sobre la totalidad del territorio y proteger a la población civil frente al conflicto armado. La **legitimidad**, por último, se ubica en la relación Estado – Sociedad y hace referencia a la confianza de la población en la capacidad del Estado para cumplir con las obligaciones que le competen.

Esta situación de fragilidad y conflicto armado ha estado presente en diversos Estados de América Latina, Europa del Este y África con correlativas violaciones graves a los Derechos Humanos de la población que han implicado el involucramiento de la comunidad internacional a partir de estrategias de construcción de paz, fortalecimiento de los Estados y justicia transicional. La evolución de estas estrategias ha llevado a organismos como las Naciones Unidas y la Organización para la Cooperación y el Desarrollo Económicos (OCDE) emitir resoluciones y lineamientos a sintetizar en las que pueden ser consideradas como buenas prácticas.

Son precisamente estos puntos comunes en las buenas prácticas internacionales las que han sido tomadas como referentes para el análisis de la Misión que ofrece el presente artículo. A continuación se presentan estos elementos comunes junto con las principales preguntas que guiaron el análisis de las acciones de la MAPP-OEA.

Elementos comunes de las buenas prácticas internacionales	Preguntas Clave
Realizar análisis de contexto como punto de partida	¿Cómo caracteriza la MAPP-OEA el contexto? ¿Analiza las tres dimensiones asociadas a la fragilidad de los Estados?
Asumir el fortalecimiento del Estado como prioridad	¿Cómo promueve la MAPP-OEA la construcción de Estado? ¿La MAPP-OEA basa su análisis en acuerdos políticos, fortalecimiento de la capacidad institucional y/o expectativas sociales y capacidades institucionales?
Priorizar los derechos de las víctimas	¿Cómo aborda la MAPP-OEA los derechos de las víctimas a la verdad, la justicia y la reparación? ¿Los esfuerzos realizados en material de Desarme, Desmovilización y Reintegración fortalecen los esfuerzos en material de justicia transicional?
Implementar enfoques diferenciados, incluyentes y orientados hacia las víctimas	¿Las víctimas son centrales para las iniciativas de justicia transicional? ¿Se han tomado medidas específicas para grupos afectados por discriminación? ¿Se ha promovido su participación?
Promoción de los derechos de las mujeres y de su participación	¿Cómo promueve la MAPP-OEA los derechos de las mujeres? ¿Cómo asegura la implementación de un enfoque centrado en las víctimas en casos de violencia de género? ¿Cómo promueve la participación de las mujeres?

Contexto de conflicto armado en Colombia y mandato de la MAPP-OEA

Colombia ha experimentado aproximadamente cincuenta años de conflicto armado, el cual ha sido considerado como uno de los más graves en la historia reciente de América Latina en términos de víctimas y violaciones al Derecho Internacional Humanitario. Durante estas décadas de conflicto armado pueden distinguirse tres categorías de actores armados: Diversos grupos guerrilleros, Las Fuerzas Armadas del Estado colombiano y grupos paramilitares organizados en torno a

la lucha contra insurgente, el tráfico de drogas y otras actividades ilegales.

El conflicto, a su vez, ha observado diversos impactos en las tres dimensiones de fragilidad enunciadas arriba. En efecto, aunque el Estado colombiano ha mantenido su capacidad para implementar estructuras políticas y estrategias económicas y administrar justicia en los centros urbanos más importantes, existen vacíos notables de presencia institucional en áreas rurales que han sido llenados por grupos armados que reemplazan al Estado. La ausencia de seguridad proveída por el Estado y de instituciones judiciales

ha resultado en deficiencias en la **autoridad** del Estado colombiano principalmente en áreas rurales.

De otro lado, las sistemáticas violaciones a los Derechos Humanos y el Derecho Internacional Humanitario han tenido serias repercusiones en materia de **legitimidad** del Estado colombiano, el cual se presenta ante la sociedad como una estructura incapaz de investigar, procesar e investigar estos hechos, generando altos niveles de impunidad. En materia de **capacidad**, por último, el Estado colombiano a nivel local ha evidenciado serias deficiencias para responder a las necesidades de la población y proveer servicios públicos fundamentales. Estas tres dimensiones de fragilidad del Estado colombiano confluyen en lo que podría entenderse como una brecha entre el centro y la periferia en términos de gobernabilidad y capacidad.

En este contexto de conflicto armado, pueden distinguirse una serie de iniciativas orientadas a lograr acuerdos políticos que den fin a las hostilidades. Dentro de estas iniciativas recientes, se encuentran los llamados Acuerdos de Santa Fe

Una actividad relacionada a la restitución de tierra en Manpujan. OEA-OAS



de Ralito en los cuales el gobierno del Presidente Álvaro Uribe Vélez concertó una serie de condiciones de Desmovilización, Desarme y Reintegración con las Autodefensas Unidas de Colombia que dieron origen a la Ley 975 de 2005 conocida como la Ley de Justicia y paz. Es en el contexto de estas negociaciones que se origina un primer mandato para la MAPP-OEA en Colombia, el cual ha venido renovándose y ampliándose de acuerdo con la propia evolución del conflicto armado y los instrumentos de justicia transicional adoptados por el Estado colombiano.²

Las acciones de la MAPP-OEA en justicia transicional de cara a las buenas prácticas identificadas

Aunque los reportes periódicos y las diversas publicaciones de la misión en material de justicia transicional no contienen una descripción completa del trabajo de la Misión o análisis a fondo sobre sus contribuciones a la construcción de la paz y el

² Pueden distinguirse tres fases en el desarrollo del mandato de la MAPP-OEA. Una primera fase cubre el periodo desde el inicio de la misión hasta la adopción e implementación primaria de la Ley de Justicia y Paz en el 2005, periodo en el cual el énfasis de la misión estuvo en el monitoreo al proceso de desmovilización, desarme y reintegración de los miembros de las Autodefensas Unidas de Colombia. Durante la segunda fase, que va desde el 2006 hasta el 2011, la MAPP-OEA realizó una verificación de la implementación de la Ley de Justicia y Paz, incluyendo monitoreo al fortalecimiento de capacidades institucionales, análisis de las condiciones de acceso a los procesos judiciales regulados por la Ley, acompañamiento a las víctimas y seguimiento a la implementación de las decisiones de los jueces. La tercera fase, que va desde el 2011 hasta la actualidad, se centra en la implementación de un segundo instrumento de justicia transicional adoptado por el Estado colombiano: La ley de Víctimas y Restitución de Tierras (Ley 1448 de 2011), que establece una serie de medidas orientadas a garantizar los derechos a la verdad, la justicia y la reparación de las víctimas del conflicto armado en su conjunto.

fortalecimiento del Estado, existen diversos ejemplos que demuestran implícitamente que la Misión ha adoptado los elementos comunes de las buenas practicas internacionales identificadas arriba.

En lo que respecta al análisis del contexto como referente para la orientación de las estrategias en materia de justicia transicional, la Misión ha hecho diversos análisis sobre los vacíos del Estado colombiano en material de autoridad, capacidad y legitimidad. A manera de ejemplo, los informes describen la ausencia de autoridad estatal a lo largo del territorio manifestada en la presencia de grupos armados ilegales y la falta de instituciones públicas en zonas de conflicto. Los informes también identifican necesidades específicas en material de fortalecimiento de capacidades de las instituciones colombianas para implementar de manera satisfactoria los mecanismos de justicia transicional entre otros aspectos de los procesos de paz y precisan recomendaciones para robustecer la legitimidad del Estado a través de la construcción de confianza y la reconexión entre el Estado y la sociedad civil en zonas afectadas por el conflicto.

Un segundo aspecto a resaltar es que si bien el fortalecimiento del Estado no es una prioridad de la Misión, esta ha contribuido a tres dimensiones fundamentales implicadas en este fortalecimiento: i. Ha promovido acuerdos políticos entre el Estado

y la Sociedad civil en el sentido de construir confianza para que las víctimas se involucren en los mecanismos y procesos de justicia transicional, ii. Ha desarrollado acciones de fortalecimiento de capacidades institucionales, entre otros, a través de apoyos directos a entidades estatales locales como las personerías municipales y la promoción del trabajo coordinado entre las entidades oficiales (coordinación de visitas interinstitucionales a las zonas de conflicto y coordinación de entidades para el cumplimiento de la Ley de Justicia y paz) y iii. Ha orientado su acción hacia las expectativas y necesidades sociales a través de iniciativas concretas orientadas a reactivar los lazos comunitarios y restablecer la confianza entre las personas y al interior de las comunidades.

A partir de diversas acciones, la Misión ha contribuido a consolidar acuerdos políticos entre el Estado y los grupos armados y ha fortalecido la confianza entre el Estado y las comunidades y organizaciones sociales. A través de las acciones de acompañamiento y monitoreo contenidas en su mandato, la Misión ha contribuido al fortalecimiento de las capacidades institucionales de las entidades responsables de implementar la Ley de Justicia y Paz y la Ley de Víctimas y Restitución de Tierras.

Es importante resaltar que uno de los roles más importantes asumidos por la Misión ha sido facilitar un

Oficiales de la MAPP reúnen con víctimas del conflicto armado en Villavicencio. OEA-OAS



diálogo entre el Estado y la sociedad civil que ha promovido relaciones renovadas y fructíferas. La promoción de relaciones entre Estado y sociedad civil se ha abordado desde el propósito explícito de construir confianza entre las instituciones públicas y las organizaciones de base en zonas afectadas por el conflicto.

Los derechos de las víctimas a la Verdad, la Justicia y la Reparación han sido promovidos a partir de las acciones de la Misión en material de justicia transicional. Resaltan en este sentido las iniciativas orientadas a fortalecer la garantía del derecho de las víctimas a la verdad (a través de, entre otros, el monitoreo a la participación de las víctimas en los procesos desarrollados bajo la Ley de Justicia y Paz y la promoción de escenarios colectivos de confesiones de hechos por parte de los grupos armados). La promoción del derecho de las víctimas a la justicia se evidencia en diversas acciones tales como el monitoreo a los procesos de justicia y paz señalando puntos críticos de los mismos y el apoyo en la identificación de lecciones aprendidas. El derecho a la reparación, por su parte, también ha sido promovido por la Misión a partir del desarrollo de estrategias orientadas a monitorear y señalar recomendaciones a las entidades estatales creadas con este fin, el monitoreo a proyectos piloto de reparación y el desarrollo de modelos para el monitoreo de la seguridad y posibles riesgos que afectan a las víctimas que buscan esta reparación.

La Misión ha fortalecido la capacidad del Estado para proteger a las víctimas y responder a sus expectativas y demandas. De hecho, la Misión ha jugado un rol fundamental en el logro de una coordinación interinstitucional entre las entidades estatales para dar respuesta a los derechos de las víctimas. Desde el punto de vista de la sociedad civil la Misión ha apoyado el ejercicio del derecho a la verdad, ha incrementado el acceso a los mecanismos de justicia transicional y ha promovido la preparación y participación de las



Una actividad de reconciliación entre mujeres. OEA-OAS

víctimas en los procesos de reparación individual y colectiva.

De otro lado, las acciones de la Misión en materia de justicia transicional han sido inclusivas, reconociendo múltiples formas de discriminación y vulnerabilidad y se evidencia además que se ha iniciado la adopción de enfoques diferenciales. La Misión ha considerado las necesidades y perspectivas de comunidades vulnerables afectadas por el conflicto armado. Los pueblos indígenas, las comunidades afrocolombianas y las organizaciones de mujeres han recibido apoyo directo, haciéndose evidentes estrategias diferenciadas para responder a los derechos, necesidades y valores culturales de estos grupos. Entre estas acciones se encuentran: i. Acciones humanitarias en favor de comunidades indígenas, ii. Apoyo a las comunidades para administrar los procesos de justicia transicional desde sus propias normas y procedimientos, iii. Recomendaciones en torno a la investigación de los derechos de niños y niñas en el contexto del conflicto armado, iv. Apoyo a iniciativas de memoria histórica de comunidades afrocolombianas, entre otros.

Las actividades de la MAPP-OEA han promovido igualmente los derechos de las mujeres así como su participación en los procesos de justicia transicional. La misión ha animado la participación de las mujeres en escenarios de debate

y definición de políticas públicas, ha formulado recomendaciones dirigidas a las entidades estatales responsables tomar acciones para responder a las necesidades específicas de las mujeres víctima de violencia armada y de las mujeres que se han desmovilizado de grupos armados, y ha acompañado a los grupos de mujeres en el desarrollo de propuestas de política pública para la garantía de sus derechos. Si bien no es posible identificar una transversalización del enfoque de género en los informes de la Misión existen múltiples ejemplos de actividades que adoptan un enfoque género sensitivo y de acciones orientadas hacia las mujeres para responder a sus necesidades específicas. Entre estos resaltan: i. Estudios y recomendaciones sobre las necesidades específicas de las mujeres desmovilizadas, ii. Acompañamiento a organizaciones de mujeres en la elaboración de recomendaciones para la implementación de un enfoque género sensitivo en temas clave tales como la restitución de tierras y las medidas de protección para lideresas en riesgo y iii. Acompañamiento a casos de violencia sexual, entre otros.

Con la evolución del mandato de la Misión y del proceso de paz, las estrategias propias de la Misión han evolucionado hacia un enfoque basado en los derechos humanos. La evolución de las estrategias y acciones de la MAPP-OEA evidencia

un notable cambio de énfasis, pues mientras en las primeras etapas la Misión se concentró en las responsabilidades estatales relacionadas con los procesos de Desarme, Desmovilización y Reintegración, en momentos posteriores se ha venido aplicando un enfoque basado en los derechos de las víctimas que hace énfasis en sus expectativas y necesidades. La Misión ha sido efectiva en promover los derechos de las víctimas y en apoyar a las organizaciones de víctimas y las comunidades,

monitoreando al mismo tiempo las acciones promovidas desde el Estado. Esta evolución ha fortalecido la legitimidad de la Misión y le ha permitido desarrollar prácticas que responden a los elementos comunes de las buenas prácticas en material de justicia transicional.

En conclusión, durante los 10 años de Apoyo de la Misión al proceso de paz en Colombia, la MAPP-OEA ha realizado contribuciones significativas a la construcción de la paz y el fortalecimiento del

Estado a partir de la verificación del desarme y desmovilización de los grupos armados, la construcción de confianza entre la sociedad civil y las entidades estatales, el robustecimiento de la capacidad estatal a partir de acuerdos de coordinación entre diversas entidades, el fortalecimiento de las capacidades de las organizaciones y comunidades afectadas por la violencia y el apoyo al Estado para responder a los derechos de las víctimas a la verdad, la justicia y la reparación. 

Alternative Transitional Justice Approaches to Address Sexual Violence against Women in Post-conflict Situations

Ashley Boyes

Countries emerging from conflict are confronted with myriad political, social and economic problems. Perhaps most challenging is how to confront past atrocities. Access to the formal justice system in the developing world post conflict can often be difficult. For women and girls, these obstacles are especially significant. Not only do women and girls face a formal justice system that is overburdened, understaffed and poorly resourced, but also the injustices that they experience are different and complex. The sexual violence that a woman or girl experiences during conflict not only impacts her physically and emotionally but has lasting repercussions for her family and community. In many countries, once a woman of any age has been sexually violated by someone other than her husband, she is regarded as impure and often socially ostracized from her community even if she has been forcibly raped or abused.

This article will present examples of alternative justice approaches that have been implemented in countries during post-conflict periods in order to address sexual violence.

Restorative, Traditional or Informal Justice Approaches

The formal justice system is characterized by an adversarial setting in which the focus is on ensuring that the offender is punished for the wrong that has been committed. While there is some emphasis on the victim to ensure that 'justice' is served, little is done to ensure that the victim's needs are met. This is especially so in

post-conflict countries. It is not uncommon for situations of armed conflict to weaken justice institutions, thereby inhibiting access to justice, reparations, and victim assistance. While the formal justice system focuses on prosecuting the offender, restorative justice approaches based on customary systems or community practices regard crime as violations not just against the victim but against the whole communal family. Below are some examples of the use of alternative approaches to the formal justice system.

Rwanda

After the 1994 genocide, Rwanda returned to an indigenous mechanism of traditional justice known as *gacaca*. Established and re-formalized in 2001 by the government, the *gacaca* courts were implemented to hold the perpetrators of genocide accountable for their crimes. Within this communal framework, villagers and neighbours congregate in outside localities throughout Rwanda in order to hear cases brought against accused killers. Sets of judges who have undergone informal legal training are present to oversee the cases, but everyone in attendance is free to speak out. The *gacaca* courts have been praised for their ability to promote community participation. The process encourages the Rwandan people to voice their concerns openly. The accounts, testimonies and interactions not only play a central role in the sentencing of the perpetrator but also give individuals and the wider community an opportunity to confront attackers, tell their stories and express emotions in an open but secure environment. In theory, this

community-based mechanism helps to promote and develop civic culture.

Administered by respected local leaders, typically elders, *gacaca* originally was designed to resolve property disputes, including land and cattle ownership, marital conflicts, questions of inheritance rights, loan, and accusations of petty theft. Originally, the adjudication of sexually violent crimes did not fall within the jurisdiction of *gacaca* proceedings. However, in 2008 an amendment to the *gacaca* law was introduced to allow crimes of sexual violence to be heard within the *gacaca* system. Since the 2008 amendment to the *gacaca* law, 6,608 cases of rape or sexual torture were transferred from the national courts to the *gacaca* jurisdiction.

Northern Uganda

Since 1997, Northern Uganda has been marked by widespread international human rights violations. Not uncommon within conflict zones, rape and sexual slavery have been used as weapons of war and terror against Ugandan women and girls. Various traditional justice mechanisms have received grassroots support and have been promoted by the local leaders and elders within the country. Many involve mediation, confession by the perpetrators, solicitation of forgiveness from victims, reconciliation, payment of compensation, and the reintegration of both the victim and perpetrator into the community.

Sierra Leone

The eleven-year diamond-fuelled civil war that began in March 1991 and ended in January 2002 ravaged the country and people of Sierra Leone. Since then, two forms of community-based restorative approaches have played a significant role in post-conflict reconciliation efforts.

The first example of this form of justice is the traditional reintegration of former combatants, which typically involves male participants. This process was facilitated by non-governmental organizations, including the Red Cross, the International Rescue Committee and the Truth and Reconciliation Commission Working Group. While there is considerable variation in traditional reintegration practices, the common theme is the community's acceptance of the offender and encouraging the offender to take responsibility for his/her actions. Traditional reintegration ceremonies involve a process of cleansing and purification, representing rebirth, followed by feasting and dancing. Because many women and girls are ostracized and shamed if they have been sexually abused or raped, the traditional reintegration of rape victims was also an important form of restorative justice. There are variations in the style of reintegration for girl victims of rape: some ceremonies involve boiling roots and leaves so the girl can breathe in the steam to be 'fumigated', while other practices involve the eating of roots and leaves to be cleansed from the inside. Others involve washing the girl in a stream. The

objective of the reintegration of rape victims is that the community accepts the girl who has been damaged as a result of (the criminal act of) sexual abuse.

The second example of a traditional approach used in Sierra Leone is a practice known as *Fambul Tok*. Like Rwanda, over the last several years Sierra Leone has reintegrated this traditional practice, aimed at continuing the work of reconciliation at the local level. Like the *gacaca* courts, *Fambul Tok*, meaning 'family talk', involves public disclosure of their experiences by both victims and perpetrators, as well as libations to the ancestors, and the sacrifice of an animal.

Established in 2007 by Sierra Leonean, John Caulker, *Fambul Tok International* builds upon Sierra Leone's 'family talk' tradition of discussing and resolving issues within the security of a community circle. The program works at the village level to help communities organize ceremonies that include truth-telling bonfires and traditional cleansing ceremonies, practices not employed since before the war. Built around what Caulker describes as a 'culture of conversation,' the Sierra Leonean people are drawing on age-old traditions and practices of confession, apology and forgiveness to bring reconciliation and healing back into their communities. According to the 2011 film documentary about *Fambul Tok*, in the first two years of the program nearly 600 people testified to over 20,000 of their neighbours at 55 *Fambul Tok* bonfire ceremonies at a cost of one million dollars. In comparison, in eight years, the Special Court has prosecuted only 10 men in 4 trials at a cost of two hundred million dollars.

Flexible Formal Justice: Mobile Courts

The number of victims of war rape and sexual violence has reached an unprecedented high in the Democratic Republic of Congo (DRC) in the past several years. Recent surveys have revealed extremely elevated levels of gang rape and abduction, reflecting the highly 'weaponized' forms of violence against women in this region. Rebel groups manipulate women into thinking that they are worthless, demoralizing entire communities through sexual violence against wives and daughters. Women end up feeling they have brought a 'curse' into their villages.

Though still a 'judicial method' for sanctioning sexual violence, the mobile court system introduced in the DRC reflects a participatory and holistic approach to combatting impunity of sexual violence. Introduced by the American Bar Association Rule of Law Initiative (ABA ROLI), the mobile court system is deployed to areas in the country where there is little or no access to the formal justice system. Congolese law provides for these courts, which can be either civilian or military tribunals. Since their implementation, they have successfully tried hundreds of alleged perpetrators of sexual violence. In South Kivu, between October 2009 and February 2011,

ABA ROLI organized 9 mobile court sessions, in which 116 individual cases were tried and 104 perpetrators convicted. In Maniema, between December 2008 and January 2011, the program provided legal counseling to 989 victims and filed 984 cases. During this period, 113 people were tried and 88 were convicted.

Victim Assistance

Victim assistance is a form of intervention that recognizes that unless their basic needs are met first, it is unrealistic to expect that women will bring legal claims forward. Victim assistance work in the Maniema region of the Democratic Republic of Congo for example revolves around a series of women's community centres called Wamama Simameni. Initially created as safe houses for victims of sexual violence, these centres now provide a wide array of services including medical, psychological and economic assistance.

Reparations

Not only do women experience conflict differently but they also have different perspectives on redressing gender-based violence. As Phumzile Mlambo-Ngcuka, the head of UN Women commented at the 2014 Global Summit to End Sexual Violence in Conflict, "Once the perpetrator is behind bars, a woman's life is not healed at that point. The tragedy continues for her. The stigma she lives with, and her economic wellbeing, are significantly compromised ... she needs psychosocial support and material support to get her life back. Women need collateral, access to finance." At the conclusion of the conference, a Guidance Note was prepared by the United Nations to provide policy and operational guidance for UN engagement in the area of reparations for victims of conflict-related sexual violence. It emphasizes, among other things, a woman's right to a remedy (in the form of compensation) as a matter of international and humanitarian law.

Though no amount of money will be able to repair the damage done to a woman who has been sexually violated, the absence of reparations causes victims of sexual violence to doubt the commitment of national and international actors to their concerns. Unfortunately, this is an area that still requires much work. While the International Criminal Court has established reparations initiatives administered by the court's Trust Fund for Victims (TFV), reparations have yet to be awarded.

Moving Forward

This article has presented various alternative justice approaches for responding to women's rights to truth, justice and reparations in relation to crimes of sexual violence committed during armed conflict. Although the development of formal rule-of-law should continue to be an important objective of the international community, the formal judicial system is not necessarily the most effective means for addressing sexually based crimes. While women

want to see their perpetrators brought to justice, there are more pressing problems with which they are confronted including the need for counseling and economic assistance.

It is important to recognize that the aforementioned examples are not without flaws. Lack of procedural fairness and difficulty in upholding international human rights standards are among the greatest challenges, especially when it comes to women's rights. In fact, some women continue to feel that because some sexually-based crimes are not processed through the formal justice system, their suffering is not truly deemed 'wrong' by the community. As governments continue to navigate formal-informal relations, true justice will only occur if women and men are treated equitably.

Two common factors that contribute to the success of alternative approaches to addressing sexually based crimes are: 1) a holistic approach that includes cross-sector partnerships, and 2) grassroots mobilization with the help of civil society organizations. Any program that combines these two factors would be more successful at combatting the culture of impunity surrounding sexual violence and would better respond to women's perception of justice. 0

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Transitional Justice and Post-Conflict Justice Reform in Contexts of Legal Pluralism

Kimberly Inksater and Erika Schneider

Post-conflict societies characterized by multiple legal systems present a unique challenge to transitional justice reform efforts. Transitional justice seeks to redress human rights violations that have occurred in the past in order to ensure accountability for crimes that had remained in impunity, to ensure non-repetition of grievous human rights abuses, and to promote societal reconciliation. While reform efforts are expected to adhere to international human rights standards, in some contexts community-based justice systems present laws and cultural understandings that seemingly conflict with these norms, particularly in respect to gender and women's rights. For this reason many post-conflict transitional justice and law reform initiatives have excluded traditional or community-based justice systems. This article seeks to demonstrate that while the challenge is formidable, incorporating traditional or community-based justice systems into transitional justice efforts should be seen as an opportunity for participatory, inclusive and culturally-sensitive reform.

Legal Pluralism: An Overview

In its most basic form, the concept of legal pluralism refers to the co-existence of multiple legal systems. In practice, the coexistence of justice systems at the national level may take many forms along a continuum. At one end of the continuum the state may claim a complete monopoly on law and justice and attempt to destroy alternative justice systems; while at the other end of the continuum there may be constitutionally recognized autonomous indigenous legal jurisdictions, as is the case in Bolivia and Colombia. In post-conflict societies some internationally supported justice reform initiatives may choose to purposely ignore the predominant use of non-state justice systems by citizens. Local traditional non-state justice processes may be preferred by citizens due to the collapse, illegitimacy or inaccessibility of the formal system. The state system and international agencies such as the United Nations may be aware of the non-state, community-based and traditional justice systems and may choose to: assume a neutral stance towards it, explicitly condemn it, or formally recognize it.

The Importance of Understanding Legal Pluralism in the Context of Post-Conflict Societies

Understanding the challenges as well as the potential opportunities presented by a society characterized by legal pluralism is of particular importance to post-conflict societies if special transitional initiatives related to grave

human rights violations and comprehensive reforms are to be successful. In countries affected by conflict or fragility there is often an absence of state apparatus at the local level. Traditional or community-based justice systems fill this vacuum by providing conflict resolution mechanisms that re-establish social harmony. The end of an occupation, authoritarian rule, or armed conflict does not immediately prepare the local population for the introduction of a formal and perhaps exogenous system that does not integrate their socio-cultural values.

Isser recognizes, as do other legal pluralism analysts, that any justice system is based on values and norms that regulate social conduct. The failure of transitional justice and post-conflict reform initiatives to recognize the context-specific socio-cultural values that underpin community-based systems and the interaction of these systems with formal administration of justice can limit progress toward social reconciliation and access to justice.

In East Timor, Chopra et al. studied post-conflict justice reform and noted that the United Nations Transitional Administration concentrated efforts on the reconstruction of a formal justice system even though the local population expressed greater confidence in community-based justice systems. Furthermore, the Indonesian-imposed formal system had been feared by the Timorese population. Disputes had traditionally been addressed through compensation at the village level. Once the wrongdoer who had strayed from community values and caused imbalance had provided compensation (material or otherwise) peaceful relations between the specific parties to the dispute and the community were re-established. Punitive criminal measures used in most formal state systems do not generally consider the re-establishment of social relations through compensation or other means. Chopra et al. provide examples of engagement and non-engagement between justice systems in the transitional context in East Timor:

- i) A diversionary justice program to address land disputes and minor offences during the transitional period integrated community elders in decision-making, and community work was used as a compensatory rather than punitive measure. UN civilian police referred cases to this alternative program until the UN released a directive that such offences had to be submitted to the formal system.
- ii) In the case of domestic violence, the traditional form of resolution that takes place between elders without women's participation is seen as a human rights violation. However, the application of the

formal justice system can result in the removal of the husband from the home, leaving the wife and children without socio-economic support, and failing to address the root causes of the violence. Chopra et al. noted that the incidence of reporting domestic violence declined when women observed that their husbands were likely to be detained.

- iii) The Commission on Reception, Truth and Reconciliation incorporated community practices in hearings related to non-serious offences. While generally this process was perceived as accessible, effective and culturally relevant it was still criticized for lack of uniform standards.

Post-conflict justice reform as socio-cultural reform: the example of women's rights

The premise that law is a cultural construct was advanced by Geertz but is often not recognized in justice reform initiatives. Socio-cultural values frame formal justice systems to the same degree as socio-cultural values provide the rationale for norms and procedures in traditional or community-based systems. The values may be different but in either system they define acceptable and unacceptable social conduct and the processes employed to redress wrongdoing. In a post-conflict context the difficult tasks of redressing the damages to victims who have suffered from human rights violations and introducing new justice mechanisms require not only a technical law reform process but collective reflection on the factors that underpinned the violence or political authoritarianism.

The East Timor examples, among others, demonstrate that a cookie cutter template for reform of a formal justice system may result in procedures which, while consistent with international human rights standards, may conflict with local socio-cultural values. The challenge becomes how to engage traditional local authorities in order to promote socio-cultural change. Given that gender equality and the rights of women are identified as the major challenge in academic and policy literature on justice reform in contexts of legal pluralism, a number of sources have expressed this challenge as an opportunity for contextualizing human rights and transforming cultural practices, including justice systems. Inksater has proposed internal reflection on socio-cultural values (among justice operators within a legal system) and then "inter-juricultural dialogue" (between justice operators of distinct legal systems) in order to transform justice systems and in particular to address gender equality and women's rights in situations of legal pluralism.

While international human rights treaty bodies, such as the UN Committee on the Elimination of Discrimination against Women (CEDAW), have often viewed culture as problematic and recommend abolishing a custom

through legislation rather than dialogue with non-state justice authorities, the United Nations Special Rapporteur on Cultural Rights "proposes to shift the paradigm from one that views culture merely as an obstacle to women's rights to one that seeks to ensure equal enjoyment of cultural rights" (Shaheed, 2012: 5). The special rapporteur emphasizes that culture is not an independent, self-propelled entity possessing the ability to change and redefine on its own. Rather, culture is continually shaped by a multiplicity of actors and institutions, and women must be allowed an active role in shaping and challenging these cultural norms.

In the context of justice reform in post-conflict societies, the recommendations of the special rapporteur are consistent with legal pluralism literature that advocates for engagement with traditional justice systems and

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particularly the inclusion of women in grassroots justice reform dialogue. Corradi has argued that justice reform must encourage dialogue among and between community groups (which include women's groups) in regards to international human rights in order to incorporate local knowledge, culture, and context into international human rights standards.

In post-conflict Guatemala Mayan organizations have implemented culturally appropriate mediation services to address various problems including cases of violence against women. This work has led to increased collective reflection, including the "re-evaluation of custom" (Seider and Macleod, 2009:66), and recognition of the challenges faced by Mayan and state justice authorities to respond to violence against women with culturally appropriate responses based on the Mayan cosmovision.

Conclusion

Justice reform in post-conflict societies could achieve the objectives of transitional justice, especially the principles of reparations for victims, non-repetition, and social reconciliation, if traditional, customary, community-based systems are taken into account. While reform must acknowledge and work with community-based justice systems, it must also ensure that women's rights and human rights more generally are respected in these reforms. Isser recommends that justice reform in post-conflict situations analyze the justice landscape in a comprehensive and rigorous manner so that reform initiatives can be designed based on a deep understanding of the socio-cultural norms that underpin traditional community-based systems. While customary norms or procedures may violate international human rights standards they serve a socio-cultural purpose in the community. Likewise, the formal justice system's preference for detention as a punitive remedy for crime may conflict with the socio-cultural values of a community. Inter-juricultural dialogue that ensures women's participation, especially related to gender-based violence, will permit traditional and state authorities to identify alternative measures within both systems that respect human rights standards while meeting the socio-cultural objectives of each justice system. 

Just Governance Group News

Women in/at war conference

In September 2014 Kimberly Inksater presented a paper at the University of Warwick on the use of community-based justice mechanisms to address gender-based violence in post-conflict situations characterized by legal pluralism.



University of Ottawa Faculty of Law Interns

In the last year JGG has hosted three law students who have supported the consultancy and knowledge functions of JGG. Ashley Boyes, Erika Schneidereit and Paula Krawus have undertaken research on various issues including transitional justice, legal pluralism, and cross-sector partnerships in development cooperation. This research has supported conference and policy papers and the recent editions of Multiples and Co-Praxis. In addition, research related to country-specific justice and human rights challenges has contributed to consultancies undertaken in Turkey and Vietnam.

JGG team conducting evaluation for OAS

A multinational and multidisciplinary team from JGG will conduct an evaluation of the program for Education for Democratic Values and Practices coordinated by the Office of Education and Culture of the Organization of American States. Carmen Beatriz Ruiz from Bolivia, co-founder of JGG, is the expert on citizenship and democracy; Dr. Reyna Hiraldo from the Dominican Republic is the expert on distance education and communication technologies; and Dr. Remy Beaulieu, evaluation expert, will provide quality assurance to the evaluation process led by Kimberly Inksater. Jael Mercedes Duarte, a former JGG intern, will provide assistance to the evaluation team.

A new format for Multiples

Multiples was first published in February 2007 as a 6-page bulletin. Multiples has expanded over the years much as our network has grown. JGG now relies on a network of governance professionals from countries in Eastern Europe and the Middle East as well as Latin America, Canada and the United States. JGG seeks to showcase this network in its knowledge publications through new formats and media. As we undertake a review of Multiples' format and frequency we welcome your feedback on Multiples. Suggestions can be sent to: info@justgovernancegroup.org

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