Democracy Promotion and Conflict Resolution: The Role of Access to Justice

Working Paper

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Democratic Progress Institute

November 2012

Democratic Progress Institute

Published by
Democratic Progress Institute
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United Kingdom

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First published, 2012

ISBN: 978-1-905592-53-1

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Foreword

DPI aims to foster an environment in which different parties share information, ideas, knowledge and concerns connected to the development of democratic solutions and outcomes. Our work supports the development of a pluralistic political arena capable of generating consensus and ownership over work on key issues surrounding democratic solutions at political and local levels.

We focus on providing expertise and practical frameworks to encourage stronger public debates and involvements in promoting peace and democracy building internationally. Within this context DPI aims to contribute to the establishment of a structured public dialogue on peace and democratic advancement, as well as to create new and widen existing platforms for discussions on peace and democracy building. In order to achieve this we seek to encourage an environment of inclusive, frank, structured discussions whereby different parties are in the position to openly share knowledge, concerns and suggestions for democracy building and strengthening across multiple levels. DPI's objective throughout this process is to identify common priorities and develop innovative approaches to participate in and influence the process of finding democratic solutions. DPI also aims to support and strengthen collaboration between academics, civil society and policy-makers through its projects and output. Comparative studies of relevant situations are seen as an effective tool for ensuring that the mistakes of others are not repeated or perpetuated. Therefore we see comparative analysis of models of peace and democracy building to be central to the achievement of our aims and objectives.

Access to justice is often a reflection of broader socio-political trends in society. Effective access to justice is a crucial element of engagement between society and the state that allows citizens to seek fair remedy for their grievances regardless of their position in society. This report examines why access to justice contributes to conflict-resolution and the promotion of democracy and what ways it can be pursued.

With special thanks to Michael Lillis for his contribution to the research for and assistance with this project.

Kerim Yildiz
Director
DPI
November 2012

Introduction

Access to justice is a concept that first began to gain credence in jurisprudence in the early 1960s and has evolved through three distinct waves, the last of which is now seen as a key pillar to conflict resolution and democratic advancement.

It can be taken that the philosophy that underpins access to justice in all of its forms seeks to increase the accessibility of legal systems and justice to those who would otherwise struggle to access them. There are multiple reasons why an individual may not be able to access the justice they are entitled to, the main ones being; their economic position and the costs involved, the capacity of the states legal system, their rights as part of a minority group, gender and language issues. The first wave of access to justice programmes and reforms aimed to tackle the economic issues that the poor had in using legal systems.

History of access to justice

The First Wave: Legal Aid

Legal aid represents the first modern attempt to tackle an age old problem, 'curia pauperibus clausa est – the courts are closed to the poor.'[1] In essence it involves ensuring access to legal experts in order for legal advice and representation to be available to those people who would not be able to otherwise obtain it. This wave has taken various forms in a number of different countries with different legal cultures that adhere to different ideas of what protecting a 'right' constitutes. Two examples are;

1 CAPPELLETTI, M (1972), 'Legal Aid: Modern Themes and Variations, Part One: Emergence of a Modern Theme', p. 347.

Judicaire System: legal aid for everyone who is eligible under the statutory terms. The state pays for the costs of a lawyer.

Public Salaried Attorney: an attorney is hired and paid for by the state and charged with furthering the interests of the poor.

The Second Wave: The protection of diffuse interests

The second wave within the access to justice movement represents a reaction to the lack of procedural rules in legal systems that allowed for groups, categories or classes of people to have access to justice together. This wave involves the protection of certain rights and interests that are applicable to a range of people. Mechanisms that have emerged out of this wave include the creation of public prosecutors charged with defending public interests, public interest litigation and class action suits.

The Third Wave: efforts to go beyond the provision of legal services

This third wave has represented a proliferation in processes and mechanisms to increase access to justice, many of which do not involve formal legal processes. This wave has encompassed the development of mediation, arbitration instead of adjudication, special procedures for small claims and what can be referred to as the Alternative Dispute Resolution (ADR) movement. Yet paradoxically there is significant debate on whether much of this third wave can be considered 'new'. ADR in particular has its roots in a number of traditional and informal justice processes, as will be demonstrated by the Rwandan Gacaca later in this paper.[2]

2 The Gacaca was a traditional community based court in Rwanda that was revived to deal with the huge backlog of cases after the genocide in 1994.

Chapter 1:
Access to Justice in Post-Conflict Societies

Much of the development of access to justice has focused on Western legal culture, yet its development has also seen it become an important pillar of conflict resolution activity in numerous societies worldwide. In this context the United Nations Development Programme (UNDP) states that access to justice refers to the following:

People's ability to solve disputes and reach adequate remedies for grievances; through formal or informal/traditional justice systems, governmental and non-governmental, judicial or non-judicial; and in conformity with human rights principles and standards, which should guarantee the qualitative dimensions of the justice process.[3]

There has been significant debate on the role of justice in post-conflict societies, for many years there was a dominant view in academic and policy circles that justice was fundamentally in opposition to conflict-resolution. [4] This was founded upon the ideas that prosecutions could destroy the basis of democracy, that human rights trials would exacerbate tension and that they could cause a political or military backlash in fragile post-conflict societies. However, there has since been a paradigm

3 United Nations Development Programme (2005), Programming for Justice: Access for All, A practitioners guide to a human rights-based approach to access to justice (Bangkok, Thailand: UNDP Regional Centre), p. 213.

4 HUNTINGTON, S (1991), The Third Wave: democratisation in the late 20th Century, p. 228.

ZALAQUETT, J (1992), 'Balancing Ethical Imperatives and political Constraints: The dilemma of new democracies confronting past human rights violations', (1992), Hastings Law Journal, Vol. 43, p. 10-13.

SNYDER, J and VINJAMURI, L (2003), 'Trials and Errors; principle and pragmatism in strategies of international justice', International Security, Vo. 28, No. 3, p. 30.

shift in this debate that has discredited the traditional dichotomy. Now both academics and policy makers regard justice and conflict resolution activities as intrinsically linked and as mutually beneficial. This idea of justice goes beyond a desire in society to ensure that those who have committed crimes are not rewarded with impunity. Rather, an effective justice system which all can access is crucial in developing a relationship between the state and its citizens, where the citizens see the benefit of the state and hold a stake in its success. Former UN Secretary-General Kofi Annan stated in his report regarding access to justice in 2004, 'our experience in the past decade has demonstrated clearly that the consolidation of peace in the immediate post-conflict, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.'[5] This reflects the dominant thinking in both academic and policy circles, and it is this thesis that underpins the importance of access to justice in democratic advancement and conflict resolution. Indeed now, the UNDP have incorporated this view into their policy documents, stating that, 'access to justice is an integral element of any peace-building and long-term development process after conflict. Concepts of redress and justice are central to peace, trust and confidence-building.'[6]

Here it is sensible to briefly touch upon how access to justice relates to transitional justice. Transitional Justice refers to a range of processes employed to deal with legacies of human rights abuse by societies moving from periods of conflict towards peaceful democracy. They are in essence

5 Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (August 23, 2004), UN Doc. S/2004/616 3, paragraph 2.
6 Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (August 23, 2004),, UN Doc. S/2004/616 3, p. 180.

trying to create a break with the past by confronting it and providing a platform for victims' grievances to be addressed. Clearly access to justice is integral here, as without it people are likely to become disillusioned or frustrated with the justice mechanism, which could lead to societal tensions that threaten the transition to peace. As mentioned previously, participation in a states' legal system encourages citizens of a society to have a stake in the new society rather seeing it as an enemy.

There are a variety of barriers that can hinder levels of access to justice and it is possible to split these barriers into two categories: operational and structural.[7] Operational barriers are related to the efficiency and effectiveness of the administration of the justice system, examples of which include a lack of finances, geographic remoteness, lack of judicial independence and corruption. Structural factors reflect general societal issues and how they relate to the administration of justice. They range from a lack of legal awareness to language barriers (particularly in the case of minority groups) and societal discrimination (ethnic, religious and gender based). For access to justice programmes to be successful they must take into account the variety of issues that affect citizens' access to justice, particularly with regard to structural factors. Society has to be prepared to acknowledge the existence of these issues.

Post-conflict justice systems tend to have a number of characteristics that impede the effective supply of justice to the population, though of course much of this depends on the nature of society before the outbreak of conflict and the intensity of the conflict itself. These justice systems can be placed into a framework consisting of three broad categories:

7 ABREGU, M (2001), 'Barricades or Obstacles: The Challenges of Access to Justice,' Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century, ed. Rudolf V. Van Puymbroeck (Washington, D.C.: World Bank), pp. 69-85.

illegitimate but functional; corrupt and dysfunctional; devastated and non-functional.[8] Within these categories there can be a number of specific problems such as: devastated infrastructure, popular mistrust in the legal system and government, shortages of qualified judges and lawyers, and the judicial system being regarded as politically tainted or corrupt. Each of these problems offer their own distinct challenges and any access to justice programme must bear in mind the specific contextual issues they face.

Access to justice and democratic advancement

Any efforts to increase access to justice cannot be isolated from the wider political context of the state they operate in. Indeed, the level of access to justice that exists within a society is often a reflection of the political and socio-economic landscape, with some arguing that improving access to justice represents a contribution to the reduction of the unequal distribution of advantages in society.[9] Access to justice programmes often have a transformative socio-political aspect, as they involve the promotion or creation of avenues for poor or marginalised groups to claim and satisfy their legal rights. This should form part of a wider engagement with civil society and the state as part of democracy building in post-conflict society. Such engagement clearly requires the willingness of the state and traditional political elites to accept these trends, but the reality is that access to justice initiatives often face resistance from these groups as they seek to defend their privileged position in society.[10]

8 MANI, R (2002), Beyond Retribution: Seeking Justice in the Shadows of War, p.73.

9 ANDERSON, M (2003), 'Access to Justice and Legal Process: making legal institutions responsive to poor people in LDCs' Institute of Development Studies Working Paper 178, p.8.

10 This can be seen in cases where citizens (often rural poor) are trying to gain formal recognition of their citizenship, a process that would draw them into the wider political system potentially undermining the power of traditional elites. See Case of Peru in

There are a number of elements that make up this wider political nature of access to justice, such as; the political independence of courts; laws that are regarded as 'just' by the majority of society; levels of corruption in state institutions; the legal accountability of government; levels of legal literacy and the presence and freedom of civil society to engage with the state.[11]

Informal and traditional justice

Informal and traditional justice mechanisms have often been viewed by the International Community as inferior to their formal counterparts; particularly from an International Law and Human Rights viewpoint.[12] However, some of the previously outlined characteristics of post-conflict societies mean that formal justice mechanisms are often not suitable to service the needs of the population. Citizens in post-conflict societies have expressed a number of reasons why they refrain from using the formal justice systems supposedly available to them; they may have a general mistrust of the law and the state, lack legal literacy, experience cultural or language issues, face financial cost and particularly in the case of gender-based violence, the victim may feel that they will not be believed or that they could be humiliated during the legal process.

Making the Law Work for Everyone, Commission on Legal Empowerment and UNDP (2008), p. 9.

11 ANDERSON, M (2003), 'Access to Justice and Legal Process: making legal institutions responsive to poor people in LDCs' Institute of Development Studies Working Paper 178, pp. 7-9.

12 There is a distinction between informal and traditional justice systems. A traditional system may be formal as it is incorporated into a formal legal system of the state (eg Rwandan Gacaca) and an informal system may not be traditional (peasant Rondas in Peru only emerged in 1980s).

For information regarding traditional and informal justice and the International Community see:

CHIRAYATH, L, SAGE, C and WOOLCOCK, M 'Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems'(Prepared as a background paper for the World Development Report 2006: Equity and Development, July 2005), 1.

The response to these problems has been a focus by the access to justice movement on informal or traditional forms of justice, as these may often be the only systems that are practically workable in the post-conflict context.[13] While violent conflict clearly has a disruptive effect on social structures, the damage is less likely to be as extensive as that suffered by the formal justice infrastructure. A United Nations Development Programme (UNDP) working paper argued, 'in post-conflict countries, where formal mechanisms may have completely disappeared or been discredited, informal systems of dispute resolution may be crucial to restoring some degree of law and order, and they may be all that is available for many years.'[14] For many developing countries, informal justice mechanisms represent the majority of dispute resolution and access to justice for much of the population. There is evidence to suggest that in these states, informal mechanisms represent 80 to 90 percent of disputes that are resolved.[15] Informal and traditional formats have a number of benefits that may allow for increased access to justice in comparison to formal state systems, which will be discussed below.

Cost: formal state systems may involve charges for legal advice and services that make them out of reach for poor and marginalised sectors of society. In addition, they tend to be located in major cities and urban areas which mean that those in rural areas may have to pay transportation costs and leave their workplace for a period of time, which may prove prohibitive. Informal measures are located in the local community and involve minimal cost due to their lack of bureaucracy.

Language: official mechanisms will often only function in the official language of the state, which may render it inaccessible for people from indigenous backgrounds or ethnicities that speak different languages. Even if there is no

13 WOJKOWSKA, E (2006), 'Doing Justice: How Informal Justice Systems Can Contribute', United Nations Development Programme, p. 14.
14 WOJKOWSKA, E (2006), 'Doing Justice: How Informal Justice Systems Can Contribute', United Nations Development Programme, pp. 5-6.
15 WOJKOWSKA, E (2006), 'Doing Justice: How Informal Justice Systems Can Contribute', United Nations Development Programme, p. 5.

language difference, if the legal literacy levels are low, people may find the formal language of official courts unintelligible and intimidating.[16]

Culture: the legal proceedings of official mechanisms can not only be intimidating, but can have very little cultural relevance to what some groups regard as justice. Traditional mechanisms are thus often more likely to fit the priorities of the local community, and as a result the verdicts imposed are more likely to be accepted.[17] The idea of traditional mechanisms representing a fair trial with an independent adjudicator can seem particularly alien to Western legal culture. However in some circumstances it can be beneficial to have a powerful community leader as the judge, as they have the power to enforce the decision, providing it is fair.[18] This is in complete contrast to the Western model that places high value on the separation of powers.

It is important not to treat informal and traditional justice mechanisms as a panacea for access to justice problems in post-conflict society. They can often entail significant issues with regard to Human Rights, treatment of juveniles and gender equality for example. With regards to the role of informal and traditional justice mechanisms' in conflict-resolution there are a number of risks that may undermine the process. Without some form of regulation they can become open to abuses of power and used to advance self-interest or discriminate against certain groups. This can lead to political manipulation of the process that may serve to antagonise rather than reconcile groups within communities emerging from conflict. Additionally, due to their specific cultural intricacies these formats have limited applicability across different regions of a particular conflict zone.

The severity of a crime is also a controversial issue when considering the use of informal and traditional forms of justice. Most access to justice programmes that

16 WOJKOWSKA, E (2006), 'Doing Justice: How Informal Justice Systems Can Contribute', United Nations Development Programme, p. 14.

17 KERRIGAN S (2012), Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

18 KERRIGAN, S (2012) Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

have international involvement, state that for the most serious crimes, informal processes such as mediation are off the table.[19] The Timap for Justice Programme (Stand up for Justice) in Sierra Leone that involves the use of community paralegals to provide access to justice to poor communities through methods such as mediation, acknowledges that it is in fact illegal to employ such methods for serious crimes.[20] This is of particular pertinence in the case of the Rwandan Gacaca that was set up to deal with the huge backlog of genocide related crimes in the late 1990s. [21]

Comparison of the advantages and disadvantages of formal and informal justice mechanisms raises a troubling paradox for post-conflict society. On the one hand, informal methods seem to be best suited for meeting the needs of individuals to access effective justice, yet to bypass formal structures ignores the importance of the rule of law and institutional capacity-building in the state, which is integral to the building of stable democracies. The reality is that many countries operate both of these legal systems (a dualist system) and this then involves a struggle to ensure the two methods (informal and formal) are engaged with each other.[22]

Key Debates

Procedural V substantive access to justice

Much of the access to justice literature has equated access to justice with access to courts and a focus on the availability of lawyers to citizens, which has led to

19 These are generally crimes such as murder, torture and rape.

20 Timap is an Access to justice programme initiated in 2009 that has received recognition and support of a number of independent organisations such as the World Bank and the International Crisis Group. See http://www.timapforjustice.org/

21 After the Rwandan genocide, there were huge numbers imprisoned on suspect of being involved in the genocide. The Gacaca was a response to this huge backlog of cases that the formal court system could not cope with.

22 In this context a dualist legal system is where informal/traditional and formal mechanisms of justice operate autonomously of each other but both are enshrined in the constitution of the state. Sierra Leone is an example of such a system.

a neglect of considering whether the outcomes of proceedings are satisfactory.[23] Access to justice must go beyond this if it is to fulfil its goals and make a significant contribution to wider societal harmony. Greater access to courts will not help the poor in a country where the laws entrench their social and economic exclusion; part of any access to justice programme must ensure that the outcomes reached promote fairness in society.[24] Even if the laws are 'good on paper' there is little guarantee in fragile states that this will translate to fair justice for citizens. This requires ensuring that the mechanisms and structures that are in place are non-discriminatory and have equality as their objective, for all citizens. The UNDP has stated that access to justice involves more than guaranteeing legal representation or access to courts and that it must be defined in terms of 'ensuring legal and judicial outcomes are just and equitable.'[25]In ensuring this occurs, access to justice needs to be seen as part of wider conflict-resolution and democratic advancement issues such as state accountability, civil society engagement and good governance.

Top down v. bottom up approaches

The growing trend in access to justice programmes has been to take a 'bottom up' form of justice reform; often focusing on local communities and civil society, in order to yield maximum results for the 'users' of the justice system. This is opposed to the 'top down' method of justice reform that focuses on state institutions. In reality, much depends on the condition of a states' infrastructure, which in many post-conflict states will be damaged to the extent where it is unable to satisfy the justice needs of the population. It makes more sense to recognise the condition of the state with its strengths and weaknesses and to adapt programmes accordingly, rather than to try and impose a Western template of what a state should look like.[26] The latter does not take into account

23 SINNAR, S, 'Access to Justice - Topic Brief', (World Bank, Law & Justice Institutions).

24 SINNAR, S, 'Access to Justice - Topic Brief', (World Bank, Law & Justice Institutions).

25 United Nations Development Programme (2004), Access to Justice: Practice Note (New York: United Nations Development Programme), p. 6.

26 BAKER, B and SCHEYE, E (2007) 'Multi-layered justice and security delivery in post-conflict and fragile states',Conflict, Security & Development Vol.7, No. 4, p. 514.

the needs of ordinary people. Instead, the focus should be on strengthening actors that have the capacity to provide justice in this setting.[27] As mentioned previously, an approach that involves both methods is often necessary, including both 'top down' reforms of the state and legal institutions and the strengthening and support of 'bottom up' approaches of access to justice that effectively deliver justice to citizens. Of course each situation is unique, but in most post-conflict states, both approaches are needed in order to effectively meet the demand for justice. This is an integral part of building effective institutions and strengthening the rule of law that underpins democratic societies.

The need for a holistic approach

The need to recognise how specific access to justice programmes are related to the wider justice system cannot be overstated. Awareness of the way in which different initiatives affect each other is key to the outcomes they produce. For example, it makes no sense to focus on increasing access to courts if the judiciary is corrupt as this would only serve to entrench the position of the privileged. Programmes need to incorporate the full range of legal issues in order to ensure their success. This tends to be an issue when international donors are involved, as they can tend to focus on one or two specific aspects of a justice programme, whilst cooperation with other actors (donors in particular) or sectors of the justice system is often minimal.[28]

27 BAKER, B and SCHEYE, E (2007) 'Multi-layered justice and security delivery in post-conflict and fragile states',Conflict, Security & Development Vol. 7, No. 4, p. 514.
28 GOLUB, S (2007), 'The Rule of Law and the UN Peacebuilding Commission: a social development approach', Cambridge Review of International Affairs, Vol. 20, No. 1, p 49.

Chapter 2: Colombia

Background

Colombia has been in a state of near continual conflict for the past five decades. This period has seen the emergence of a number of groups engaged in violence, both against each other and upon civilians. Fuerzas Armadas Revolucionarias de Colombia (FARC) is a left-wing guerrilla group that emerged in the mid-1960s and has since been in near continual conflict with the Colombian State. In response to the actions of the FARC and the smaller Ejercito de Liberacion Nacional (ELN), a number of right-wing paramilitary groups emerged in the late 1980s and early 1990s to combat them, forming a loose coalition called the Autodefensas Unidas de Colombia (AUC).[29] The conflict reached a bloody nadir in the 1990s and early 2000s with massacres, forced displacements, torture and disappearances all becoming commonplace. As with many conflicts, it has been the most vulnerable populations that have borne the brunt of this suffering, particularly the Afro-Colombian, rural poor and indigenous communities. The situation has improved in the past decade after the demobilisation of the paramilitaries between 2003 and 2006 as well as the FARC being seriously weakened after a sustained military campaign by the state.[30] However the legacy of Human Rights abuse and the size of the Internally Displaced Population (estimated at around 4 million, second only to South Sudan) have made access to justice a key issue in Colombia's transition to a peaceful democratic society.

29 There was a third major guerrilla group, the Movimiento 19 de M (M-19) which demobilised in the late 1980s.

30 Whether the paramilitaries have actually demobilised is a contested issue. Since 2003 Colombia has seen an emergence of a number of armed criminal groups that bear great resemblance to the factions of the AUC. These are known as Bandas Criminales or BACRIM in Colombia today and are a major force in some areas of the country, possessing great levels of wealth derived principally from the drug trade.

This case study will focus on La Ley de Justicia y Paz (the Justice and Peace Law) that was passed in 2005 in order to try demobilised ex-combatants (primarily paramilitaries) accused of crimes during the conflict and to obtain both truth and reparations for Colombia's victims. It is difficult to categorise a country such as Colombia; the armed conflict has taken place in an environment where there has consistently been a stable democracy. Colombian state institutions are well developed in the major urban areas, particularly Bogota and Medellin. The legal culture is sophisticated, with clearly defined structures and separation of powers. Yet despite this high level of development, the state is weak in large remote parts of the country.[31] Here, armed groups may be the most important sources of authority and if state institutions are present, they either lack the resources to be effective or have the trust of the citizens. There remain deeply entrenched patterns of discrimination, particularly against the Afro-Colombian population and indigenous groups. The state of access to justice in Colombia is often a reflection of these wider contextual factors and this must be kept in mind when analysing the subject.

The Justice and Peace Law (hereafter JPL) differs to previous laws which deal with human rights abuses in Colombia such as Law 418 because it does not provide blanket amnesty for law breakers that fall under its mandate. Some of the previous laws would offer amnesty in return for cooperation with judicial proceedings. However, the JPL was created on the basis that cooperation with prosecutions was rewarded with 'judicial benefits' such as a reduced sentences, as opposed to complete freedom. This law set out to preserve the rights of the victims' need for justice, whilst also providing incentives for demobilised ex-combatants to assist with the proceedings.[32]

31 Touval in G. R. Berridge (2010), Diplomacy: Theory and Practice (Basingstoke: Palgrave MacMillan), p.246

32 The Center for Justice and Accountability (2011) Colombia: The Justice and Peace

The JPL is effectively a framework that attempts to provide incentives for peace to the armed groups while respecting the rights of victims to truth, justice and reparations. It requires the Colombian Government to create a historical memory of truth through formal judicial proceedings that establish the facts surrounding crimes committed and assign individual criminal responsibility. The victims' right to participation during the process is enshrined in law, a process that is aimed at allowing the victim to clarify and challenge details of the defendant's confession. All those who register as victims are entitled to legal representation from the state. This service provided by the Public Defenders' Office, a department controlled by the Human Right's Ombudsman.[33] The Colombian State views this legislation as part of a transitional justice programme that is vital to building trust between the state and society, helping to facilitate Colombia's development to a peaceful and democratic society. For this to happen, effective access to justice must be made available across all sections of society. However, there are a number of issues that have hindered this access to justice and the reality is that many see the JPL as an ineffectual piece of legislation that has done little to tackle the impunity that has been so pervasive in Colombia's history.

State capacity, security and judicial independence

The JPL is a formal legal process that draws on the existing legal structures of the state and is dependent on the state for resources. However, the Colombian state does not possess the capacity to process the huge number of cases that have been logged since its inception, severely hindering access to justice for victims. This is a problem seen across the country, but as mentioned previously, the rural-urban imbalance with

Law, retrieved on 16/11/2012 at: <http://www.cja.org/article.php?id=863>

33 United States Agency for International Development (2010), Assessment of USAID/ Colombia's Justice Reform and Modernisation Programme, p. 36.

regard to state institutions exacerbates the problem further for rural communities. Prosecutors face caseloads that are insurmountably high; in the department of Nariño, lawyers in the prosecution department face an average of 700 cases at any given time; in Cucuta all of the crimes committed by the Bloque Catatumbo of the AUC (an estimated 5000 Human Rights violations) are being processed by two prosecutors alone, and even in Colombia's second city, Medellin prosecutors are managing between 300 and 350 cases each.[34] By 2011, 66,773 victims had registered to be part of the process, with regard to 52,263 crimes (of which some 46,000 were homicides).[35] The scale of the task has led to a near paralysis of the process in the eyes of average Colombian citizens, who face long waits for their cases to be heard. Consequently, this is having an impact on the quality of the legal services that citizens are receiving. Often, citizens attending hearings have to do so without legal representation as it simply does not exist, and prosecuting lawyers do not have time to conduct their own investigations in order to ensure that the truth is reached.[36] Little attention is given to the psychological support for victims who may have endured terrible abuse. The national Ombudsman's office, which is charged with providing these services, also does not have sufficient resources.[37] There have been significant issues with the conduct of state officials, who are the first formal point of contact for victims. State officials have reportedly demonstrated a lack of consideration and compassion for people who have endured great suffering and to whom the formal justice system is alien and intimidating.[38] Little training or

34 Colombia: The legal profession still under attack, Colombia Caravana UK Lawyers Group/Lawyers without borders (2011), p.22.

35 United States Department of State (2011), Human Rights Report: Colombia.

36 Colombia Caravana UK Lawyers Group/Lawyers without borders (2011), Colombia: The legal profession still under attack, p.23.

37 International Bar Association (2007), La Cooperacion Internacional y la lucha contra la impunidad en Colombia, p. 25.

38 International Bar Association (2007), La Cooperacion Internacional y la lucha contra la impunidad en Colombia, p. 25.

resources are available to deal with this problem, making it harder to build the vital trust needed between the state, victims and civil society to ensure both justice and wider democracy building.[39]

As stated previously, the conflict in Colombia, though much improved, is not over and there remain significant sources of power outside the control of the government in the form of illegal armed groups and the guerrillas. Given the power of armed groups, particularly in rural areas, there have been significant issues regarding victims who wish to seek justice, being threatened, intimidated and attacked by these groups in order to deter prosecution.[40] There is often little history of any state presence in these areas as a result of the dominance of armed groups in the past, thus making it very difficult to develop state institutions to the extent that they are seen as the local authority and are capable of governing the rule of law. These groups or local strongmen may even operate their own parallel legal systems.[41] Indeed the United States Agency for International Development has stated that security concerns for particular areas are paramount in determining to what extent access to justice can be realistically enhanced.[42] In the framework of the JPL, the Colombian state lacks an effective structure that offers protection to victims, witnesses and legal officials that are involved. The Attorney General's Office is officially charged with offering protection to those who request it, but it lacks sufficient economic resources or technical capacity to do so.[43] There were

39 International Bar Association (2007), La Cooperacion Internacional y la lucha contra la impunidad en Colombia, p. 25.
40 Colombia Caravana UK Lawyers Group/Lawyers without borders (2011), Colombia: The legal profession still under attack p.23.
41 Colombia Caravana UK Lawyers Group/Lawyers without borders (2011), Colombia: The legal profession still under attack, p.25.
42 United States Agency for International Development (2010), Assessment of USAID/Colombia's Justice Reform and Modernisation Programme, p. 45.
43 International Bar Association (2007), La Cooperacion Internacional y la lucha contra la impunidad en Colombia, p. 25.

nearly 2000 requests for such protection in the first few months of 2007, a figure that does not include the families of those requesting protection.[44] There is insufficient capacity to effectively protect these people from armed groups and without this protection, the JPL will fail to ensure the non-repetition of such violence, and impunity for perpetrators will continue. The Organisation of American States (OAS) reported in 2011 that threats and intimidation of those involved were commonplace and even concluded that they were highly susceptible to physical violence and murder.[45] These illegal groups reportedly distribute propaganda in both rural and major urban centres that explicitly threatens victims groups, civil society organisations and lawyers involved in the JPL process and Human Rights defenders.[46]

In formal legal systems, the independence of the judiciary or at least the perception of independence is essential in developing trust between authorities and citizens, to support a credible justice sector.[47] Without this, those seeking justice may not have confidence that the system will treat them fairly and may feel that they will be humiliated or even endangered during the process. The judiciary in Colombia have come under repeated pressure from the executive branch with regard to their actions and judgements, particularly when issues of state criminality are involved. A widely publicised case was that of Judge Maria Stella Jara who sentenced a colonel involved in the forced disappearance of 11 Guerrillas in the 1980s to 25 years in prison. In response to this,

44 International Bar Association (2007), La Cooperacion Internacional y la lucha contra la impunidad en Colombia, p. 17.
45 United States Department of State (2009), Human Rights Reports: Colombia, p. 126.
46 Colombia Caravana UK Lawyers Group/Lawyers without borders (2011), Colombia: The legal profession still under attack, p.23.
47 APTEL, C and LADISCH, V (2011), 'Through a new Lens: A Child Sensitive Approach to Transitional Justice', International Centre for Transitional Justice, p. 45.

President Uribe publicly discredited the ruling, calling it unjust.[48] The judge in question subsequently received a number of deaths threats and chose to flee the country. Given the wider security and protection issues that have been described previously with regard to those involved in the judicial process, the possibility of being publicly criticised by the state puts the judiciary in a very vulnerable position. It also undermines the perception of credibility within the judiciary, which in turn undermines the effectiveness and support for the JPL.

The case of Judge Maria Stella Jara brings into sharp focus the issue of justice for crimes committed by state actors. In recent years Colombia has been rocked by the so called Falsos Positivos (false positives) scandal, where it was found that the army had killed a number of civilians and passed them off as guerrillas in order to reach performance targets. By November 2011 a total of 1,746 troops had been arrested in relation to these extra-judicial killings, yet prosecution has been very slow. The US State Department has stated that impunity for those involved is widespread, with the army actively obstructing justice.[49] Without a strong and effective programme that guarantees access to justice for the victims of this scandal, the relationship between the state (particularly the security actors) and society will be strained. The state has to be able to recognise and confront its past failures; to obstruct justice for such Human Rights abuses contrasts with prioritising the importance of democratic accountability. Democratic progress requires trust between the two sectors, without it there will remain a suspicion on the part of society that will only serve to undermine Colombia's stability.

48 Colombia Caravana UK Lawyers Group/Lawyers without borders (2011), Colombia: The legal profession still under attack, p.25.
49 United States Department of State (2011), Human Rights Reports: Colombia.

Gender and minorities

The experience of women is very important when analysing access to justice, both with regard to the abuse suffered specifically by women and their specific needs to ensure successful access to justice.[50] As in many conflicts across the globe, women have suffered disproportionately at the hands of combatants in Colombia; enduring rape, prostitution and forced abortion.[51] Some experts on the subject argue specific measures need to be in place with regards to their position on the judicial agenda.[52] Impunity for violence against women creates two messages; one is to the perpetrator, that there will be no consequences for their actions, and the other is to women, that such acts will always happen to them.[53] The JPL has certainly lacked focus with regard to sexual violence, with only 42 acts of sexual violence being reported out of a total of 51,616 crimes by 2010.[54] This is quite clearly a massively inaccurate figure given that there were 15,418 cases of sexual violence reported through the civil system in 2009 alone.[55] There has been a prevalent mind-set amongst prosecutors that women do not want to denounce the perpetrator, therefore they can't prosecute.[56] This interpretation fails to understand the wider issues women may face in this context, whether concerning their safety or the

50 These specific needs involve taking into account the possible barriers that may prevent them from access the legal system, particularly with regard to childcare and the ability to travel unaccompanied.

51 Inter-America Court of Human Rights (2006), 'Violence and Discrimination against Women in the Armed Conflict in Colombia', p. 18. See this report for further information.

52 MANTILLA, J (2012) Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

53 MANTILLA, J (2012), Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

54 International Bar Association (2007), La Cooperacion Internacional y la lucha contra la impunidad en Colombia, p. 17.

55 United States Department of State (2009), Human Rights Reports: Colombia.

56 MANTILLA, K (2012), Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

fear of public humiliation. As noted in the opening chapter, access to justice has to have a holistic approach; therefore it has to be part of a wider reorientation of the status of women in society. The type of justice that women receive also has to be tailored to their specific gender needs. This justice needs to be transformative, that is to say that it must tackle the context of overall discrimination in which the crime happened, in order to ensure non-repetition.[57] Without tackling the underlying issues of wider discrimination, women may feel exasperated and helpless with regards to their relationship with the state and wider society. There are also specific needs that have to be addressed with regard to access to justice for women, whether the crime is gender based or not. There have been cases in the Justice and Peace court where women have been refused entry on the grounds that their children were not allowed in with them.[58] Given that many victims are from very poor backgrounds, childcare is not an option for many, even for one day. For real access to justice, there have to be facilities that allow women to attend hearings, such as state provided childcare at the courts or allowing children into court. This is just one example of substantive discrimination at state level, which hinders access to justice for women.

Colombia possesses a small but significant number of minority groups that have largely existed outside of the control of the state. These include 82 different indigenous groups (about one per cent of population) and Afro-Colombian groups that live in small rural Panqueros around the Pacific and Caribbean coasts (about two per cent of population).[59] These

57 MANTILLA, K (2012), Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

58 MANTILLA, K (2012), Conference on Transforming Post-Conflict Societies: Everyday Violence and Access to Justice, British Library, London, 22nd May 2012.

59 Afro-Colombians constitute between 19 and 25 percent of the total population, the figure above refers to the number living in the self-governing communities called panqueros.

groups have a long history of discrimination and suffered greatly at the hands of both the FARC and the paramilitaries, often for supposed collaboration with the opposing group. Due to this general isolation from the rest of society, there exists a much lower level legal awareness in these communities compared to the rest of society. Also given the abuse they may have suffered, many communities are deeply distrustful of any interaction with other parties, including the state. This is exacerbated by the state's inability to protect indigenous leaders who have entered the JPL; by June 2010, 45 indigenous leaders had been assassinated after entering the JPL framework to try and reclaim land they had been dispossessed from.[60] In the case of the indigenous groups, rather than the Afro-Colombians, the language of the proceedings renders them inaccessible. Large proportions of these groups may not speak Spanish, and there is little state effort to incorporate indigenous languages into the formal system.

60 Alba TV, 'Ya son 45 los líderes de víctimas asesinados por reclamar sus tierras; en 15 días murieron tres', 10th June 2010.

Chapter 3: Rwanda

Gacaca 'Judgement on the Grass'

100 days of violence during the summer of 1994 left approximately 800,000 Rwandans dead and over 130,000 suspected genocidaires in jail.[61] Given that the capacity of Rwandan prisons stood at 45,000 and the judicial infrastructure had been completely destroyed during the genocide, the country faced enormous challenges with regard to ensuring justice for the victims. The International Criminal Tribunal for Rwanda (ICTR) set up in the aftermath was never intended to provide the mass justice that was needed, instead focusing on the highest-ranking perpetrators. The extent of the backlog of cases in the weak Rwandan Court system was such that after five years, cases were proceeding at such a rate that it would have taken a hundred years to process them all.[62] Victims were not receiving justice and the situation in prisons, where populations were nearly three times the official capacity were squalid and inhumane, with thousands dying as a result.[63] The response of the Rwandan government was to effectively formalise a traditional community based form of justice, the Gacaca. These courts first began operating in 2005 and officially closed on the 4th May 2012.[64]

61 TIEMESSEN, A (2004), 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', African Studies Quarterly, Vol. 8, Issue 1, p. 57.
62 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's Community Based Gacaca Courts, p. 2.
63 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's Community Based Gacaca Courts, p. 2.
64 KOK, N (2012), The Closing of the Gacaca Courts and the implications for Access to Justice in Rwanda, Institute for Security Studies.

What is the Gacaca?

A Gacaca is in essence a community court, held completely in the open, to which any member of the community can contribute. The defendant is brought to court, accused, and then depending on their plea either offers a full confession of their crimes or defends themself against the charges. Community members (who may be victims) are encouraged to speak up to verify facts, question the defendant or support them. The process does not involve any lawyers; instead the community members present prosecute the defendant collectively. There are nine judges who don't have a formal background in legal matters but will have received specialist training from the state. The judges can impose sentences ranging from life imprisonment to community service, though unlike the national courts they cannot impose the death penalty. Plea-bargaining is a key element of the process, though this raises some issues that will be discussed in this section. The court operates under what is known as Rwandan Organic Law, which was established in 1996 to facilitate prosecution of genocide crimes. According to this law, crimes committed fall into four categories; category one crimes include the planning, and organising of genocide, physical perpetrators who were particularly 'notorious', lesser crimes committed by people who held positions of political or religious authority and crimes of sexual violence.[65] These crimes carry the sentences of life imprisonment or the death penalty, thus are deemed too serious to be tried in the Gacaca. Instead these trials occur in the existing national court system. Categories two to four range from the physical perpetration of genocide and conspiring to commit genocide, to the theft of property and criminal damage. It is these crimes that are tried in the Gacaca and carry the aforementioned punishments.[66]

65 TIEMESSEN, A (2004), 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', African Studies Quarterly, Vol. 8, Issue 1, p. 61.

66 TIEMESSEN, A (2004), 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', African Studies Quarterly, Vol. 8, Issue 1, p. 61.

Success of the Gacaca

In terms of a solution to the huge logistical problems that Rwanda's justice programme faced after the Genocide, the Gacaca has been an undoubted success. Regular Gacaca trials have been held in nearly 11,000 different communities, achieving in a seven-year period what the national court system would have needed over a 100 to do. It has brought justice into communities, that is easily accessible for all. It has been estimated that nearly every Rwandan adult has participated in a Gacaca court during this seven-year period, a quite remarkable statistic.[67] Not only have the Gacaca brought justice to the victims, but also they have relieved the huge backlog that was causing such suffering within the prison population.[68] The focus of this system on community service and reintegration into communities has avoided recreating the capacity problem in the prisons.[69]

The structure of the Gacaca and the type of justice it brings is also believed to have had a number of benefits for Rwandan society. The proximity of the court to the community and the participatory nature of the process have given Rwandans a tangible result; they can see justice being served for the crimes that tore their country apart.[70] Many Rwandans see the process as actively fostering reconciliation within communities; many crimes were intra-community in their nature so this is vital in the long-term reintegration of perpetrators.[71] A male defendant spoke positively about the Gacaca in an interview with the British newspaper The Guardian, saying that 'to go in front of the family of people you have killed is very hard, but it's better to explain to them because we want

67 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press, 23/3/2012.
68 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press, 23/3/2012.
69 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press, 23/3/2012.
70 KOK, N (2012), 'The closing of the Gacaca Courts and the implications for Access to Justice in Rwanda', Institute for Security Studies.
71 KOK, S (2012), 'The closing of the Gacaca Courts and the implications for Access to Justice in Rwanda', Institute for Security Studies.

forgiveness.'[72] Those taking part have spoken of the open discussion and even story telling in the Gacaca positively. It allows survivors to come together and tell their stories to an empathetic audience. It helps to overcome the social dislocation that they may feel, acting as a cathartic process for those involved.[73] This openness is facilitated by the familiarity of the system and the participants. A Gacaca judge claimed that 'people feel they can tell the truth. I know them. I can ask questions without feeling embarrassed. We speak the same language.'[74] Of course such a process is highly personal and it would be wrong to claim that this benefit is universal, for some people attending the Gacaca on a regular basis; the process may actually serve to retraumatise them.[75] Either way the Gacaca serves to create a culture of discourse regarding the genocide in Rwandan civil society, it has ensured that the events of 1994 are dealt with openly and not swept under the carpet.[76] This engagement with the subject by civil society is crucial to the development of a peaceful democratic state.[77] It may be painful for some but the facilitation of dialogue is vital and the Gacaca has been crucial to this. Nevertheless, despite disadvantages of the Gacaca (that will be discussed in more detail), the high level of accessibility and the 'restorative' nature of its justice have garnered much support amongst Rwandans, with genocidaires living side by side with victims in atmosphere that was unthinkable 18 years previously.[78]

72 KHALEELI, H, 'Rwanda's Community Courts; a unique experiment in justice', The Guardian, 11/1/2010.
73 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press 23/3/2012.
74 KHALEELI, H, 'Rwanda's Community Courts; a unique experiment in justice', The Guardian, 11/1/2010.
75 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press 23/3/2012.
76 BOMKAMM, P (2012), Rwanda's Gacaca Courts: Between Retribution and Reparation, p. 162.
77 BOMKAMM, P (2012), Rwanda's Gacaca Courts: Between Retribution and Reparation, p. 162.
78 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press 23/3/2012.

Problems of the Gacaca

Unsurprisingly given the serious nature of the crimes involved and the informal nature of the Gacaca, there has been a fair amount of criticism of the process. Much of this has emerged from the International Human Rights community who have argued that the Gacaca does not represent a fair trial.[79] This is based, on the fact that Gacaca judges have no formal legal background and that the defendant has no proper legal representation, which has meant that the process is flawed when compared to international standards.[80] Often the Gacaca judges have not received even the most basic of education, yet they are expected to make judgements on often what are often highly complex and sensitive cases. This lack of education is compounded by the absence of remuneration for judges, which in a relatively poor country such as Rwanda clearly increases the chances of corruption among the judiciary.[81]

There is considerable debate as to whether the Gacaca courts have truly achieved the popular participation that was supposed to prevent the system being abused. The idea was that given the community participation, people would speak up when they saw false evidence being presented, either for or against the defendant. However some studies have indicated that many have sat passively through the proceedings afraid that speaking out will lead to retribution against them.[82] If this is true then the Gacaca could be easily influenced by those who hold the economic, political and

79 Human Rights Watch (2012), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, pp. 27-80.
80 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 4.
81 BOMKAMM, P (2012), Rwanda's Gacaca Courts: Between Retribution and Reparation, p. 160.
82 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 4.
BOMKAMM, P (2012), Rwanda's Gacaca Courts: Between Retribution and Reparation, p. 160.

coercive power in the community, to the detriment of the process. The Gacaca could become an extension of their power in the community rather than the community-owned process it is meant to be.

Given that the majority of the guilty verdicts in Gacaca courts have resulted in sentences of community service, there are many who question whether the consequences are too lenient for crimes of such gravity. Indeed, many survivors are unhappy with this leniency and there is a perception that perpetrators have benefitted from the government's need to rapidly empty the prisons.[83] A survivor of the genocide in southern Rwanda interviewed for a study said that, 'we know all the prisoners cannot go back to jail. The jails are full and we need the prisoners to work on the farms. But if they kill people, 6 or 7 people and you only spend six or seven months in jail, that isn't right.'[84] Yet given the crisis of prison capacity in Rwanda it is difficult to see any alternative. These criticisms are valid but with given the shattered economy and infrastructure that Rwanda inherited after the genocide, a vast expansion of prison facilities has been completely untenable. The lenient sentencing has led to reports of false confessions from those in prisons in order to leave the squalid conditions and take advantage of the plea bargaining system to receive a sentence of community service.[85]

Another major issue of the Gacaca process is that many see it as the delivering of 'victor's justice' by the Tutsis against the Hutus. It is accepted that Hutus committed the vast majority but as the genocide drew to a close with the Tutsi Rwandan Patriotic Front (RPF) defeating the Hutu forces, thousands of Hutus were killed in revenge attacks.[86] Initially

83 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press 23/3/2012.
84 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press 23/3/2012.
85 CLARK, P, 'The legacy of Rwanda's Gacaca Courts', Think Africa Press 23/3/2012.
86 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 5.

the Gacaca had jurisdiction for 'crimes against humanity, war crimes and crimes of genocide'. Yet soon after his election, President Kagame decided that Gacaca should not try the crimes of the RPF and launched a campaign in 2004 to formally remove war crimes from the jurisdiction of the Gacaca.[87] The worry here is that the Gacaca will assign collective guilt on the Hutus and undermine the reconciliation process. This one sidedness also raises serious questions about Hutus' access to justice; the Gacaca is essentially closed to their demands and needs for justice while being extremely accessible to the Tutsis.[88] This may have lasting consequences for a peaceful and democratic Rwanda as Hutus may feel excluded from state institutions that could be perceived as the tool of a 'Tutsi Ethnocracy', with grievances of the Hutus slowly exacerbated by a lack of remedy.[89]

The issue of sexual violence has also become embroiled in the debate surrounding Gacaca. Originally, as mentioned before, sexual violence was classed as a 'category one' crime so could only be tried in the national court system, rather than the Gacaca.[90] However in May 2008 the government determined that such cases (including rape) would be heard in the Gacaca.[91] Their rationale was based on the reality that many of

For comprehensive information regarding the numbers killed during the genocide see Human Rights Watch (1999), Leave none to tell the story: Genocide in Rwanda.

87 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 5.
President Paul Kagame was the military leader of the Rwandan Patriotic Front that defeated the Hutu forces in 1994. He was elected President in 2000.

88 Many Hutus were killed by other Hutus for opposing the genocide. Hutu survivors are able to seek justice in the Gacaca for these crimes, but for those who suffered at the hands of the RPF there is no remedy.

89 TIEMESSEN, A (2004), 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', African Studies Quarterly, Vol. 8, Issue 1, p. 57.

90 TIEMESSEN, A (2004), 'After Arusha: Gacaca Justice in Post-Genocide Rwanda', African Studies Quarterly, Vol. 8, Issue 1, p. 61.

91 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 5.

the victims were dying of AIDS and would not see justice if they had to wait for the case to pass through the national courts. On the other hand, though the Gacaca could take place behind closed doors if requested by the victim of a sexual crime, its community nature put women in a difficult situation where they feared that the intimate details of the violence they suffered would be known to all.[92] Clearly there is no easy answer to such a complex problem, many women would appreciate the chance to have justice but others would feel that they could not participate out of the fear of humiliation or embarrassment. The challenges that the Gacaca faced: international standards, ethnic divisions, fair sentencing and the sensitivity needed when dealing with sexual violence emphasise that there is no easy answer to post-conflict justice problems.

92 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 5

Conclusions

If this paper has demonstrated one thing more than any other, it is that access to justice is an immensely diverse and complex topic. A discussion of access to justice in society is to a large extent, a reflection of a number of realities facing that society. Access to justice is not something that can be pigeonholed by a certain set of criteria and efforts to improve it certainly cannot be based on a 'one size fits all' template. Rather as mentioned in chapter one, attempts to improve access to justice have to be holistic in their nature as access to justice is determined and constrained by an array of societal factors. The case of Colombia demonstrates this complexity, with many different elements undermining the progress of the Justice and Peace Law. An individual's ability to use the justice system is not determined by one of these factors, rather it is an amalgamation of them that governs their access to justice. Some important parallels and differences between these two case studies can be examined to demonstrate this complexity and the methods of tackling it.

Access to justice and large scale Human Rights abuse

Both Rwanda and Colombia faced a huge task with regard to the caseloads they faced after such levels of human rights abuse (though of course the level of abuse in Rwanda was much higher and spanned a much shorter a period). However, both countries chose very different ways to approach the problem. Colombia sought to use its relatively sophisticated formal legal system and state institutions; though it has become apparent since then that with its current level of resources, the Colombian legal system does not possess the capacity to effectively provide access to justice for victims of the conflict. As previously stated, prosecutors in major cities in Colombia face caseloads of 250 to 300 each while in some rural municipalities the figure is as high as 700. This capacity deficiency and

the backlog of cases it has created is one of the great failings of access to justice within the JPL framework. The length of time that many victims are facing in using the JPL mechanism is likely to create disillusionment in the process that will undermine the already fragile relationship between the state and society.

Rwanda on the other hand recognised that its national court system was much too small to deal with the huge backlog of cases from the genocide. It was quite clear that they would not be able to bring justice on any sort of acceptable timescale, a fact that had very serious consequences for the Human Rights of both the victims and the vast numbers of prisoners awaiting trial in squalid prison conditions. Undoubtedly the Gacaca has been incredibly effective in dealing with this backlog, managing a caseload that would have taken the formal system over one hundred years to work through, in just seven. The practicality of the solution has to be admired, the decision to implement Gacaca reflected the realities of the situation in Rwanda, in particular its huge structural deficiencies. As a result, hundreds of thousands of Rwandans were able to not only receive some form of justice for the crimes they endured, but were able be actively involved and have a sense of ownership of the proceedings.

The comparison between the Colombian and Rwandan examples asks the question, does there have to be a trade-off between the standard of trials and the overall level of justice, when a society is facing a legacy of Human Rights abuse? Though there are many problems with the proceedings of the JPL, they conform much more closely with international legal standards than the Gacaca. That is to say in the case of Colombia that there are trained and qualified lawyers for the prosecution and the defence, an accepted legal code and a qualified judge. The Gacaca on the other hand has none of these things, leaving it open to a plethora of procedural issues. However Colombia, does not have the ability to

implement these higher legal standards on the scale needed, which raises the question; would it better to have a less complex system that may not meet certain legal standards but could operate at a greater capacity? This is obviously a rather narrow comparison of the two situations but it is a question that post-conflict countries must confront when considering how they will approach access to justice

Security issues and state presence

Although Rwanda's conflict was much more intense and damaging in respect of the loss of life and damage to infrastructure than Colombia's conflict, a clear and dominant victor in the RPF emerged at the end. In Colombia, armed groups continue to wield significant influence in a number of regions. A community based system like the Gacaca could simply not operate in a country with a security situation like Colombia's; communities are too easily controlled by armed groups, and thus a community court system could easily come under their influence.[93] The Rwandan state may have been fragile after 1994 but the RPF provided a relatively stable security situation, this was made easier by Rwanda's small geographical size and high population density; two factors that are the exact opposite in Colombia and seriously hamper the state's ability to monopolise the use of force. Until Colombia is able to establish the state as the prime source of security across the country, effective access to justice will remain unattainable for those whose communities are influenced by armed actors. If these communities cannot turn to the state to seek justice then the possibility of building a peaceful and democratic society will remain out of reach.

93 A community court system may become co-opted by an illegal armed group that is able to exercise coercive control over the community. The court may then become a de facto extension of their power and infer legitimacy upon by the group due the courts links with the state.

Societal discrimination and access to justice: gender and minority groups

It is impossible to overstate the importance of understanding how access to justice is fundamentally related to societal norms. If groups are discriminated against or are traditionally marginalised, then it is very likely that this will be reflected in their level of access to justice. The status of Afro-Colombian and indigenous groups under the Justice and Peace Law is indicative of this. Even if the discrimination is not overt, there are important barriers that have to be tackled to improve access to justice. The most important of these are the levels of legal literacy, language issues, geographical isolation and a lack of trust in the state from these communities. If those trying to improve access to justice fail to take positive action to deal with these barriers then not only will levels of access to justice remain low, but they will serve to further isolate these communities and entrench patterns of inequality and discrimination. Rwanda also demonstrates the problem of 'victor's justice', especially given the sharp ethnic divide that exists there. The Gacaca has made justice easily accessible, but only for those who suffered crimes at the hands of the Hutus. For the predominantly Hutu victims of RPF's revenge attacks there is no avenue to seek justice and redress. For all the Gacaca's success in facilitating access to justice and reconciliation of genocidaires and victims, this lack of redress for some victims, risks undermining what progress has been made in resolving ethnic tension.

The two cases have also raised the issue of the gender and access to justice; both in how women can actually access the legal system and how sexual violence is dealt with by a legal system. The nature of a woman's role in many societies requires responses in access to justice programmes that recognise specific needs. Cases in Colombia where women have been unable to attend court due to their children being prevented from

entering the courtroom illustrate how childcare could be a major barrier for access to justice. State childcare or the admittance of children into the court would ease these problems for women who would not be able to afford it otherwise. The very low levels of sexual crime being prosecuted under the Justice and Peace Law also indicate that there is a need for an initiative from prosecutors to actively investigate such acts, encouraging women to give evidence. Lastly the decision to admit crimes of a sexual nature into the Gacaca shows how complex the issue can be. With many victims suffering from HIV/AIDS, the length of time a case took to be processed was important to bring these victims justice. Yet on the other hand, some have questioned the appropriateness of hearing sexual crimes community environment such as a Gacaca?[94] There is obviously no right answer to sensitive questions such as these and thus it requires much further debate, study and investigation.

Access to justice is a broad subject that encompasses an array of factors and each context is unique in its own way. There is no template that can be easily followed, transplanted from one example to another. However it is clear that effective access to justice is vital to the long-term transition of a country from conflict to peace. Access to justice not only satisfies grievances for past abuse, but if people see the state as a source of redress for their grievances, then it gives them a stake reason to support it in the future. Furthermore it helps foster trust between the state and society, where previously there may have been none, and it is this trust that is crucial for the advancement of democracy.

94 Human Rights Watch (2011), Justice Compromised: The legacy of Rwanda's community based Gacaca Courts, p. 5

Acronyms

ADR: Alternative Dispute Resolution

AUC: United Self-Defence Forces of Colombia

ELN: National Liberation Army

Farc: Revolutionary Armed Forces of Colombia

ICTR: International Criminal Tribunal for Rwanda

JPL: Justice and Peace Law (la ley de Justicia y Paz)

OAS: Organisation of American States

RPF: Rwandan Patriotic Front

UNDP: United Nations Development Programme

USAID: United States Agency for International Development

Appendix I

Map of Colombia[95]

95 www.mapsofworld.com

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Appendix:
DPI Board and Council of Experts

Director:

Kerim Yildiz

Kerim Yildiz z is Director of DPI. He is an expert in international human rights law and minority rights, and is the recipient of a number of awards, including from the Lawyers Committee for Human Rights for his services to protect human rights and promote the rule of law in 1996, the Sigrid Rausing Trust's Human Rights award for Leadership in Indigenous and Minority Rights in 2005, and the Gruber Prize for Justice in 2011. Kerim has written extensively on human rights and international law, and his work has been published internationally.

DPI Board Members:

Nicholas Stewart QC (Chair)

Barrister and Deputy High Court Judge (Chancery and Queen's Bench Divisions), United Kingdom . Former Chair of the Bar Human Rights Committee of England and Wales and Former President of Union Internationale des Avocats.

Professor Penny Green (Secretary)

Head of Research and Director of the School of Law's Research Programme at King's College London and Director of the International State Crime Initiative (ICSI), United Kingdom (a collaborative enterprise with the Harvard Humanitarian Initiative and the University of Hull, led by King's College London).

Priscilla Hayner

Co-founder of the International Center for Transitional Justice, global expert and author on truth commissions and transitional justice initiatives, consultant to the Ford Foundation, the UN High Commissioner for Human Rights, and numerous other organisations.

Arild Humlen

Lawyer and Director of the Norwegian Bar Association's Legal Committee. Widely published within a number of jurisdictions, with emphasis on international civil law and human rights. Has lectured at law faculties of several universities in Norway. Awarded the Honor Prize of the Bar Association for Oslo for his work as Chairman of the Bar Association's Litigation Group for Asylum and Immigration law.

Jacki Muirhead

Practice Director, Cleveland Law Firm. Previously Barristers' Clerk at Counsels' Chambers Limited and Marketing Manager at the Faculty of Advocates. Undertook an International Secondment at New South Wales Bar Association.

Professor David Petrasek

Professor of International Political Affairs at the University of Ottowa, Canada. Expert and author on human rights, humanitarian law and conflict resolution issues, former Special Adviser to the Secretary-General of Amnesty International, consultant to United Nations.

Antonia Potter Prentice

Expert in humanitarian, development, peacemaking and peacebuilding issues. Consultant on women, peace and security; and strategic issues to clients including the Centre for Humanitarian Dialogue, the European Peacebuilding Liaison Office, the Global Network of Women Peacemakers, Mediator, and Terre des Hommes.

DPI Council of Experts

Dr Mehmet Asutay

Reader in Middle Eastern and Islamic Political Economy and Finance at the School of Government and International Affairs, Durham University. Researches, teaches and supervises research on Middle Eastern economic development, the political economy of Middle East including Turkish and Kurdish political economies, and Islamic political economy. Honorary Treasurer of the British Society for Middle East Studies and of the International Association for Islamic Economics. His research has been published in various journals, magazines and also in book format.

Christine Bell

Legal expert based in Northern Ireland; expert on transitional justice, peace negotiations, constitutional law and human rights law advice. Trainer for diplomats, mediators and lawyers.

Cengiz Çandar

Senior Journalist and columnist specializing in areas such as The Kurdish Question, former war correspondent. Served as special adviser to Turkish president Turgut Ozal.

Yilmaz Ensaroğlu

SETA Politics Economic and Social Research Foundation. Member of the Executive Board of the Joint Platform for Human Rights, the Human Rights Agenda Association (İHAD) and Human Rights Research Association (İHAD), Chief Editor of the Journal of the Human Rights Dialogue.

Salomón Lerner Febres

Former President of the Truth and Reconciliation Commission of Perù; Executive President of the Center for Democracy and Human Rights of the Pontifical Catholic University of Perù.

Professor Mervyn Frost

Head of the Department of War Studies, King's College London. Previously served as Chair of Politics and Head of Department at the University of Natal in Durban. Former President of the South African Political Studies Association; expert on human rights in international relations, humanitarian intervention, justice in world politics, democratising global governance, just war tradition in an Era of New Wars and ethics in a globalising world.

Martin Griffiths

Founding member and first Executive Director of the Centre for Humanitarian Dialogue, Served in the British Diplomatic Service, and in British NGOs, Ex -Chief Executive of Action Aid. Held posts as United Nations (UN) Director of the Department of

Humanitarian Affairs, Geneva and Deputy to the UN Emergency Relief Coordinator, New York. Served as UN Regional Humanitarian Coordinator for the Great Lakes, UN Regional Coordinator in the Balkans and UN Assistant Secretary-General.

Dr. Edel Hughes

Senior Lecturer, University of East London. Expert on international human rights and humanitarian law, with special interest in civil liberties in Ireland, emergency/anti-terrorism law, international criminal law and human rights in Turkey and Turkey's accession to European Union. Previous lecturer with Amnesty International and a founding member of Human Rights for Change.

Professor Ram Manikkalingam

Visiting Professor, Department of Political Science, University of Amsterdam, served as Senior Advisor on the Peace Process to President of Sri Lanka, expert and author on conflict, multiculturalism and democracy, founding board member of the Laksham Kadirgamar Institute for Strategic Studies and International Relations.

Bejan Matur

Renowned Turkey based Author and Poet. Columnist, focusing mainly on Kurdish politics, the Armenian issue, daily politics,

minority problems, prison literature, and women's issues. Has won several literary prizes and her work has been translated into 17 languages. Former Director of the Diyarbakır Cultural Art Foundation (DKSV).

Jonathan Powell

British diplomat, Downing Street Chief of Staff under Prime Minister Tony Blair between 1997- 2007. Chief negotiator in Northern Ireland peace talks, leading to the Good Friday Agreement in 1998. Currently CEO of Inter Mediate, a United Kingdom -based non-state mediation organisation.

Sir Kieran Prendergast

Served in the British Foreign Office, including in Cyprus, Turkey, Israel, the Netherlands, Kenya and New York; later head of the Foreign and Commonwealth Office dealing with Apartheid and Namibia; former UN Under-Secretary-General for Political Affairs. Convenor of the SG's Executive Committee on Peace and Security and engaged in peacemaking efforts in Afghanistan, Burundi, Cyprus, the DRC, East Timor, Guatemala, Iraq, the Middle East, Somalia and Sudan.

Rajesh Rai

Rajesh was called to the Bar in 1993. His areas of expertise include Human Rights Law, Immigration and Asylum Law, and Public Law. Rajesh has extensive hands-on experience in

humanitarian and environmental issues in his work with NGOs, cooperatives and companies based in the UK and overseas. He also lectures on a wide variety of legal issues, both for the Bar Human Rights Committee and internationally.

Professor Naomi Roht Arriaza

Professor at University of Berkeley, United States, expert and author on transitional justice, human rights violations, international criminal law and global environmental issues.

Professor Dr. Mithat Sancar

Professor of Law at the University of Ankara, expert and author on Constitutional Citizenship and Transitional Justice, columnist for Taraf newspaper.

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