THE CENTRE ON HUMAN RIGHTS IN CONFLICT

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JUST PEACE? PEACEBUILDING AND RULE OF LAW IN AFRICA

Lessons for policymakers

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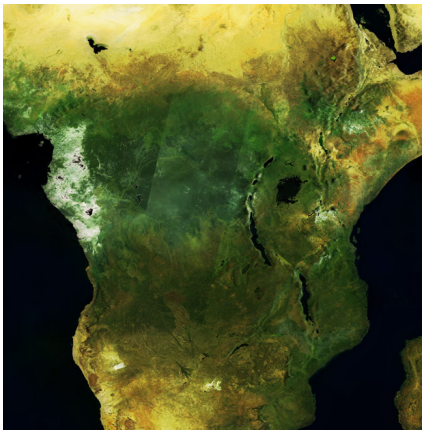

Executive summary

- Rule of law promotion is integral to peacebuilding, but not always well integrated
- It is important to distinguish between technical delivery of rule of law assistance and access to justice as perceived by the population
- Rule of law promotion and transitional justice may be complementary, or competitive
- Despite emphasis on the formal sector, informal justice processes are often most accessible to the vast majority
- Such informal processes may be transformed both by conflict and by peacebuilding activities
- Emphasis on state institutions in rule of law promotion can inadvertently undermine equal access to justice
- Given these challenges, the international community faces serious dilemmas about whom to engage, and particularly whether to engage the informal sector at all

Introduction

This policy paper encapsulates the key findings of a research project undertaken by the Centre on Human Rights in Conflict (CHRC) of the University of East London School of Law on rule of law in African countries emerging from violent conflict, funded by the British Academy. The CHRC commissioned a range of experts and practitioners from around the world to examine and assess contemporary international efforts at promoting rule of law reform in peacebuilding operations and development assistance. Country studies examined in depth the experiences of a number of African countries—the Democratic Republic of Congo (DRC), Liberia, Rwanda, Sierra Leone, and Sudan—while thematic studies examined rule of law as part of peacebuilding in comparative perspective, the role of traditional justice, and specific aspects of rule of law in the African context. These studies will be published as a book entitled *Just Peace? Peacebuilding and rule of law in Africa.*[1]

Clearly, the range of experiences with rule of law promotion in countries emerging from conflict in Africa is vast, and there is no single set of prescriptions that could possibly emerge from a comparative study of this sort.

However, it is nonetheless possible to identify a number of crosscutting themes, patterns, and recurring challenges that appear in many of the countries examined in this volume and elsewhere on the continent. This paper seeks to elaborate upon those key themes, and then turn to insights which may be gleaned to develop guidance for policymakers. Again, there is no one-size-fits-all prescription to be made, but recent experience provides some insights into risks, alternatives, and emergent policy practice, and we elaborate upon these.

Key themes

Rule of law in peacebuilding: integral but not always integrated

Rule of law is now viewed as integral to peacebuilding processes, and indeed is increasingly included in peacekeeping operations as well. Peacekeeping operations, such as the United Nations Mission in the Democratic Republic of Congo (MONUC) or the United Nations Mission in Liberia (UNMIL), have distinct rule of law divisions or pillars. Rule of law programming is also a priority for development organizations such as the United Nations Development Programme (UNDP) and many bilateral donors. This has created an increasingly elaborate set of programming in development, peacekeeping, and peacebuilding activities in post-conflict contexts. However, rule of law programming may not always be fully integrated in peacebuilding processes, as efforts at transitional security arrangements such as disarmament, demobilization and reintegration of ex-combatants (DDR) and security sector reform (SSR) may proceed in isolation from, and often prior to, rule of law promotion. In many countries, police and prison reform are treated as matters of security reform, but of course the justice sector cannot function if convicted persons cannot be incarcerated, and will be subject to criticism if individuals are held in inhumane conditions without trial for long periods of time due to lack of resources and capacity, as in Rwanda.

Our research demonstrates that despite the development of integrated peacebuilding missions to provide better coordination, coordination is generally better developed at headquarters level than in the field. There are not only gaps within activities, but 'cherrypicking' can generate excessive emphasis on a particular area, or even duplication, as actors choose the rule of law activities that are the most appealing.

Technical rule of law assistance vs. justice as perceived by the populace

Evidence from in-country interviews demonstrates a persistent gap between the delivery of rule of law assistance according to programme guidelines and the perception of access to justice held by individuals. For example the impact from the reconstruction of infrastructure may be limited to urban areas and the training of legal staff may be concentrated in large population centres. Often, the language of formal courts is inaccessible to much of the population, both because it is highly technical or formalized, or a completely different language, Furthermore, the process required is generally very lengthy and bureaucratic, and the cost of obtaining legal counsel, where it is available, may be prohibitive. Lack of functioning or diligent police forces can also impede the collection of evidence. All of these phenomena can contribute to a sense amongst many that the courts are not fair, or are simply not for them.

The gap between programming and perceptions of justice may prove difficult to address with mere expansion of programming, since any change relies upon a change in beliefs embedded over a long period of time, which may also be promoted by those who benefit from the status quo.

Among those who do view the formal system as a means to achieve justice, expectations may be unrealistically high, which can put added stress on the system. If they feel that bias and corruption are not being dealt with quickly enough, this may affect their perception of the performance of the government as a whole and increase dissatisfaction, which could potentially be destabilizing.

[1] The CHRC gratefully acknowledges the support of the British Academy for this project under larger grant number LRG-44998.

Finally, rule of law promotion is not a mere technical activity: it is also a political one. It involves not only training of staff in technical standards, but potentially removing corrupt individuals from their posts, reducing benefits to and discretion of officials in the legal or security sectors, and changing substantive law in ways which may be politically contentious.

Rule of law promotion and transitional justice efforts: complementary and contradictory

The relation between attempts to promote rule of law and efforts at transitional justice is increasingly complex. While a few years ago, the conventional wisdom often assumed that rule of law efforts would bolster accountability efforts by simply providing or strengthening the institutional framework or culture of law, or that transitional justice would necessarily enhance rule of law efforts by offering a demonstration of justice in action, the reality is not quite so simple. In fact, transitional justice efforts at the national level can complicate rule of law efforts, not only by potentially destabilizing a fragile situation, but by drawing off material and human resources, and potentially politicizing how people view the idea of justice in countries lacking a history of transparent and responsive institutions of justice. Transitional justice processes may create unreasonable expectations of the judicial system, as where truth commissions recommend domestic prosecutions which new or weak courts cannot handle. Similarly, in those places where traditional justice processes are in use, they may complicate state-based or internationally supported transitional justice processes, and ordinary citizens may not understand how these relate to one another or to the (re)construction of a formal judicial sector. In a post-conflict context, traditional justice processes may also be altered beyond recognition, or co-opted for specific political purposes.

Informal and non-state processes are most accessible for the vast majority, but are also problematic

In many states in Africa, and not only those emerging from violent conflict, it is well known that the majority of the population have little or no access to the formal justice sector. In such situations, rule of law programmers must work in the context of the operation of non-state providers of justice and conflict resolution. This is unavoidable, but as discussed below, policymakers and practitioners need to consider whether they work with or around these providers, as well as the likelihood that such actors will view them with suspicion. In many instances, non-state justice is the only type available, so it would be unwise to simply ignore it. Nonetheless, it often operates in ways which are not transparent, may be biased against women and youth, and may impose disproportionate or human rights-violating sanctions.

Informal and non-state processes may be transformed not only by conflict, but by peacebuilding processes

However, while the majority of the population in a country such as Sierra Leone or Liberia may continue to rely on non-state providers of justice and conflict resolution after a conflict ends, the processes, and the relationship between the population and those providers, may have fundamentally changed. Traditional chiefs may have lost some authority because of their actions during the war, and youths may also demand that elders cede them some authority. This does not mean that traditional practices disappear, but rather that they may have changed in subtle or dramatic ways, and also, potentially, that they might be open to reform efforts, discussed below. Peacebuilding processes inevitably alter the formal judicial sector but what is often less apparent is how such processes may also alter informal processes, whether or not external actors engage directly with them. They may, first, over time serve to limit the power of informal justice or conflict resolution processes (through formal legal limitations or offering state-based justice processes as an alternative). Second, as discussed below, peacebuilding processes may seek to engage informal processes more directly, promoting their reform, or even generating demands for their reform amongst the populace.

Institutional emphasis in rule of law programming can inadvertently undermine equal access to justice

The emphasis by external actors upon (re) building institutions of the state, including those of the justice (and related security) sector, reflects an understandable desire to stabilize states emerging from conflict, prior to the promotion of democratic competition through elections, and as part of an exit strategy for the international community. However, this contestation can privilege some groups over others in ways that undermine the legitimacy of institutions of justice. Most obviously, support to formal state institutions is likely to reinforce an urban/rural or rich/poor divide, with those unable to access state institutions viewing them with suspicion. Or, alternately, one or more groups which emerged as relatively more powerful from the conflict or peace settlement may dominate those institutions, or the institutions may become sites of contestation for those who seek to emerge stronger from the peacebuilding process. Where such divisions emerge along ethnic, but also political, lines, the potential for conflict, and the stress upon fragile institutions of justice, should be evident. Where institutions of rule of law appear unwilling or unable to hold the powerful to account, the credibility of these institutions will suffer. This was the case in Sierra Leone, where the Anti-Corruption Commission was active, but heavily criticised for failure to pursue high-level allegations of corruption, resulting in the firing of its then-head in late 2007.

Dilemma for the international community: whom to engage?

In light of the potential reinforcement of bias and privilege, or the creation of new biases, the international community faces challenges in deciding whom to engage, and how. In Rwanda, the government's narrative about ethnicity means that donors are unable or unwilling to query the composition of security forces, which are disproportionately comprised of ethnic Tutsi, with obvious implications for the justice sector. Donors, of course, require at a bare minimum state permission to engage in programming, and ideally seek positive engagement. In the DRC, presidential influence over the judiciary clearly undermines efforts to promote a transparent, depoliticised judiciary, but has been tacitly supported by donors. In Rwanda, the gacaca process does not address Tutsi, only Hutu, accused. UK programmers in Sierra Leone have adapted their programming over time to increasingly engage traditional authorities. However, external actors may also find it difficult to understand the social and political roles played by groups such as secret societies in parts of West Africa, much less to engage them.

In parts of Sudan, the government itself is providing significant support to rule of law promotion in tandem with UNDP, even as the government continues to be accused of complicity in war crimes and crimes against humanity in the Darfur region in the country. Where states seek to hijack rule of law promotion, bias it, or simply engage in it in apparent bad faith, donors may well be concerned that their assistance will be misused or serve as cover, but will likely want to continue to engage somehow, to increase access to justice to people in post-conflict countries.

International actors may find it difficult in practice to confront corruption, where it involves challenging the very actors whose cooperation and consent they require. The persistence of corruption, and the toleration of it by international actors, may affect the legitimacy not only of state institutions but also of the international actors.

Policy insights and recommendations

Integrate relevant programming on the ground and address the entire justice sector

International assistance should be part of a common rule of law strategy led by national counterparts. The UN should develop a unified rule of law strategy for all of its departments, funds and agencies, while coordinating better with national and other international actors. Such programming could be guided by, among other tools, DPKO and OHCHR Rule of Law Indicators. Programmers should also engage in proper monitoring and evaluation and adapt programming accordingly. Such integration may take place through integrated missions, but may also be bolstered by better-coordinated planning and reporting amongst all programmers in the rule of law sector.

Manage expectations and build a culture of legal literacy

Reconstructing the formal judicial sector and rebuilding rule of law in a post-conflict situation is a lengthy process. People accustomed to a corrupt and abusive justice sector may continue to mistrust new and reformed institutions. Education and outreach is essential so that individuals understand the legal process, and respond to their sense that the formal sector is ineffectual or any misperceptions and mistrust. Education about rights may help to create a positive demand for rule of law and active support for rule of law reform.

Assess impact in terms of access to justice (perceived and real), not only technical benchmarks

There is a need to assess the impact of rule of law policies and programming in terms of their impact upon access to justice as experienced and perceived by the people in a given society, not solely technical benchmarks. This is not to say that practitioners do not understand the importance of access to justice or that technical benchmarks are not also important: a programme to train members of the judiciary which does not engage anyone would clearly fail on any measure. Although advances such as the rebuilding of infrastructure and training of new members of the legal profession are significant accomplishments in themselves, they may have limited impact on members of the populace in rural areas. However, efforts to expand the pool of legal aid-type workers and to ensure that magistrates are not only located in each district but travel around them to hear cases, may offer some possibility of greater access to an otherwise inaccessible formal sector. Here, a reorientation of programming away from delivering some rule of law outputs to a consideration of access to justice impacts, which can already be seen in the evolution of programming, is critical.

Engage the non-state sector more extensively if cautiously

Our research indicates a need to engage the non-state or quasi-state justice sector more extensively. This is a potentially complex and fraught undertaking, requiring engagement with rules and processes which are likely not to be codified, which vary over time and across regions and communities, and practitioners who may speak very different languages to those engaged in programming, in both a linguistic and a technical sense. Because roles as practitioners of traditional justice or conflict resolution confer status, and may include benefits of tribute, fees, and fines, the interposition of external rule of law promoters may not be particularly welcomed by such practitioners. It may more generally be viewed with suspicion as culturally intrusive and insensitive, where programmers are most likely to come from other, developed, and even former colonizer nations. Further, any engagement must proceed with extreme caution, lest external programmers inadvertently support or promote the violation of basic human rights.

In order to engage more effectively, policymakers need to understand the complexity of the informal sector, including differences amongst the multiplicity of mechanisms, such as colonial native courts, or informal traditional justice and harmful traditional practices. Where dual systems of formal and informal processes are in place, standards regarding crimes, punishments, and discrimination should be made consistent, and appropriate channels of appeal from the informal to the informal sector should be created or ensured.

- Be sensitive to national and international legal standards, and to the fluidity of custom

There is a risk that programmers of rule of law, rightly recognizing the limitations of the impact of their engagement with the formal, state-run judicial sector, will rapidly engage with myriad “traditional” actors without sufficient guidance and caution. Thus British programmers have come to recognize that in Sierra Leone there is a need to engage, and as they term it, sensitize, traditional actors about the limitations of international human rights and Sierra Leonean law. This can only be achieved through partnership with local actors and proper research, to both understand the full range and content of traditional practices, to compare them with international and national legal standards, and possibly to promote reform, rather than rejection or blind acceptance, of traditional dispute resolution practice. In particular, programmers should be sensitive to the presence of potentially harmful practices, such as trial by ordeal, where engagement and dialogue is needed in order to promote genuine change from within the community. Strong public condemnation or prohibition may simply drive such practices underground. Greater knowledge does not guarantee acceptance of reform efforts by traditional authorities who have potentially the most to lose, although where programmers build strong partnerships with local actors and seek to develop relationships of trust with traditional authorities, such acceptance might be more likely.

- Support community-based activities in parallel to informal and formal activities

Mediation and arbitration programmes can provide mechanisms within local communities for individuals to resolve disputes without relying upon courts or traditional authorities, and indeed might be viewed as bridging the gap between formal and informal justice and conflict resolution processes. Rule of law programmers should consider expanding support to such programmes where appropriate.

Address the risk of institutional bias or capture

The perception of access to justice is affected further by the impact of control by a small segment of the population over state delivery of justice. In the context of post-conflict countries, whether the conflict was divisive ideologically, ethnically, or on some other basis, the post-conflict settlement may have clear winners and losers, whether it arises through negotiated settlement or largely military victory. Programmers must therefore be sensitive to political dynamics and elite manipulation.

Identify and engage relevant partners

The lack of political will in state structures to promote reform does not mean that reform is impossible. There are a range of incentives that should be considered in any plan for rule of law assistance to increase cooperation such as the provision of funds for infrastructure, salary stipends or support to national experts which bring immediate benefit to the host country or meetings of the international diplomatic community that focus international attention on rule of law. While many state officials may resist change, states and bureaucracies are not monoliths, so programmers should seek to identify and engage individuals who are more amenable to change.

Areas for future research

As much as the studies and this volume have revealed about rule of law programming in specific countries, and about the trends and limitations of internationally driven rule of law promotion activities in post-conflict situations, there remains much more to be learned through future research. What follows are a number of areas in which further research is needed to assess and assist international and domestic rule of law promotion.

Further research on rule of law promotion activities in practice

Programming on rule of law in each of the countries examined here engaged with, or avoided engaging, an active informal justice sector. However, what is still needed is a systemic overview, a fuller review of where rule of law promotion activities engage the informal sector, country by country, and where they do not.

This study primarily examined rule of law promotion activities by the UN, and to a lesser degree specific donors such as the UK, and of a few international NGOs. However, the UN is not the only significant actor in the field, although it is an important one. Future research could engage in similar in-depth cross-country comparisons of programming by the EU, and a wider range of bilateral donors and NGOs.

Finally, there is a need for broad cross-regional comparison, to identify similarities and differences between programming in Africa and programming in Latin America, Asia, and Europe. Scholarly work can also bolster knowledge about the efficacy of a range of mechanisms, such as legal aid, and support to mediation processes.

Rule of law programming by a range of international actors, as part of peacekeeping, peacebuilding, and development activities has grown in scope and complexity in recent years, and this trend appears likely to continue. Scholarly analysis has a critical role to play in assessing it, and using assessments to help inform improvements in policymaking.

Evaluate the impact of donor priorities

Future research should examine the effects of the prioritization of certain aspects of law reform over others. Specifically, our research raises the question that programming in "popular" areas such as gender may be emphasized to the detriment of other programming. Similarly, it would appear that rule of law reform preferences criminal over civil law. Further research is needed to determine whether this is indeed the case, and whether programming in this area could prevent land tenure and inheritance disputes, which are potentially destabilizing in a post-conflict context. .

Make research into traditional mechanisms accessible to policymakers

It is essential that research on traditional and non-state mechanisms of justice and conflict resolution be conducted, but, perhaps equally importantly, that their insights be accessible to policymakers. There is a great deal of exceedingly good research, much of it by anthropologists, but it often does not reach policymakers, or is not taken up by them. This may be due to is publication in specialised journals which policymakers do not seek out, or use of specialised jargon which they may find difficult. In any event, in-depth research on traditional mechanisms could be made more accessible to those taking programming decisions about whether to engage traditional actors, and if so, how, in a given situation.

Such knowledge would help to support the review (already being initiated in some countries) of the compatibility of traditional practices with international human rights and international humanitarian law. However, any such review must also seek to identify aspects of international obligations that are universalizable/translatable to a range of traditional actors.

Engage in research on support to legal aid and alternative dispute resolution mechanisms

While there is some evidence from the cases that legal aid, mediation and arbitration play positive roles in ensuring the peaceful resolution of disputes and potentially citizen engagement with the justice sector, closer study and assessment are needed. The findings of such research may help to promote better programming to support resolution of disputes outside of both the formal and informal sectors, and in particular perhaps to address a range of civil disputes.

Key recommendations: a summary

Policymakers and practitioners should:

- Integrate relevant programming on the ground and address the entire justice sector
- Manage expectations and build a culture of legal literacy
- Assess impact in terms of access to justice (perceived and real), not just technical benchmarks
- Engage the non-state sector more extensively if cautiously
- Address the risk of institutional bias or capture
- Identify and engage relevant partners

Policy-oriented researchers should:

- Further review rule of law promotion activities in practice
- Evaluate the impact of donor priorities
- Make research into traditional mechanisms accessible to policymakers
- Engage in research on support to legal aid and alternative dispute resolution mechanisms

About the CHRC:

The Centre on Human Rights in Conflict (CHRC) is an interdisciplinary centre promoting policy-relevant research and events aimed at developing greater knowledge about the relationship between human rights and conflict.

Our work in human rights and armed conflict addresses the complex interplay between human rights and armed conflict, including human rights violations as both cause and consequence of violent conflict, the dilemma of pursuing justice as well as peacebuilding, and the unique challenges for the protection of human rights posed by illegal armed groups and terrorist organizations. Specific research and events have been developed in three areas: Rule of Law in Post-Conflict Situations, Business and Human Rights in Conflict, and Accountability, Reconciliation and DDR in Post-Conflict Situations. Further information can be found at www.uel.ac.uk/chrc.

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