

RULE OF LAW PROGRAMS IN PEACE OPERATIONS

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Executive Summary

RULE OF LAW AND CONFLICT MANAGEMENT: ISSUES AND CHALLENGES

1. Over the last fifteen years, the international community has supported the implementation of programs designed to strengthen the rule of law in countries susceptible to or recovering from violent conflict. Yet the question of how best to restore and/or implement rule of law programs in fundamentally insecure environments and to what degree the rule of law can prevent or mitigate conflict is not yet fully known.

2. The United Nations (UN) recently adopted a common definition of the rule of law for the many agencies involved in this programmatic area. While this advancement is widely welcomed, translating the all-encompassing nature of the definition into specific activities in field operations is likely to be a major challenge. The international community must give further thought to the rule of law as a guiding principle and then match it to the design of international programs. This objective may be blurred due to the sheer number of programs dedicated to disparate aspects of rule of law activities.

3. Many rule of law experts have been hesitant to admit the political nature of their programs, yet such activities are inherently political in that they aim to affect societal and governmental power structures. Thus, the rule of law should not be regarded as a subset of security objectives or as a technical component of development programs, but as an integral element of peacebuilding strategies.

4. "Local ownership" of rule of law activities is widely supported by international actors, but the concept is not effectively understood or implemented. Where local efforts do exist, it may be argued that too much emphasis by the donor community is placed on the reform of formal and centralized institutions that do not necessarily reach out to large portions of the population.

5. The role of informal systems in the (re)-establishment

of the rule of law is a key area that must be incorporated into programs and planning. There is mounting interest in the use of customary and informal legal systems in conflict-prone or post-conflict countries. One should caution, however, against unconditional endorsement of customary systems, for they may perpetuate discriminatory practices against vulnerable groups.

6. One of the main challenges for actors in this field is the absence of overarching and coherent strategic frameworks and planning related to the sequencing of rule of law programs within peacebuilding initiatives. In particular, measures aimed at longer-term development reforms—through administrative laws and processes, anti-corruption strategies, property, land and housing rights, and natural resource management—are still comparatively neglected in UN approaches.

7. While the rule of law is increasingly included as part of post-conflict peacebuilding strategies, considerably less attention has been given to the role that rule of law can play in conflict-prone societies. As relevant actors seek to encourage rule of law support beyond current peace operations, it is necessary to apply certain lessons learned in these areas to the conflict prevention paradigm.

IMPROVING RULE OF LAW POLICY AND PRACTICE

- While the last few years have seen the progressive recognition and affirmation of the importance of the protection of civilians and of human rights in the mandates of peace missions adopted by the Security Council, experts favor more consistent inclusion of rule of law elements in Security Council mandates and peace agreements. This would help clarify the role and tasks of rule of law components in peacekeeping operations and consolidate current international practice.
- The primary objective in the immediate aftermath of conflict is to re-establish security, in particular internal security, which is a prerequisite for the

successful implementation of longer-term development strategies. There needs to be a better understanding of the inter-linkages between the various components of the criminal justice system—courts, corrections, criminal defense, police and prosecutors. Other areas should also be considered, in particular those connected to the return of refugees and displaced persons, such as housing, land and property, and citizenship issues.

- Future reforms need to be undertaken which help to bridge the divide between the immediate restoration of basic law and order and the perhaps less visible yet equally pervasive aspects of wider, longer-term rule of law initiatives aimed at economic, social and political transitions.
- Rule of law institutions have been granted a primary role in achieving national reconciliation. By addressing past human rights abuses and fighting impunity, domestic legal institutions can gain greater legitimacy among the population. There is, however, a broader role for legal institutions beyond transitional justice, such as in the realm of social and economic rights, which have tended to be overlooked in rule of law programs of UN agencies.
- Rule of law practitioners have learned that the best-laid plans will backfire if no strategy exists to handle well-organized spoilers. Some level of international control may have to be adopted in the early stages of the mission. Yet engaging the political leaders and local elites and building national reform constituencies will still be a crucial task of rule of law practitioners in field missions.
- International approaches should ideally be based on:

the identification and utilization, as part of a strategic planning processes, of local reform constituencies; the use of local experts to produce needs assessments; the accessibility (including through the appropriate use of local languages) of international norms and regulations; and the adoption of meaningful participatory approaches.

- While evaluations, assessments and lessons learned on rule of law programming have flourished in recent years, their use and relevance for practitioners is still sparse and not sufficiently disseminated.
- Improvements are still needed in the provision of adequate rule of law expertise to field missions. There is a need to move away from the exclusive focus on lawyerly expertise and to draw on a wider set of skills for effective and professional rule of law field practice.
- Efforts need to be made to better engage political representatives at the international level. Besides ensuring better pre-mission briefing of Special Representatives of the Secretary-General (SRSGs) on rule of law issues, there is an urgent need to give wider international legitimacy to current UN efforts in order to secure steadier financial support for rule of law tasks in post-conflict contexts.
- The proposed rule of law unit within the support office of the recommended Peacebuilding Commission at UN headquarters should be entrusted with a clear and robust mandate and adequate resources. At the national level, the creation of a transitional rule of law unit or a focal point within the national government of post-conflict countries, which would be in charge of strategic planning, sequencing and prioritization of activities, should be considered.

I. Introduction: Development, Security and the Rule of Law

In recent years, policymakers and academics alike have made important strides to better understand the intertwined political, social and economic dimensions of violent, intra-state conflicts, leading in effect to the progressive integration of development and security initiatives. The International Peace Academy program on the Security-Development Nexus examines the achievements and failings of comprehensive approaches to conflict management and seeks to extract policy-relevant recommendations on how coherent and mutually supportive security and development policies can be designed and implemented at the UN and beyond.

International programs to support the rule of law are now regarded as important components of both the security and development agendas. From a security perspective, rule of law institutions are indispensable for internal security and law enforcement purposes, and to ensure the transparency, accountability and control of security forces such as the police and the military. Development agencies also believe that (re-)establishing the rule of law is a prerequisite for the emergence of stable and peaceful societies. While the judiciary is the primary institution concerned with the rule of law, the inclusion of rule of law assistance as part of integrated conflict management approaches has reinforced pre-existing linkages with governance and security institutions, and further justifies the need to situate rule of law reforms and programs within a broader analytical framework.

Against this backdrop, the International Peace Academy (IPA) held a conference on 29 October 2004 on *Rule of Law Programs in Peace Operations: Toward a Conflict-Sensitive Perspective*. The international conference brought together policymakers, practitioners and academics to discuss the effectiveness and long-term sustainability of current programs,

and in particular their actual impact in different phases of conflict, with a view to distilling recommendations for improved rule of law and conflict management policy and practice. This conference sought to expand on some of the issues which were presented in the 2004 UN Secretary-General's report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*.

Since the IPA Conference, major policy developments have taken place that are of critical import to the UN and international community. In March 2005, the UN Secretary-General, encouraged by the 2004 UN report of the High Level Panel on Threats, Challenges and Change, released *In Larger Freedom: towards development, security and human rights for all*, where important proposals were put on the table for reforming the UN system as a whole. The report included key recommendations that are particularly relevant for the rule of law, by recognizing its significance in peacebuilding and calling for the creation of a rule of law unit to be housed within the proposed Peacebuilding Commission. In anticipation of the UN Summit in September 2005, this IPA Policy Report seeks to integrate these recent developments into discussions that are currently taking place and which can play a major role in strengthening rule of law policy and practice.

II. Rule of Law and Conflict Management: Issues and Challenges

Over the last decade, international actors have increasingly supported the implementation of programs designed to strengthen the rule of law in countries susceptible to or recovering from violent conflict. From Cambodia to Liberia, El Salvador to Afghanistan, policy-making and programming activities have included advice on: constitution-making and legislative drafting; judicial and law enforcement reforms; support to human rights institutions; anti-corruption and transparency initiatives; regulatory

mechanisms and administrative law; and the establishment of transitional justice mechanisms. There is now a growing body of literature on the subject and greater awareness about the importance of these programs in vulnerable countries.¹ While the relevance of the rule of law in volatile situations is generally undisputed, how best to implement international programs in fundamentally insecure environments and to what degree the rule of law can help prevent or mitigate conflict are questions that have yet to be fully explored.

Competing Definitions, Activities and Approaches

The international community's interest in this topic recently culminated with the 2004 release of the UN Secretary-General's report on *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*. The aim of the report was to adopt a common language and a set of priorities for rule of law programs undertaken by UN agencies and departments. Among its many advancements, the report enunciated a (heretofore lacking) definition of the rule of law that integrates what amounts to procedural, institutional and substantive principles and establishes the rule of law as a fundamental component of good governance strategies:

[The rule of law] ...refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with

international human rights norms and standards. It requires, as well, measures to ensure adherence to principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal uncertainty, avoidance of arbitrariness and procedural and legal transparency.²

While a common definition had been sorely needed, translating such a broad pronouncement into specific activities, processes and outcomes in field operations constitutes a major challenge. The report may mark the emergence of a harmonized approach at the UN, yet there is an urgent need to give further thought to the rule of law as a guiding principle that can be applied in the design of international programs.

While security and development approaches have tended to converge through the emergence of peacebuilding strategies,³ greater coherence in rule of law programming still remains a distant objective, given the sheer number of disparate projects. On the development side, bilateral agencies, the World Bank and the United Nations Development Programme (UNDP) have been involved in building the capacities of national judiciaries and prosecutors' offices, and in the refurbishment of facilities such as prisons and courts.⁴ On the security side, agencies such as the United Nations Department of Peacekeeping Operations (UNDPKO) have increasingly inserted rule of law activities such as the maintenance of law and order through reform and training of national police

¹ For a review of the growth of rule of law in recent years, see: Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77, no. 2 (March/April 1998); Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Rule of Law Series, Carnegie Endowment for International Peace, Democracy and the Rule of Law Project, No. 34, January 2003; Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, Rule of Law Series, Carnegie Endowment for International Peace, Democracy and the Rule of Law Project, No. 55, January 2005.

² UN Doc. S/2004/616, 3 August 2004, para. 6.

³ Agnès Hurwitz and Gordon Peake, *Strengthening the Security-Development Nexus: Assessing International Policy and Practice since the 1990s*, Conference Report, International Peace Academy, April 2004, p.7.

⁴ On the development aspects of rule of law programming, see also *Initiatives in Judicial and Legal Reform*, World Bank Legal Vice Presidency, February 2004; *Justice and Security Sector Reform: BCPR's Programmatic Approach*, United Nations Development Programme, November 2002. These issues also came out of Session I, "Rule of Law and Conflict Management: Issues and Challenges", at the IPA Conference on 29 October 2004, *Rule of Law Programs in Peace Operations: Toward a Conflict-Sensitive Perspective*.

and law enforcement officials, judicial reform and human rights training in their mission activities.⁵ Thus, some agencies see the rule of law as a cornerstone of democracy and the market economy, while others view the strengthening of such programs as a first order of business for successful peacemaking and peace implementation, and one of the primary means for conflict prevention.

Differences in strategies and subsequent activities may be traced to the existence of minimalist and maximalist approaches.⁶ Minimalists tend to focus on programs that specifically address the legality of rules while divorcing issues of ethics and human rights from the rule of law. Maximalists utilize a more expansive definition, believing that the law must be about justice and hence cannot be separated from morality. They also support the expansion of rule of law activities ranging from human rights to good governance and in projects that work to effect deep-rooted societal change.

Another perspective on the current prominence of the rule of law highlights the discrepancy between international pressures to establish the rule of law in vulnerable countries, and the weakening of the international rule of law, which has become particularly apparent in the war on terror waged after the attacks of September 11, 2001.⁷ What has been preoccupying is the increasing involvement of the United Nations in the implementation of counter-terrorist activities through the establishment of the Counter-Terrorism Committee, sometimes at the expense of fundamental principles endorsed and supported by the same organization in the field of human rights. Counter-terrorism is not the only area of international activity in which accountability has been lagging. Activists have long criticized the role of

the Bretton Woods institutions in devising policies that may have serious human costs, but for which they are generally not held accountable. These international agendas often have a detrimental impact on domestic support for the rule of law in vulnerable countries. For example, Nepal adopted the Terrorist and Disruptive Activities Ordinance, which curtails the reviewing power of the judiciary in detention cases and allows the government to define terrorism so broadly that any individual can be arrested as a terrorist, even for committing ordinary crimes.

How and in what ways these various perspectives converge may have a significant impact on the evolution, coordination and effectiveness of policy and practice. Efforts directed at different levels of rule of law reform can undermine each other, as opposing principles are advanced. One concern is the duplication and, in extreme cases, corrosion of rule of law principles resulting from the proliferation of multilateral donors and civil society actors. The field of rule of law programming contains a wide variety of practitioners. Private sector consulting firms, non-governmental organizations (NGOs), academic institutions, individual governments and multilateral organizations, the UN and regional development banks have all engaged, with differing approaches, in programs that seek to enhance the rule of law. A wide spectrum of national actors also play a vital role in the actual results achieved by rule of law strategies—from the police and military to the media, political parties, professional associations, trade unions and women's groups. Often, different groups are involved in initiatives targeted at the same concern; such overlapping efforts can result in the nullification of reforms as countervailing strategies effectively cancel each other out or create further confusion in an already complex legal environment.

⁵ Nina Lahoud, "Rule of Law Strategies for Peace Operations," in *Rule of Law in Peace Operations*, ed. J. Howard and B. Oswald (The Hague: Kluwer Law International, 2002).

⁶ Rama Mani, *Beyond Retribution: Seeking Justice in the Shadow of War* (Cambridge, UK: Policy Press, 2002) pp. 26–28.

⁷ See Amnesty International Report 2005, *The State of the World's Human Rights*, p. 8.

Measuring Impact and Effecting Sustainable Change

In addition to the lack of coordination and synchronized planning by rule of law actors, another issue in need of further exploration is the difficulty of gauging the impact of these programs, which resists quantification and easy evaluation. This challenge can be traced to two salient characteristics of rule of law programming. First, such initiatives aim to effect a societal and not a strictly technical change. Necessarily, such changes will have an impact on the jockeying for power within a society, with certain individuals benefiting from current structures and reluctant to invest in activities that may disrupt their political, social and economic holdings. Many organizations working in this field are reluctant to admit the political nature of their programs. Yet a truly effective initiative will, almost by definition, alter a governing system's approach to the law. As stated in a recent report by the Centre for Humanitarian Dialogue:

If we are prepared to accept the argument that the institutions of justice and the rule of law embody, to some extent, the state, we must also face the fact that this makes them extremely sensitive areas in which for outsiders to get involved. They symbolize the power and sovereignty of the state and thus any involvement with them is of necessity political and cannot pretend to remain purely technical.⁸

A healthy respect for these principles will manifest itself in a wide set of legal interactions and relationships, most of which defy categorization or evaluation: "aid providers have helped rewrite laws

around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing conditions for implementation and enforcement."⁹ A wide-ranging legal overhaul may falter if the changes in legal codes are not accompanied by alterations in conduct among those charged with the implementation of reform. Many of the benefits of efficacious rule of law programming lie in actions not taken, as legal actors introduce a level of self-restraint and self-correction absent in states marked by cronyism, despotism or anarchy.

Second, the distinction between a positive rule of law initiative and a meritless one lies in the quality of programming, not in the quantity of reforms proposed and effected. The difference between an enduring constitution and a flawed one cannot be found in the length of its pages but in the relevance and legitimacy of its principles. Similarly, it is exceedingly difficult to measure what positive impact may result from the training of judges, the building of prisons and the support to prosecutors, for instance, as such programs almost never yield immediate and recognizable results beyond the tangible outputs they present in the form of trained judges or new facilities. The transformation of a legal culture into one marked by respect for the rule of law is a gradual one, meaning that improvements may be initially imperceptible.

Local Ownership

Another potentially explosive issue worthy of attention is the preclusion of national ownership of legal reforms.¹⁰ Where reforms are viewed as imposed by external forces and national consultation

⁸ Antonia Potter, "The Rule of Law as the Measure of Peace? Responsive policy for reconstructing Justice and the Rule of Law in post conflict and transitional environments," Centre for Humanitarian Dialogue, Paper for UNU-WIDER Conference on *Making Peace Work*, May 2004.

⁹ Carothers, "The Rule of Law Revival."

¹⁰ For further discussion about local actors and rule of law projects, see *The Experience of Local Actors in Peace-building, Reconstruction and the Establishment of the Rule of Law*, Conference Report from the Project on Justice in Times of Transition, March 2002.

is shallow or nonexistent, it is difficult to foster internal respect for the rule of law, a value which itself is founded on actors' view of the law as legitimate. Donors' imposition of their own view of the rule of law on different cultures and societies has in some circumstances neglected local values that could be more effectively harnessed in the service of the rule of law. In Colombia, for instance, criminal procedure has been transformed from an inquisitorial to an adversarial process, without properly consulting with civil society. Moreover, where such initiatives are introduced irrespective of the specific conditions and needs of a society—as has been alleged to be the case with many peacekeeping operations—they are unlikely to assist states in a sustainable manner, and often do not adequately address what the local community perceives to be of greatest import to the reforms of their legal system.

It may also be argued that the donor community places too much emphasis on the reform of rigid, formal structures that do not necessarily impact large segments of the population in question.¹¹ In conflict-prone or conflict-ridden countries, the majority of the population, and especially those outside of capital cities, may settle disputes and handle rule of law-related activities through non-formal, or customary, channels. These informal, traditional or customary structures may provide effective dispute resolution mechanisms for huge swaths of the population, yet they are not sufficiently understood by outside actors. As such, more attention should be granted to informal dispute settlement mechanisms in the planning and implementation of rule of law activities in conflict-prone countries, but without romanticizing or overlooking their political nature.¹²

¹¹ Stephen Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," Rule of Law Series: Carnegie Endowment for International Peace, Democracy and Rule of Law Project, Number 41, October 2003.

¹² On this question see Liz Alden Wiley, "Formalizing the informal: Is there a way to safely secure majority rural land rights?" Paper presented to EGDI-WIDER Conference on *Unlocking Human Potential: Linking the Informal and Formal Sectors*, Helsinki, Finland, 17–18 September 2004, p.14. See also: *Final Recommendations of IPA's International Workshop on Land, Property and Conflict: Identifying Policy Options for Rule of Law Programming*, forthcoming.

¹³ "A Review of Peace Operations: A Case for Change," The International Policy Institute, King's College London, February 2003.

Strategic Frameworks

Perhaps one of the most demanding challenges facing the range of actors working in this field today, especially for those in the UN system, is the absence of overarching and coherent strategic frameworks and planning related to the sequencing of rule of law programs within conflict prevention or peacebuilding initiatives.¹³ Where some form of strategic planning might be strongest is in the restoration of criminal justice measures. Yet even then the inter-linkages between the various components of the criminal justice system are not always adequately taken into consideration. As will be elaborated below, greater efforts should be placed on better understanding the connections between the elements of the criminal justice system, and planning should focus on strategies which sequence their activities so that no one sector will be overlooked. Additionally, preventive measures and initiatives aimed at longer-term development reforms—through administrative laws, anti-corruption strategies, border and customs training, property rights and land laws, and natural resource management—are comparatively neglected. Greater thought needs to be given to rule of law reforms that would help to bridge the divide between the immediate restoration of basic law and order and the perhaps not so visible yet just as pervasive aspects of wider, longer-term rule of law initiatives aimed at economic, social and political transition.

III. Identifying Priorities

It is important to examine whether rule of law strategies have been properly tailored to specific and differentiated needs for states in different stages of

stability and development, and whether adequate cooperation and coherence of both actors and overall policies currently exists in conflict prevention, peacemaking and peace implementation, and post-conflict peacebuilding. Although these three phases are overlapping and blurred, examining activities through this lens is nonetheless useful for analytical purposes, as the strategies, priorities and needs of international actors and local constituencies are likely to differ in these various phases.

Rule of Law and Conflict Prevention: The Old Wine in New Bottles Syndrome?

The rule of law is increasingly finding favor in the post-conflict peacemaking and peacebuilding discourses, yet considerably less attention has been given to the role that legal institutions can play in conflict-prone societies.¹⁴ Unsettled contradictions are faced by those who work on rule of law programs in pre-conflict environments; primarily, that while there is rhetorical commitment in inserting rule of law programs more squarely into prevention strategies, in practice, rule of law initiatives tend to be used mainly as a traditional development or post-conflict peacebuilding tool.¹⁵

Development actors such as UNDP, the World Bank (WB), NGOs and bilateral agencies have only recently, if at all, begun viewing the rule of law through the lens of conflict prevention. For instance, the WB includes rule of law principles in its approach to conflict prevention, though with a distinct focus on governance and property issues aimed at creating

favorable conditions for external investment and economic growth. The United Kingdom's development organization, the Department for International Development (DfID), has been one of the major proponents of including aspects of rule of law in conflict prevention, and has recently included the rule of law in its whole of government approach to conflict prevention and post-conflict peacebuilding.¹⁶ Other bilateral donors, such as Denmark, Norway and Sweden, for example, have long included the rule of law in their development approaches, but it sits fairly low on their agendas. USAID (US Agency for International Development) has also incorporated rule of law in its development work on democracy and governance, but has not necessarily included it systematically in its conflict assessments of certain unstable states.¹⁷ Indeed, one of the main challenges is to figure out how to differentiate rule of law programming in fragile states, where considerably little best practice exists, from rule of law programming in traditional development policy.

Conflict prevention itself did not gain much currency in the international community until after the end of the Cold War. Documents such as the *Agenda for Peace*, the *Report of the Panel on United Nations Peace Operations* (otherwise known as the Brahimi Report), the Secretary-General's report on the *Prevention of Armed Conflict*, and the Carnegie Commission's report on *Preventing Deadly Conflict* have all illustrated the growing necessity of deepening operational and structural prevention measures at the UN and beyond in an attempt to be more pre-emptive rather than to wait for the next civil war to erupt. These reports

¹⁴ The relationship between the rule of law and conflict prevention was discussed during Session II, "Rule of Law and Conflict Prevention: The Old Wine-New Bottle Syndrome?", at the IPA Conference on 29 October 2004, *Rule of Law Programs in Peace Operations: Toward a Conflict-Sensitive Perspective*.

¹⁵ See also Chandra Lekha Sriram, "Rule of Law, Conflict Prevention and Development Assistance: Old Wine in New Bottles?" in *Rule of Law Programming in Conflict Management: Towards Security, Development and Human Rights?*, ed. Agnès Hurwitz with Reyko Huang (Boulder, CO: Lynne Rienner Publishers, forthcoming).

¹⁶ See *The Global Conflict Prevention Pool: A Joint UK Government Approach to Reducing Conflict* available at www.fco.gov.uk and www.dfid.gov.uk; see also DfID, *Fighting poverty to build a safer world: a strategy for security and development*, March 2005, <http://www.dfid.gov.uk/pubs/files/securityforall.pdf>.

¹⁷ USAID Office of Conflict Management and Mitigation, *Land and Conflict: A Toolkit for Intervention*, 2004.

recommended increased reliance on development actors, such as UNDP and the WB, to engage in preventive action, including on human rights and the rule of law. The importance of building an effective justice system as a conflict prevention or conflict-mitigating tool became more commonly appreciated.

Thus, the rule of law has become somewhat of a more familiar term in the conflict prevention discourse, and its prevalence in the UN system has spread from under the sole guard of the Office of the High Commissioner for Human Rights (OHCHR)—where the rule of law had primarily taken shape as a fundamental principle of the international human rights framework—to also include efforts that fit within the ambit of development and security programs run by UNDP and UNDPKO. On the conflict prevention front, UNDP's Bureau of Crisis Prevention and Recovery (BCPR) established the Justice and Security Sector Reform (JSSR) program, to address the links between human development, human security, justice and security sector reform.¹⁸

Despite the increased awareness of the role that legal institutions can play in mitigating conflict, or conversely, in exacerbating tensions and grievances in fragile states, rule of law activities still could be more firmly inserted into conflict prevention at the UN and among other organizations working in this area. Indeed, this is demonstrated in the apparent disconnect between the conflict prevention agenda as laid out in a recent UN report on the prevention of armed conflict—which, among other things, calls for the strengthening of the rule of law, including respect for human rights—and the lack of a resulting coordinated response at the operational level.¹⁹ As relevant actors

seek to encourage support for rule of law activities beyond the current focus on post-conflict peacebuilding, it is necessary to apply certain lessons learned in these areas to the conflict prevention paradigm, namely, assessing national needs and capacities, developing domestic justice systems, understanding the relationship between formal and informal legal systems, and identifying gaps in the rule of law.

Rule of Law and Peacemaking and Peace Implementation: Order, Law and Justice

Discussions concerning the rule of law in peacemaking and implementation tend to revolve around the identification of a set of tools that could be used by peacekeeping missions to support the rule of law and the adoption of a clear rule of law strategy for the early post-conflict phase. Where peacekeeping operations are deployed, there is overwhelming recognition that the first order of business is to (re)-establish basic law and order and to provide security for the population.

Recurrent findings coming from rule of law policy and practice in peacekeeping identify a number of key recommendations to achieve their objectives.²⁰ First, rule of law experts generally favor more consistent inclusion of rule of law elements in Security Council mandates and peace agreements, as this would help clarify the role and tasks of rule of law components in peacekeeping operations and consolidate current international practice. Second, as explained above, it is now widely accepted that international programs should support all the key components of the criminal justice system, including criminal defense and correc-

¹⁸ Some participants at the IPA October 2004 Conference noted that the JSSR approach, as well as other approaches initiated by actors working on conflict prevention activities, is being overshadowed by more security-related activities that would be included in security sector reform programs, such as training and vetting the police.

¹⁹ Interim report of the Secretary-General on the prevention of armed conflict, UN Doc. A/58/365-S/2003/888, 12 September 2003, para. 12, p. 5.

²⁰ IPA Conference, Session III, "Rule of Law and Peacemaking & Peace Implementation: Order, Law and Justice?", 29 October 2004, *Rule of Law Programs in Peace Operations: Toward a Conflict-Sensitive Perspective*.

tions, as well as juvenile justice. Appropriate expertise and capacity should also be provided to fight organized crime and transnational criminal networks, which often proliferate in fragile countries. For long, emphasis has been placed on recruiting, vetting and training civilian police forces, among the most visible law and order actors.²¹ The unintended consequence of this focus has been that a disproportionate allocation of resources is given to one part of the criminal justice system—the police—while courts and prisons remain overburdened and under-funded. In Afghanistan, for example, police training took place before the refurbishment of prisons and the training of the judiciary was addressed. As a recent United States Institute of Peace report states:

even a well-trained force will not be able to provide genuine law enforcement if there is no functioning criminal justice system or corrections system in which to place offenders. At best, such a force will be able to provide some public order; at worst, the international community will have enhanced the ability of power-holders to control and abuse the population without creating mechanisms to protect the rights of Afghans. A substantial investment in one area of rule of law will not have a meaningful pay-off in terms of real democratic governance and stability unless other pieces of the puzzle are put in place as well.²²

Third, all components of multidimensional peacekeeping operations should be responsible for the

promotion and protection of the rule of law. In particular, progress in the protection and promotion of the rule of law has been evidenced by the increasingly proactive role of the peacekeeping military component in the protection of civilians and the arrest and detention of war criminals.²³ This was recently highlighted in eastern Congo, where the military had to fulfill some of these functions in the complete absence of a structured police force and formal justice system.²⁴

Fourth, rule of law peacekeeping practitioners have also learned, sometimes bitterly, that the best-intentioned approaches will backfire if no strategy exists to handle well-organized spoilers. Some level of international control may have to be accepted as a necessity in the early stages of the mission. Kosovo taught the international community important lessons in this respect: the need to include international judges and prosecutors alongside nationals was recognized far too late, and took place after much of the damage had already been done.²⁵

While most of these basic principles of rule of law approaches in peacekeeping are now undisputed, the implementation and operationalization of such principles remains unsatisfactory. As noted earlier, strategic planning and sequencing should guide international action in the rule of law area.²⁶ The need to develop more sophisticated diagnostic and needs assessment tools, including thorough conflict analysis, may be one of the more crucial elements of

²¹ Anja T. Kaspersen, Espen Barth Eide and Annika S. Hansen, *International Policing and the Rule of Law in Transition from War to Peace*, Norwegian Institute of International Affairs, October 2004; Charles T. Call and William Stanley, "Civilian Security," in *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen John Stedman, Donald Rothchild, and Elizabeth M. Cousens (Boulder, CO: Lynne Rienner Publishers, 2002), pp. 303, 312 and 316–18.

²² Laurel Miller and Robert Perito, *Establishing the Rule of Law in Afghanistan*, United States Institute of Peace Special Report, March 2004, p.2.

²³ See also Simon Chesterman, *The Use of Force in UN Peace Operations*, Best Practices Unit, Department of Peacekeeping Operations, October 2004, p.12.

²⁴ On eastern Congo, see *Operation Artemis: Lessons of the Interim Emergency Multinational Force*, Best Practices Unit, Department of Peacekeeping Operations, Military Division, October 2004.

²⁵ See also William G. O'Neill, *Kosovo: An Unfinished Peace* (Boulder, CO: Lynne Rienner Publishers, 2002), p. 77.

²⁶ UN Doc. S/2004/616, 3 August 2004, para.14–16, 21.

strategic planning. The tendency to repeat past mistakes and to overlook previous lessons learned and other evaluations is a sad reality that, to a certain extent, reflects the lack of institutional continuity that continues to plague the United Nations and other international agencies' activities. Several institutions, such as the International Network for the Promotion of the Rule of Law, are now trying to address these shortcomings, which could help to ensure better communication among rule of law practitioners coming from diverse backgrounds.²⁷

Important improvements are also urgently needed in the provision of adequate international rule of law expertise. Training itself will not fully resolve the problems faced in the identification and recruitment of rule of law practitioners. There should be a move away from the exclusive focus on lawyerly expertise which has led to a conflation between rule of law and lawyers, and a realization that multidisciplinary teams including anthropologists and country specialists would actually be more adept at designing and implementing rule of law programs in the challenging environments of post-conflict countries.

Finally, more effort should be made to engage political representatives at the international level. Besides the need to ensure better pre-mission briefing of Special Representatives of the Secretary-General on rule of law issues, there is an urgent need to give wider international legitimacy to current UN efforts to support the rule of law as part of peacekeeping tasks.

Rule of Law and Post-Conflict Peacebuilding: Addressing Long-Term Needs through Sustainable Legal Reforms

Ensuring the long-term sustainability of rule of law reforms is currently one of the most daunting challenges faced by policymakers and practitioners. Beyond this rather dim assessment, fundamental divergences remain among the approaches of various development actors.

Rule of law reforms have been part of development policy tools for much longer than is usually acknowledged, hidden under the guise of public sector reforms or good governance and democratization.²⁸ It was only after the end of the Cold War that the rule of law "became the big tent for social, economic, and political change generally—the perceived answer to competing pressures for democratization, globalization, privatization, urbanization, and decentralization," and that the UN, in particular UNDP, became involved in this policy area.²⁹ Multilateral development banks began implementing rule of law projects more recently, but have been severely constrained by their charters, which prevent them from engaging in the political dimensions of their work.³⁰

The post-conflict context adds yet another layer of difficulty to this sector of development policy. The most crucial question that is still not satisfactorily addressed by international agencies is the long-term impact of activities that were designed for short-term

²⁷ See International Network for the Promotion of the Rule of Law, <https://inpro.usip.org>.

²⁸ Erik Jensen identifies three waves of rule of law reforms starting after World War II and before the end of the Cold War: the first wave focused on the reform of bureaucratic machineries; the second wave, known as the law and development movement, promoted both economic and democratic development; and the third wave was the first to apply in post-conflict countries and limited its reach to legal institutions per se. See Jensen, "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses," in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, ed. E. Jensen and T. Heller (Stanford, CA: Stanford University Press, 2003), pp. 336, 345–6.

²⁹ *Ibid.*, p. 347.

³⁰ *Ibid.*

purposes. In other words, the legacy, negative or positive, of rule of law reforms undertaken as part of a peacekeeping operation deserves closer analysis, so as to improve the long-term outcomes of international programming.

The issue of coordination, or the lack thereof, is one of the most recurrent problems of post-conflict peacebuilding, from Guatemala to Cambodia to Sierra Leone, and inside-operators are well aware of the shortcomings of their respective organizations in this respect:

Despite high-level meetings where cooperation and coordination are promised, with a few notable exceptions, in-country donor cooperation at its best means staying out of one another's way. At its worst, it begins to look like the dark side of political campaigns, high-stakes sport matches, and industrial races for a larger market share. ...The worst cases are natural outgrowths of the organization's incentive systems, occurring with neither the direct encouragement nor the knowledge of higher-ups.³¹

Recent experiences, such as the lead donor approach taken in Afghanistan, where Italy was entrusted with leading the rule of law reform process, have not proven to be any more successful.³² At the UN in particular, the transition between peacekeeping operations and the handover of responsibility to the Department of Political Affairs and UNDP is still awkward. The recommendation made in the Secretary-General's report *In Larger Freedom* to establish a Peacebuilding Commission and a rule of

law unit within its support office is an important initiative to help improve the coordination between different UN agencies and the monitoring of longer-term recovery objectives.³³

Rule of law institutions play a primary role in achieving national reconciliation, one of the foremost goals of post-conflict peacebuilding, through transitional justice mechanisms. By addressing past human rights abuses and fighting impunity, domestic legal institutions can gain greater legitimacy among the population, and establish the basis for sustainable strengthening of the rule of law. There is, however, a broader role for legal institutions, such as in the realm of social and economic rights, which have tended to be overlooked in rule of law programmatic approaches.

What is ultimately at stake here is the political role of rule of law institutions, and the political nature of programs supported by international actors.³⁴ Some have emphasized institutional design as the core objective of rule of law work in post-conflict peacebuilding. From this perspective, creating incentives to push institutions and the individuals they are composed of towards enhanced professionalism and accountability would go a long way towards the sustainability of rule of law reforms. This will necessarily take time in countries with a dearth of professionals, and will require initiatives on civic education and media strategies.

Others have lamented the lack of quality dialogue between local and international actors, and highlighted the importance of a political space that

³¹ L. Hammergren, "International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers," in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, ed. E. Jensen and T. Heller (Stanford, CA: Stanford University Press, 2003), p. 290, 315–6.

³² United States Institute of Peace, *Establishing the Rule of Law in Afghanistan*, March 2004, p.5.

³³ *In Larger Freedom: Towards Development, Security and Human Rights for All*, UN Doc. A/59/2005, 21 March 2005, para.115.

³⁴ These issues were also discussed in Session IV, "Rule of Law and Post-Conflict Peacebuilding: Addressing Long-Term Legal Needs Through Sustainable Reforms", at the IPA Conference on 29 October 2004, *Rule of Law Programs in Peace Operations: Toward a Conflict-Sensitive Perspective*.

can make dialogue possible. This was attempted in Afghanistan, where the political dimension of the process was at the heart of UNAMA's (UN Assistance Mission in Afghanistan) strategy. In concrete terms, international approaches should be based on the identification, as part of a strategic planning process, of local reform constituencies; the use of local experts to produce needs assessments; the accessibility (including through the appropriate use of local languages) of international norms and regulations; and the adoption of meaningful participatory approaches. International agencies also need to lower their expectations and profile, because, in the end, it is social and political change triggered by local advocates' and activists' struggle for justice which is most likely to lead to long-lasting political and legal reforms.

IV. Conclusion: Recommendations for Improving Rule of Law Policy and Practice

Strategic Frameworks: Improving Rule of Law Policy

The rule of law is an increasingly significant element of international strategies for fragile and/or developing countries. Yet, creating the most effective programs to effect change in this area is still very much a work in progress. Strategic approaches must be based on the recognition that the law is always the product of a political process and that political buy-in is required for reforms to be successful and sustainable. Thus, the rule of law should not be regarded as a subset of security objectives or as a purely technical component of development programs, but should rather be seen as an integral element of peacebuilding strategies. While a single blueprint would not reflect the complexity and variety of contexts in which rule of law programs have to be implemented, in each instance, the adoption of a strategic framework should be based on the following considerations.

Timing Rule of Law Processes: The most essential element of strategic approaches is the timing and sequencing of the various programs and projects. Strategies inherently entail selective approaches on what to do and when. This question is particularly critical, because once a policy is set in course, it is extremely difficult and sometimes highly damaging for international actors to backtrack. This question is also crucial because, as practice shows, there is often a high demand to include more activities in the peacebuilding equation, yet these demands are not often met with the funding or national and international capacity necessary to implement the dizzying array of activities. A specific strategy to address this transition should therefore be laid out from the outset of a peace mission.

Systematic Approaches: Actors should move away from isolated and fragmented initiatives on rule of law reform. Mapping and analyzing the state of legal institutions in a given context is a first step. This would, for instance, avoid or at least attenuate the disconnect that exists between policing and judicial reform programs, and heighten interest in supporting the correctional component in criminal justice. Additionally, while rule of law reforms tend to focus on law and order, in particular in the immediate post-conflict phase, a wider range of legal matters that are likely to directly affect people, including property and inheritance rights, and access to justice and administrative authorities, should be given increased attention.

Consultation, Participation and Accountability: The SG report put strong emphasis on the need for rule of law strategies to be based on people's needs rather than on donors' interests. Consultation and participation should be an ongoing and long-haul process; public education and awareness campaigns should be an integral part of rule of law strategies. Consultation and participatory processes should ideally be broad-

based and reach out to the various constituencies and stakeholders in society, such as victims' group, women's groups, bar associations, magistrates, security forces and civil servants. Practitioners nevertheless warn against a dangerously naïve approach towards local actors. In this perspective, local ownership should be seen not so much as the means but as the objective of programmatic approaches in the rule of law area. Finally, these processes will be of little significance if international experts posted in the country are not fully responsive to local needs and expectations. The accountability of international field staff should be regarded as a key element in the support for demand-driven approaches to the rule of law.³⁵

Leadership: There have been significant advances in the inclusion of rule of law specialists in peace missions, yet the importance given to rule of law issues is still unsatisfactory at the highest political levels in the field. Adequate pre-mission briefings of politicians selected to head peace missions as SRSGs are now recognized as an issue of great urgency. This is particularly true in the case of rule of law programs, which should receive greater attention and support by the missions' political teams. The role of the General Assembly (GA) and of its committees can also play an important role. Many Member States have formally endorsed the rule of law agenda at the occasion of the Security Council's open debate.³⁶ However, greater support for rule of law activities in some of the key GA committees, namely the budgetary committee and the Special Committee on Peacekeeping Operations, is still lagging.

Institutions: In accordance with the recommendations included in the Secretary-General's report on UN reforms, a rule of law unit should be created within the support office of the proposed Peacebuilding Commission. Such a structure should be entrusted with a clear and robust mandate and adequate resources. It should be given a leading role in policy development and coordination of rule of law assistance, and should contribute to the UN's adoption of a coherent strategic approach and a common methodology for sound analysis, planning and implementation. At the national level, it would also be worth considering the creation of a transitional rule of law unit, or a focal point within the national government that would be in charge of designing a strategic plan with clear sequencing and prioritization of activities on the basis of wide-ranging consultations, and which would ensure coordination with other reforms on the agenda, such as the economy and the security sector.

Funding: All the above will be hard, if not impossible, to achieve without adequate and sustainable funding. The inadequacy of funding mechanisms in line with the scale and timeframe of post-conflict peacebuilding activities was given particular attention within IPA's Security-Development Nexus Program, and specific recommendations have been made to the international community through the Peacebuilding Forum in which IPA participated.³⁷ Many of these recommendations are directly relevant to rule of law strategies. The suggestion in the Secretary-General's report on UN reforms to establish a voluntary standing fund for peacebuilding is

³⁵ See the recommendations made to the Secretary-General in the report by Prince Zeid Ra'ad Zeid Al-Hussein on a comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations, UN Doc.A/59/710, 24 March 2005.

³⁶ *Justice and the rule of law: the United Nations' role*, UN Doc. S/PV.5052, 6 October 2004.

³⁷ IPA and WSP International, *Building Effective Partnerships: Improving the Relationship between Internal and External Actors in Post-Conflict Countries*, Peacebuilding Forum Conference Document, 7 October 2004, recommendation 1, p.7. Available at: http://wsp.dataweb.ch/wspapplets/data/Documents/Final_Conference_Document.pdf.

welcome, but may not be sufficient to address this crucial issue.

Programmatic Implications: Improving Rule of Law Practice

A number of specific recommendations are offered here which would improve rule of law programming in practice. Key among them are:

Monitoring and Oversight: Monitoring processes and oversight mechanisms of rule of law institutions should be integrated in rule of law strategies as a means of identifying chronic dysfunction of rule of law institutions, and to ensure that these are adequately addressed in programmatic activities.

Assessment Methodology: While evaluations, assessment and lessons learned on rule of law programming have flourished in recent years, their use and relevance for practitioners is still sparse. As noted in the Secretary-General's report, needs assessments generally take place too late and are too short. The best rule of law assessments are usually the ones that have taken place within a longer timeframe and that have been commissioned to national experts. Assessments should be more thorough and should include multidisciplinary expertise, including local or country specialists who are able to analyze the causes of conflict and how rule of law issues feature within broader international strategies and political developments at the national level. Moreover, information gathering and exchange should be improved so as to allow for information to be easily accessible in anticipation of a rule of law mission. Benchmarks that determine whether rule of law projects are successful should be developed and refined.

Standby Arrangements/Justice Packages: Various actors have now developed a standby capacity that would allow for rapid deployment of rule of law experts in the immediate post-conflict phase. These arrangements seek to overcome tardy deployment and inadequate training of personnel deployed to post-conflict environments to re-establish criminal justice institutions. The recommendation for "on-call" civilian police, international judicial experts and penal experts was made in the Brahimi Report and has been reiterated in various other documents since then. Two countries have taken practical steps to develop capacity in this area, Australia and Norway, while a "justice rapid response initiative" has been launched to address more specifically the investigation of international crimes. UN agencies should look into ways to ensure effective cooperation with the countries that are developing these tools.

Recruitment and Training: Training national judges, lawyers and civil servants in post-conflict countries has from the outset been a common feature of rule of law programming. However, an area that has been relatively neglected is the refreshing of recruitment policies and training requirements for international staff at the United Nations. Many of the judicial experts who are hired are too often not adequately qualified or trained to deal with the challenges of rebuilding rule of law institutions in war-torn societies; multidisciplinary field teams would be better equipped to address the political dimension of rule of law work. Most peacekeeping and peacebuilding practitioners recognize that greater diversity of expertise, better screening processes, mandatory pre-deployment training, and joint training of civilian and military components could go a long way towards improving the quality and competence of rule of law practitioners in the field.

This report can be accessed online at:
www.ipacademy.org/Programs/Research/ProgReseSecDev_Pub.htm

The background note, agenda and participants' list of the 29 October 2004 IPA Conference on *Rule of Law in Peace Operations: Toward a Conflict-Sensitive Perspective* can be accessed online at www.ipacademy.org.

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