# Chapter 11

# Rule of Law Programs in Multidimensional Peace Operations: Legitimacy and Ownership

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## Introduction

For the last fifteen years, the international community has engaged in unprecedented efforts to stabilize and rebuild countries that have been torn by violent conflict. Starting in the early 1990s in El Salvador, Cambodia and Mozambique, UN peace missions have become ever more complex, integrating various components, including the rule of law, which comprises judicial and penal reform, transitional justice mechanisms and human rights monitoring.

Re-establishing the rule of law in war torn societies is no doubt a commendable objective, yet these initiatives still suffer from a relative lack of legitimacy amongst UN membership and in the very countries where UN missions are deployed. The recent UN SG Report issued in 2004 made a strong case for the development of meaningful consultation and participatory approaches by UN peace missions, but two other fundamental principles, responsiveness and accountability are not granted comparable attention. At the multilateral level, in spite of declarations supporting comprehensive approaches that integrate socio-economic dimensions, rule of law programs are still perceived as a Western initiative, in which developing countries have little interest.

How are the multilateral and the country levels connected? While it would be far-fetched to argue that enhanced legitimacy at the multilateral level would necessarily impact upon popular perceptions of

international programming at the country level, the reverse, - enhanced legitimacy and effectiveness at the country level leading to greater support at the multilateral level, with the financial and human resources implications that would ensue, - definitely holds some truth. Another way in which the global and the local are connected is through the presence of law enforcement agendas driven by external considerations, such as counter-terrorism and illegal immigration, which further undermine international commitments to local ownership, and reinforce developing countries' apprehensions. At a time where there are unprecedented attempts at reinforcing rule of law expertise and strategic planning at headquarters, the interconnectedness of the two levels should definitely be granted further consideration.

In this paper, I will analyze the current dichotomy between rhetorical statements supporting comprehensive approaches and local ownership, on the one hand, and the state of the multilateral debate and of operational approaches in UN peace missions, on the other. The paper will start with a brief historical overview of the emergence of international support for rule of law institutions and their progressive inclusion into conflict management strategies. I will then proceed to examine why rule of law programs still suffer from a lack of legitimacy at the multilateral and operational levels.

## 1 Historical Background on the Rule of Law and Conflict Management

Most of peace studies literature traces the emergence of rule of law programs to the end of the cold war and the increasing involvement of the international community in the resolution of internal conflicts.[1] Yet, support for rule of law institutions has been part of development policy tools for much longer than is usually acknowledged, under the guise of public sector reforms or good governance and democratization.[2] Erik

[1] Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, Polity Press, 2002, p. 54.

[2] E. Jensen, "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses" in E. Jensen and T. Heller, *Beyond*

Jensen identifies three waves of rule of law reforms starting after WWII until 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; the third wave was the first to apply in post-conflict countries and limited its reach to legal institutions *per se*. At the United Nations, the end of the 1960s saw the progressive integration of human rights into the development discourse, as reflected in the methodology of the UNDP human development reports, the adoption of the 1968 Proclamation of Tehran and the 1986 UNGA Resolution on the right to development, and culminated with the mainstreaming of rights-based approaches into development policies.[3] The World Bank also took notice and adopted specific standards on internal displacement and the protection of indigenous people in the 1980s.

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.'[4] Rajagopal argues that the term 'rule of law' appeared as a malleable alternative to the human rights discourse, which had become increasingly used as an advocacy tool by social and political activists in developing countries.[5] Unlike human rights, the rule of law discourse did not seek social and political change, but rather, was focused on processes and a more positivistic understanding of the law. In this sense, the rule of law proved particularly handy for security and development actors, a relatively hollow concept, at least in the international context, which could be used and interpreted in many different ways.[6] A different, yet not unrelated interpretation would highlight the move from

*Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford University Press, 2003, pp. 336, 345-6.

3 1968 Proclamation of Tehran, para.13 http://www.unhchr.ch/html/menu3/b/b_tehern.htm; UN Declaration on the right to Development, UNGA Res. 41/128, 4 December 1986.

4 E. Jensen, (note 2) p. 347.

5 B. Rajagopal, "Rule of Law and Security, Development and Human Rights: International Discourses, Institutional Responses" in Agnès Hurwitz (ed.) *Rule of Law and Conflict Management: Towards Security, Development and Human Rights* Forthcoming 2005.

6 Ib.

an approach based on individual rights and human dignity, to one focused on institutional processes, coinciding with the emergence of a state-building or nation-building discourse, which has also received its share of criticisms.[7]

This emphasis on the rule of law was particularly evident with USAID, one of the most active development agencies in the field. Its involvement started in the 1980s in Latin America, including countries such as El Salvador and Guatemala, in the wake of the peace settlements brokered with the support of the international community. USAID programs focused on criminal justice and judicial reform and were implemented by subcontracted consulting firms.[8] By 2001, it was reported that almost half of US development assistance was designated to rule of law programming.[9]

While Washington-based institutions unequivocally shifted emphasis from human rights to the rule of law, other organizations recognized and insisted upon the organic relationship between the two. As early as 1990, some regional organizations, in particular the Organization for Security and Cooperation in Europe (OSCE) whose participating States declared in 1990 that:

> *'the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the*

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7 See R. Paris, *At War's End: Building Peace After Civil Conflict*, Cambridge University Press, 2004; "International Peacebuilding and the 'Mission Civilisatrice'", *Review of International Studies*, 28:4, October 2002, pp. 637-56.

8 Funding for USAID's Latin American programs totaled roughly $200 million between 1983 and 1993. Between 1994 and 1998, another $196 million was obligated in the region. Between 1994 and 1998, another $196 million was obligated in the region, L. Hammergren, 'International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers' in: T. Heller and E. Jensen (ed.) *Beyond Common Knowledge, Empirical Approaches to the Rule of Law*, Stanford University Press, 2003, pp. 295-6; see also C. T. Call, "Democratization, War and State-Building: Constructing the Rule of Law in El Salvador", *Journal of Latin American Studies*, Vol. 35, 2003, pp. 827, 849.

9 C.T. Call, Introduction, in: *Constructing Justice and Security After Wars*, forthcoming, on file with the author, p. 1.

*human personality and guaranteed by institutions providing a framework for their full expression.*'[10]

The United Nations, which had been particularly successful in its support for the adoption and implementation of international human rights norms since the end of WWII, somehow used both concepts in conjunction, but with less clarity as to the respective scope and differences between the two.[11] In 1993, the General Assembly acknowledged that 'the rule of law is an essential factor in the protection of human rights' and supported the role of the then Human Rights Centre in strengthening rule of law institutions at the national level.[12] This original resolution was followed by 7 other ones until 2003, which reiterated *mutandis mutandi*, the statement included in the earlier instrument and further emphasized the high priority granted to rule of law activities.[13]

The integration of these new approaches in conflict management policy came up at a similar time, as evidenced by the two founding documents of the early 1990s that drove policy development in the peacebuilding area, the *Agenda for Peace* and the *Agenda for Development*. The *Agenda for Peace* mentions improved policy and judicial systems and human rights monitoring among the manifold activities of post-conflict peacebuilding,[14] while the rule of law is mentioned as part of democratic practice.[15] Similarly, the second document includes a series of 'typical' rule of law activities as part of UN work on good governance, such as

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[10] Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, p. 3, http://www.osce.org/docs/english/1990-1999/hd/cope90e.pdf.

[11] For an analysis of the relation between human rights and the rule of law, see Rama Mani, *Beyond Retribution, Seeking Justice in the Shadows of War*, Polity, 2002, p. 29.

[12] UNGA Res.48/132 on strengthening of the rule of law, 20 December 1993.

[13] Resolutions of 1994, UNGA Res. 49/194, 23 December 1994; UNGA Res.50/179 of 22 December 1995; UNGA Res. 51/96, 12 December 1996; UNGA Res. 52/125, 23 February 1998; UNGA Res. 53/142, 8 March 1999; UNGA Res. 55/99, 1 March 2001; UNGA Res. 57/221, 27 February 2003.

[14] An Agenda for Peace: Preventive Diplomacy, peacemaking and peace-keeping, UN Doc. A/47/277-S/24111, 17 June 1992 para. 55; See also Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations, UN Doc. A/50/60-S/1995/1, 3 January 1995, para. 47

[15] Ib., para. 59.

constitution drafting, support to domestic human rights laws, enhancing judicial structures or training human rights officials.[16]

The progressive integration of rule of law activities into peace missions started with the deployment by the department of political affairs of field operations that were mandated to monitor the implementation of the peace agreements in El Salvador, Haiti, and Guatemala.[17] In all these cases, the UN included human rights monitoring as part of its operations, which consisted in compiling information on the human rights situation in the country, drawing up reports on human rights, and making recommendations towards their enhanced protection and promotion. This approach, mostly reactive in nature, eventually moved towards more proactive assistance on human rights and institutional reforms. Kosovo and East Timor were characterized by the central role of institution-building and institutional reform, in particular in the rule of law area, in the mission's mandate and the executive authority granted to them,[18] even though the UN transitional authority established in Cambodia constituted an important precedent, since it had effectively taken charge of the administration of the country until the holding of elections in 1993.[19]

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16 An Agenda for Development, Report of the Secretary-General UN Doc. A/48/935, 6 May 1994, para. 124.

17 United Nations Observer Mission in El Salvador (July 1991- April 1995) established under UNSC Res. 693 (1991), 20 May 1991; United Nations Mission in Haiti (UNMIH) (1993-1996) was established under UNSC Res.867 (1993), 23 September 1993; it was followed by the United Nations Support Mission in Haiti (UNSMIH) (1996-1997) established under UNSC 1063 (1996), 28 June 1996, the United Nations Transitional Mission in Haiti (UNTMIH) (1997) established under UNSC 1123 (1997) 30 July 1997, and the United Nations Civilian Police in Haiti (MINOPUH) (1997-2000) established under UNSC Res. 1147 (1997), 28 November 1997; finally the Mission for the Verification of Human Rights and of Compliance with the Commitment of the Comprehensive Agreement on Human Rights in Guatemala (MINUGUA) was established under UNGA Res.48/267, 28 September 1994.

18 William O'Neill, "Comparative Advantages? UN Peacekeeping Operations and Rule of Law Programs" in Agnès Hurwitz (ed.) *Rule of Law and Conflict Management: Towards Security, Development and Human Rights*, forthcoming 2005, p. 9.

19 United Nations Transitional Authority in Cambodia (1992-1993), UNSC Res.74 (1992), 28 February 1992; Simon Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building*, 2004, Oxford University Press, p. 74.

Kosovo and East Timor were the first interventions that placed institutional reform as the centerpiece of their mission.[20] The Brahimi report eventually formalized existing practice by emphasizing the importance to reestablish the rule of law, opening the way for express recognition in Security Council Mandates and inclusion of rule of law components into multidimensional peacekeeping operations:[21]

> *'39. (...) Where peace missions require it, international judicial experts, penal experts and human rights specialists, as well as civilian police, must be available in sufficient numbers to strengthen the rule of law institutions. (...)*
> *40. (...) In short, a doctrinal shift is required in how the Organization conceives of and utilizes civilian police in peace operations, as well as the need for an adequately resourced team approach to upholding the rule of law and respect for human rights, through judicial, penal, human rights and policing experts working together in a coordinated and collegial manner.'*

This policy and institutional developments have now been almost fully digested. The recent Security Council Resolution on Haiti, for instance, details the task of MINUSTAH in the support for rule of law institutions, including the police, the judiciary and the prisons.[22] As noted by Call, 'the rule of law is not only a framework for post-war state-building, but also an exit strategy for peacekeeping troops.'[23] The most recent institutional developments in this area have seen the greater involvement of regional organizations in civilian crisis management, such as the African Union and the European Union, the latter having deployed over 200 rule-of-law specialists in its various operations.[24]

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20 Ib., p. 9.
21 Report of the Panel on UN Peace Operations, UN Doc. A/55/305, 21 August 2000.
22 SC Resolution 1542/2004 on Haiti establishing the UN Stabilization in Haiti. See also SC Resolution on Afghanistan, Burundi, DRC, Liberia.
23 C T. Call, Introduction, note 9 above, p. 3.
24 Security Council Open Debate on Civilian Aspects of conflict management and peace-building, UN Doc. S/PV.5041, 22 September 2004, p. 5.

The organization's role in supporting transitional justice mechanisms constituted another major element in the UN debate. The establishment of the *ad hoc* tribunals in 1993 and 1994[25] was the first stage in a process that led to the recognition of the international community's responsibility in holding accountable those responsible for war crimes, crimes against humanity and genocide, and culminated with the entry into force of the Statute of the International Criminal Court in 2002. Since then, the United Nations has been involved through its various agencies and programs in supporting transitional justice mechanisms established at the national level.[26]

The last year has seen major developments in the greater visibility of the rule of law on the international agenda. Upon request by the Security Council in 2003, the Secretary-General issued a report on rule of law and transitional justice in conflict and post-conflict societies, which was then discussed in an open debate at the Security Council in October 2004.[27] Both the report and the debate reflected on the progress achieved while highlighting the need for further improvement in policy and practice. Several important themes emerged from this process. First, the necessity to develop better methodologies on strategic planning, including conflict analysis and needs assessments, mission planning, selection and deployment of specialized staff and provision of guidance and support to rule of law components of peace missions, in sum, supporting integrated and comprehensive rule of law strategies.[28] Second, the need to devote more consistent resources to rule of law work within the UN and to streamline rule of law activities within the Secretariat.[29] The final and most important theme of the report for this paper's purposes is the call for local ownership, expressed through adequate assessment of national needs and capacities, support for

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25 UNSC Res. 808, 22 February 2003; UNSC Res. 955, 8 November 1994.

26 C. T. Call, Introduction, note 9 above, p. 9; see Report of OHCHR's Transitional Justice Workshop "Rule of Law tools for Post Conflict States", 27-29 September 2004, on file with the author.

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

28 SG Report on the rule of law and transitional justice in conflict and post-conflict societies [hereinafter Rule of Law Report], UN Doc. S/2004/616, 3 August 2004, para. 12-13, para. 23-26.

29 Ib, para. 65.

domestic reform constituencies based on a thorough understanding of the political context, with a view to fill a 'rule of law vacuum' and develop national justice systems:[30]

> *(...) peace operations must better assist national stakeholders to develop their own reform vision, their own agenda, their own approaches to transitional justice and their own national plans and projects. The most important role we can play is to facilitate the processes through which various stakeholders debate and outline the elements of their country's plan to address injustices of the past and to secure sustainable peace for the future, in accordance with international standards, domestic legal traditions and national aspirations. In doing so, we must learn better how to respect and support local ownership, local leadership and a local constituency for reform, while at the same time remaining faithful to United Nations norms and standards.*[31]

The recent report of the Secretary-General on UN reforms was the last and crucial step in the progression of the rule of law on the UN agenda.[32] The report is structured around four main sections: freedom from want, freedom from fear, freedom to live in dignity, and the strengthening of the United Nations. Under the penultimate section, the report deals with the rule of law, human rights, and democratization. Most noteworthy is the call to improve human rights mainstreaming throughout the organization's work, including in the deliberations of the Security Council.[33] Briefly put, the report did not really announce any major changes in current UN thinking on the rule of law, but confirmed the prominence of the issue, and proposed the creation of a rule of law unit, which would be established within the peacebuilding commission also recommended in the report.[34]

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30 Rule of Law Report, para. 14-22, para. 27-37.
31 Rule of Law Report, para. 17.
32 Report of the Secretary-General, "In larger freedom: towards development, security and human rights for all", UN Doc. A/59/2005, 21 March 2005.
33 Ib, para. 144.
34 Ib., para. 137.

This brief overview demonstrated that the rule of law agenda has been guided for the most part by external considerations, rather than domestic demands, and that the notion that rule of law processes should be demand-driven, is a relatively recent principle in UN circles. These preliminary considerations bear particular importance in understanding the limitations of the current efforts to adopt strategies and follow processes that ensure genuine participation and ownership by the populations of post-conflict countries.

## 2 Enhancing the Legitimacy of Post-Conflict Rule of Law Programs at the Multilateral Level

In spite of the significant advances chartered in the last year at the United Nations, the rule of law agenda is still perceived as a Western initiative in which most developing countries find little interest. Apart from post-conflict countries, such as Sierra Leone or Afghanistan, most developing countries do not yet feel that this issue is of particular relevance to them. This is also due to the relative absence of General Assembly involvement in this area of UN policy and practice. The open debates organized by the Security Council on civilian crisis management and rule of law and transitional justice in the fall of 2004, highlighted some of the frustrations expressed by developing countries with respect to current international approaches. Brazil, which is hoping for representation as a permanent member of the Council, stated that

> *'the United Nations has failed the people of Haiti in the past by interpreting its role too strictly and focusing it excessively on security issues. This time, in parallel with efforts to establish a more secure environment, we need to launch a sustained programme to assist Haitian society in the political, social and economic areas. (...) I wish to emphasize the need to develop new and better tools for addressing the structural problems at the root of tensions that lead to violence and conflict. Poverty, disease, lack of opportunity and inequality are some of the causes of conflicts, particularly those within countries, which,*

*regrettably, are becoming ever more prevalent on our agenda.'*[35]

In the open debate on the rule of law, Brazil reiterated that it 'favoured a comprehensive approach that underscores the developmental nature of the rule of law in order to enhance the provision of support to countries for national capacity-building, a primary strategy in strengthening the rule of law.'[36] The representative of Benin expressed a similar concern:

*'special attention should be given to the dialectical correlation between the rule of law and economic and social development. While the rule of law and a functioning justice system are essential to ensuring the sustainable development of post-conflict countries, the rule of law, however, can seem to be an unattainable luxury for countries that are so poor that most of their people are just managing to survive one day at a time.'*

He then insisted on the 'importance of promoting economic and social rights as an integral part of the rule of law, not only in post-conflict countries but also in countries whose economy is clearly vulnerable.'[37]

The Peruvian representative also insisted on the importance of social marginalization:

*'in almost all strategy studies undertaken nowadays, social marginalization is considered to be one of the main causes of civil war. Social marginalization means that political, ethnic, and religious differences evolve into extreme rivalries and hatred, leading to crimes against humanity, which is what we are trying to prevent. That is why the social marginalization dimension must be taken into account in the context of any comprehensive approach to the restoration of the rule of law*

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35 Security Council Ministerial Level Debate on Civilian aspects of conflict management and peace-building, UN Doc. S/PV.5041, 22 September 2004, p. 17.

36 Security Council Open Debate on Justice and the rule of law: The United Nations Role, UN Doc. S/PV.5052, 6 October 2004, p. 14.

37 Ib., p. 19; see also the statement of the representative of Uganda, UN Doc. S/PV.5052 (resumption 1), p. 10.

*and justice in societies that have undergone serious civil conflicts.'*[38]

While UN headquarters revolve for the most part around the work of the Security Council, the General Assembly has still important prerogatives, namely, in the budgetary and peacekeeping areas. A search on the General Assembly database reveals the limited involvement of the General Assembly in the rule of law components of conflict management policies: only 8 succinct resolutions mentioned earlier on strengthening the rule of law were adopted from 1993 to 2003, and focused most exclusively on the role of the UN High Commissioner for Human Rights. The 2003 Resolution was the first to highlight the role of the Office of the High Commissioner in the design of human rights components of UN peace operations including rule of law support.[39]

What has thus been lacking so far in the policy debate, according to some representatives of developing countries, is a stronger focus on the economic dimension of rule of law efforts, in particular in relation to social and economic rights. While the SG report sought to be even-handed in its approach, the actual practice of UN agencies reveals that their activities concentrate for the most part on criminal justice, transitional justice and judicial reform in the most conventional sense. While this is justifiable in the case of the judicial and criminal law advisory unit at DPKO, which is concerned with the re-establishment of internal security in the immediate aftermath of conflict, this focus is less evident in the case of OHCHR,[40] and even less so, in the case of the UNDP. Thus, the UNDP's Bureau for Crisis Prevention and Recovery has a team devoted to justice and security sector reform,[41] but its rule of

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38 Ib. p. 29.

39 UNGA Res.57/221, 27 February 2003.

40 The additional report presented by the Secretary-General to the General Assembly on the activities of the Office of the High Commissioner for Human Rights in strengthening the rule of law, provided a list of technical assistance activities undertaken in a great number of countries. While most activities naturally focused on the strengthening of human rights institutions, the rest of the Office's interest focused on judicial and penal reform. UN Doc. A/59/402, 1 October 2004, pp. 8-17.

41 *Justice and Security Sector Reform: BCPR's Programmatic Approach*, November 2002. The report refers to studies showing that 'security has become one of poor people's major

law portfolio does not seem to include programs directly addressing economic and social rights, which would seem to be at the heart of the UNDP's mandate on social and economic development.[42] The SG report itself notes that 'governance reform of the justice and security sector is now widely recognized as one of the essential conditions, *albeit not sufficient*,[43] for sustainable human development.'

The issue of housing, land and property issues is an excellent example of these shortcomings. Post-conflict environments are characterized by large-scale displacement, abandoned land and housing, illegal HLP occupation, overlapping claims, reduced housing stock and lack of HLP records. Simply put, if not addressed, PLH disputes have a real capability of jeopardizing post-conflict peacebuilding goals of national reconciliation and sustainable economic and social development. Yet, housing, land and property disputes have thus far been addressed on an *ad hoc* basis by the UNHCR and UN-Habitat in particular, and are not adequately integrated into post-conflict rule of law strategies. Apart from large scale restitution processes implemented most notoriously in Bosnia and Herzegovina and Kosovo, programs to improve access to HLP and tenure security, have not been given the priority that they deserve, with deleterious effects.

East Timor provides a dramatic example of the consequences of *ad hoc* approaches on long-term land, property and housing issues.[44] According to one practitioner, 'there was virtually no planned policy response to the relatively predictable effects on housing of widespread property destruction, mass population return, and the rapid influx of well-renumerated international personnel.'[45] While immediate measures to

concerns and that during the 1990s, they experienced a decline in their sense of security.' p. 4.

42 Note that BCPR has other activities focused on socio-economic development, but it is not clear whether these have integrated rule of law into their approaches.

43 Emphasis added.

44 see also Jean du Plessis, "Slow Start on a Long Journey: Land Restitution Issues in East Timor, 1999-2001" in Scott Leckie (ed) *Returning Home*: *Housing and Property Restitution Rights of Refugees and Displaced Persons*, pp. 143-4.

45 Daniel Fitzpatrick, "Land Policy in post-conflict circumstances: some lessons from East Timor", UNHCR Working Papers, February 2002, p. 12.

temporarily allocate public and abandoned properties were taken,[46] the absence of a property or land claims commission[47] led to legal uncertainty around temporary allocation, and opened the way for the multiplication of competing claims and to social unrest.[48] In Afghanistan, which is also plagued with land and housing problems, in particular landlessness and conflict around grazing and pasture lands, piece-meal approaches have proved utterly insufficient. A land disputes court was created, but its limited remedies make it constitutionally questionable, and it has focused thus far on claims by wealthy returnees or claimants.[49] Advocates and experts have, therefore, recommended that policy makers and planners better address the linkages between refugee return, housing and land administration, elaborate template strategies for land and housing policies in peacebuilding contexts, and develop enhanced institutional coordination amongst international actors.[50] In sum, the UN should consider the adoption of rights-based PLH strategies as part of its post-conflict peacebuilding activities and, in particular, have these included in the mandate of the proposed UN Peacebuilding Commission or another body charged with post-conflict peacebuilding. At the very least, PLH should be better integrated into the planning, implementation and sequencing of peacebuilding activities undertaken by UN agencies, including the UNDP, UNHCR, UN-Habitat or FAO.

By granting more attention to these issues, UN agencies programs and departments involved in rule of law work would be able to directly address the criticisms formulated by many developing countries, which feel, rightly or wrongly, that the UN debate has been geared too much towards narrowly framed security, at the expense of social and economic development.

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46 Ib. p. 7.

47 According to Fitzpatrick, 'there is thus still in East Timor: no functioning land registry, no system to record or verify private land transactions, no effective regime to govern and legalize foreign interests in land, and no framework to determine competing claims to land', note 45 above, p. 15.

48 Fitzpatrick, note 45 above, p. 5; Jean du Plessis, note 44 above, pp. 150-2 and 157, indicates that plans were drawn up to address long-term land, property and housing and included in the joint assessment mission, but these were never adopted by the Cabinet.

49 Liz Alden Wiley, "Land and the Constitution", AREU Policy Brief, September 2003, p. 4.

50 Daniel Fitzpatrick, note 45 above, p. 23.

## 3 Enhancing the Legitimacy of Rule of Law Programs in Post-Conflict Contexts

While the multilateral debate has been characterized by a polarization between security and development concerns, policy-makers and practitioners preoccupied with the nitty-gritty of programme implementation have tried to enhance the legitimacy of rule of law activities and embraced the concept of local ownership of rule of law reforms.[51] Yet, there is still a gulf between people's aspirations and the approaches and outcomes of rule of law programming. A set of case studies on justice and security sector reform showed the prevalence of approaches where 'neither everyday citizens nor civil society organizations figure prominently in these accounts of justice and security sector reform. Post-war JSSR efforts are generally state-initiated or externally directed 'top-down reforms to state institutions that have marginalized citizen input.'[52] This is particularly the case in post-conflict countries where societal institutions and processes have been profoundly disrupted if not destroyed. What is impressively consistent, is the lack of consistency and the erratic approaches of international actors in their efforts to involve local expert and local citizenry, with as one easily imagines, devastating effects. The cases of applicable law and judges' appointments in Kosovo are well known examples of these failures.[53]

The endorsement of local ownership by international agencies, while relatively recent, is the latest incarnation of concepts of 'participation' or 'local voices', which have for long been part of the development discourse. The concept appeared first in an OECD Document on 'Development Partnership in the new global context' adopted in 1995 that stated: 'for development to succeed, the people of the countries concerned must be the 'owners' of their policies and programmes.' Local ownership was then adopted as one of the themes of the OECD

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51 Rule of Law Report, note 28 above, para. 17, *supra*, p. 5.

52 C. T. Call, "Conclusions" in *Constructing Justice and Security After War*, on file with the author.

53 Simon Chesterman, note 19 above, pp. 165-6.

DAC's manifesto.[54] The very concept of local ownership is loaded with ambiguity and is highly contentious. One basic problem is that the term 'ownership', in the meaning used in international jargon, is not easily translatable in other languages. The French version of the rule of law report translates 'ownership' as 'appropriation', a relatively new meaning given to this word, which may not be fully understood by most French readers. The Spanish version relies on a more conventional usage and translates the concept as 'el control y la dirreciòn locales', which seems to have a slightly narrower focus than ownership. More importantly, the concept allows international actors to elude some fundamental questions: who are the owners? The leaders who are probably partly responsible for the outbreak of violent conflict? Or the entire population? What is there to be owned? In this sense, and as analyzed eloquently by Simon Chesterman, the concept is particularly useful, inasmuch as it expresses a rhetorical commitment to something that is so ill-defined and uncertain that it can be used very conveniently and flexibly by international actors, but also by those members of post-conflict societies that are ready to manipulate political processes for their own benefit. Chesterman's analysis is particularly relevant, as it unpacks the various objectives that are generally thought to be included under the concept of local ownership. Six distinct objectives are identified by the author: responsiveness of international actors, consultation, participation, accountability, effective control and the ultimate objective, which is full sovereignty.[55] Based on this taxonomy, the following paragraphs will grant particular attention to consultation, participation, responsiveness and accountability.

Consultation and participation are probably the better known and most used concepts in peacebuilding practice, and are now regarded as essential processes in rule of law reforms.[56] Studies on popular perceptions and opinions based on various methodologies are becoming more common. A first category of studies focuses on local opinions

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54 Simon Chesterman, "The Trope of Ownership", forthcoming in Agnès Hurwitz (ed.), *Rule of Law and Conflict Management: Towards Security, Development and Human Rights* p. 6.

55 Ib., p. 9. The author notes that the main purpose of the classification is to highlight the multiple meanings of the concept, rather than offering a definite classification.

56 Rule of Law Report, note 28 above, para.17, *supra*, p. 5.

regarding transitional justice mechanisms that were undertaken partly as a response to criticisms regarding the priority granted to transitional justice in international fora. The International Center for Transitional Justice commissioned such studies for East Timor and Iraq.[57] In Afghanistan, The Afghan Independent Human Rights Commission (AIHRC) recently issued a report which highlights the importance of justice for past human rights abuses in Afghan popular opinion.[58] The Asia Foundation has, on the other hand, examined popular perceptions on more broadly defined judicial reform in Indonesia and East Timor.[59] Although there is a growing body of quantitative studies on popular opinions about rule of law reforms, the question, of course, is whether the findings of these studies and their methodologies have been analyzed by international agencies and acted upon, if at all disseminated to them.

Participatory processes are also seen as an important tool in building greater legitimacy of rule of law reforms, but one is struck by the limited number of systematic research on participatory processes in the rule of law area. Development agencies have naturally been the first to develop

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[57] P. Pigou and P. Seils, *Crying Without Tears: In Pursuit of Justice and Reconciliation in Timor-Leste: Community Perspectives and Expectations*, International Center for Transitional Justice, August 2003; "Iraqi Voices: Attitudes Toward Transitional Justice and Social Reconstruction", *Occasional Paper Series,* International Center for Transitional Justice and the University of California Human Rights Center, May 2004; see also L. Fletcher and H. Weinstein, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, Berkeley Human Rights Center, 2000, possibly the first study of this kind, although focusing exclusively on legal professionals and with very critical findings about the administration of international justice; *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, which was based on a gathering from representatives of post-conflict countries.

[58] The report was based on focus groups based interview with over 1000 interlocutors; Afghan Independent Human Rights Commission, *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan*, January 2005.

[59] *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations*, prepared by the Asia Foundation and survey research from AC Nielson, August 2001; *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor*, USAID and Asia Foundation, February 2004; see also Foundation for Coexistence, *Ethnic Relations and Human Security in Eastern Sri Lanka*, A Report based on individual interviews, Asia Foundation, January 2004.

expertise in these mechanisms, with mixed results.[60] In Afghanistan, for instance, the UNDP and UN-Habitat established community forums based on the traditional 'shuras' models, which would provide advice on community matters. In Somalia, the support granted by internationals to councils of elders was misguided, inasmuch as elders in Somali clan systems have an advisory rather than leadership role.[61] In their paper on participatory intervention, Chopra and Hohe list four different approaches to participatory intervention, according to their respective levels of 'social engineering' which whilst slightly artificial, have the merit of bringing greater clarity on the different gradations of participatory interventions. *Reinvention*, which is recommended where the previous systems was abusive, completely dysfunctional or has disappeared as a result of the war, and which consists of creating a new local administration and will obviously require the greatest amount of international planning and resources. *Transformation* will entail gradual reforms and formalization of local administration. *Integration* of existing local administration into the state building process would be relevant where indigenous authorities have maintained their legitimacy and are far more functional than central structures. Finally, *reinforcement* applies where integration already exists, and will only work to support existing authorities, yet the authors warn that whilst this may seem at first the best option, it may not adequately address the roots of violence.[62]

All these different examples also illustrate the importance of anthropological knowledge in devising consultation and participatory processes and show that much remains to be done to integrate anthropological expertise in the analysis, planning and implementation of consultation and participatory processes, and have them adjusted to operational contexts.[63] Yet, anthropological understanding would not fully resolve the inherent ambivalence in international support to participatory approaches. Chopra and Hohe make the point that

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60 See USAID and UNDP, fn 11 in Jarat Chopra and Tanja Hohe, "Participatory Intervention", *Global Governance,* No. 10, 2004, pp. 289-204.

61 Ib., p. 294.

62 Ib., pp. 299-303.

63 Ib., pp. 296 and 298.

'approaches will also vary according to the degree of social change intended and the scale of time required to alter existing structures.'[64] There is, in other words, a basic contradiction between the commitment to local ownership and the 'social engineering project' undertaken by international actors. The authors acknowledge this, giving the example of East Timor, where 'resenting their loss of control as part of the logic of a program aimed at community empowerment, UN negotiators turned down twice the only project that had been funded at the time.'[65] Chesterman identifies another facet of this inherent tension of international interventions which endorse 'local ownership', even though they have become necessary as a result of the very failure of 'local owners' to govern their communities.[66]

The responsiveness and accountability of international actors would seem, in comparison, relatively easy to tackle, but this remains one of the most fundamental obstacles to the enhanced legitimacy of rule of law reforms. Lack of responsiveness can be partly attributed to the 'subculture of UN missions', as much of the staff still operates as diplomats, rather than as directly accountable civil servants.[67] The problem of responsiveness is then compounded by the absence of effective legal accountability mechanisms for breaches of international law and of the very principles that the mission is supposed to promote.[68] The recent sexual exploitation scandals in the Democratic Republic of Congo are the most egregious manifestations of a problem which is seriously undermining the outcomes of international interventions in post-conflict countries. DPKO policy paper on human trafficking and peacekeeping laid down a zero tolerance policy and advocated support rule of law policies that would prevent and counter human trafficking,[69] but it is the most recent UN report on sexual exploitation, which clearly highlighted the UN's fundamental institutional weaknesses that have

64 Ib., p. 293.
65 Ib., p. 297.
66 Simon Chesterman, note 19 above, p. 153.
67 Ib., p. 290.
68 On accountability mechanisms, see Simon Chesterman, note 19 above, pp. 146-153; D. Marshall and S. Inglis, "The Disempowerment of Human Rights–Based Justice in the United Nations Mission in Kosovo", *Harvard Human Rights Journal*, No. 16, 2003, pp. 96-146.
69 "Human Trafficking and United Nations Peacekeeping", DPKO Policy Paper, March 2004.

enabled perpetrators to go unpunished. Besides the difficulty posed by the legal arrangements between the UN and troop-contributing countries, the report identified lacunae in the investigative capability of the organization, the organizational, managerial and common accountability mechanisms, and in disciplinary, individual financial, and criminal accountability.[70] However, the focus on sexual exploitation and similar serious crimes should not hide the fact that accountability mechanisms should apply at all levels and for any violation of disciplinary or legal standards of behaviour. There is definitely greater awareness than ever before of the extent of the problem, and the UN reform report of March 2005, devoted several paragraphs to the issue, emphasizing the importance of accountability and the need to overhaul the UN human resource system.[71]

A final set of remarks, which may be connected to responsiveness, participation and control revolves around the fundamental contradictions that exist between international agencies' commitment to 'local ownership' and the political agendas underlying international action in post-conflict countries. The purpose here is not to fall into a cultural relativist argument about Western concepts of human rights and democracy. Instead, the argument focuses on what some have appropriately called 'prophylactic' measures, which constitute an increasingly important component of rule of law programs undertaken by international agencies. As noted by Cooper and Pugh, 'prophylactic' control strategies are designed to address the problems that war and informal economies are perceived to export to the 'zones of peace' in the West – for example, drugs, asylum seekers and sex workers. However, rather than attempting to transform the state from within, the emphasis here is on creating a cordon sanitaire around the "unruly" world.'[72]

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[70] Comprehensive Review of the Whole Question of peacekeeping operations in all their aspects, UN Doc. A/59/710, 24 March 2005.

[71] Report of the Secretary-General, In larger freedom: towards development, security and human rights for all, UN Doc. A/59/2005, 21 March 2005, para. 188 and 191.

[72] Michael Pugh and Neil Cooper with Jonathan Goodhand, *War Economies in a Regional Context: Challenges and Transformation*, A Project of the International Peace Academy, Lynn Reinner Pub., 2004, p. 204.

'Prophylactic' programs are now common in the portfolios of bilateral and regional organizations. Thus, in Bosnia and Herzegovina, over 32 projects funded by the European Union in the field of justice and home affairs in 2003, 21 dealt with returnee processes including property legislation implementation, while 9 of these dealt with border control, asylum and migration, amounting to 91,980,000 million euros.[73] In one of the projects on support to BIH State border service, the document clearly states that the objective of the programme is 'to establish the rule of law in BiH by contributing to the fight against illegal migration, organised crime, smuggling, trafficking …'[74] Another program consists in assisting the competent Bosnian Ministry in adopting a comprehensive strategy in migration and asylum, drafting asylum and immigration legislation, training the police forces in 'migration procedures and asylum awareness', and assisting the competent ministry in setting-up a database for third country nationals. Regardless of the fact that one may consider these goals to be perfectly valid, the question of whether these programmes receive popular support and are 'locally owned' deserves to be raised.

Within the United Nations system, the recent focus on counter-terrorism has also impacted rule of law programming priorities in post-conflict countries. In accordance with UNSC Res. 1373, Member States have agreed to implement a series of measures to fight terrorism, including through effective border controls and controls on issuance of identity papers and travel documents, information exchange, etc.[75] A counter-terrorism committee was established as a subsidiary organ of the Council, to monitor the implementation of these measures.[76] Member States are expected to report to the committee on the progress made in the implementation of these policies, including the legislative and executive measures in place or contemplated to give effect to the resolution and the other efforts they are making in the areas covered by

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73 Justice & Home Affairs, *Assistance Projects, Asylum, Migration, Border Management, Customs*, Bosnia and Herzegovina, 2003, on file with the author.

74 Ib. p. 37.

75 UNSC Res. 1373, 28 September 2001, para. 2 g) and 3b). See also para.4, which emphasizes the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking.

76 Ib., para. 6.

the Resolution.[77] In this area as well, EU assistance is significant. In the assistance directory of the CTC, EU programmes for Mexico, Guatemala, Colombia, Panama and Peru are said to specifically target networks 'associated with terrorism' through judicial reform, support for the rule of law and promotion of good governance.[78] The mounting interest in a repressive law enforcement approach to rule of law reforms driven by external concerns on terrorism or illegal immigration, would not only seem to send the wrong signal to autocratic governments; it would antagonize the very 'reform constituencies' that the United Nations is supposed to embolden.

## Conclusions

Rule of law reforms have now been formally recognized as an essential component of UN work in both the development realm and in the context of peace operations. At the operational level, there has undoubtedly been progress in ensuring more genuine consultation and participatory processes on rule of law reforms undertaken in peace missions. Yet, it is unlikely that this progress will bring about major improvements in the current context, primarily because some crucial elements for the enhanced legitimacy of rule of law reforms have been overlooked until now, that is, the responsiveness of international staff in every single area of their work, and its corollary, legal and disciplinary accountability. The presence of 'prophylactic' agendas in rule of law programmatic activities is another facet of the legitimacy problem and should alert us to the inherent limits of international interventions to reestablish full sovereignty in post-conflict countries. Further efforts to address more consistently the protection of social and economic rights,

[77] Note by the Chairman on guidance for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001, para. 1.2. http://www.un.org/Doc/sc/committees/1373/guide.htm, 1 April 2004.

[78] http://domino.un.org/ctc/CTCDirectory.nsf/0/, 1 April 2004.

for example through support for rule of law policies on housing, land and property issues, could possibly tip the scale towards a more positive perception of rule of law reforms by developing states and, most importantly, by the populations of postconflict countries.