

Towards Enhanced Legitimacy of Rule of Law Programs in Multidimensional Peace Operations

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1. Introduction

For the last fifteen years, the United Nations has been increasingly engaged in efforts to stabilize and rebuild countries that have been torn by violent conflict. Starting in the early 1990s in Cambodia, UN peace missions have become ever more complex, integrating, alongside military contingents, various civilian components, such as disarmament demobilization and reintegration (DDR), demining, electoral assistance, post-conflict recovery and rehabilitation and rule of law, which comprises, *inter alia*, 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. 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, for the most part driven by the Security Council, in which developing countries have little interest. At the operational level, while there has been progress in the adoption of meaningful consultation and participatory approaches, field practice is still plagued by a lack of criminal and administrative accountability. The recent Secretary-General's Report on rule of law and transitional justice in conflict and post-conflict societies has sought to address current shortcomings through its endorsement of the concept of local ownership. However, the presence of law enforcement agendas driven by external considerations, such as counter-terrorism and illegal immigration, further undermine international commitments to local ownership, and reinforce the position of those who view rule of law programming as a neo-imperialist undertaking.

How are the two levels connected? While it might be far-fetched to argue that enhanced legitimacy at the multilateral level would necessarily and directly impact on popular perceptions of rule of law policies at the country level, addressing the well-known systemic failures of the organization's legal and managerial structures would probably help resolve some of the most serious cases of misconduct witnessed in the field. The reform process currently underway at the United Nations, which will culminate with the Millennium+5 Summit of September, should, if successful, help heighten the legitimacy of UN peacebuilding activities, through, *inter alia*, the establishment of the peacebuilding Commission and the adoption of more effective accountability mechanisms. In turn, enhanced legitimacy and effectiveness at the country level could arguably lead to greater support for rule of law programming at the multilateral level, with the financial and human resources implications that would ensue. As the world's organization is said to enter a new era that will focus on implementation and operationalization rather than on

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norm-making,¹ the legitimacy of country-level programs will bear increasing importance for the UN and its status in the world.

In this paper, I will analyze the connections between the multilateral debates and external agendas, on the one hand, and the implementation of rule of law strategies in the field, on the other. The first part of the paper will start with a brief historical overview of the emergence of international support for rule of law institutions and its progressive inclusion into conflict management strategies. I will then proceed with an analysis of the state of the multilateral debate and of the concept of 'local ownership', with a view to identify why rule of law programs still suffer from a lack of legitimacy at the multilateral and operational levels.

Before turning to the next section, I should also make an important preliminary remark regarding the scope of this paper. Much of recent international legal scholarship has focused on the analysis of the various categories of transitional administrations or international territorial administrations (ITA), which have been revived in the last few years after prior incarnations under the League of Nations and in earlier UN practice.² As is well known, recent ITAs, specifically East Timor and Kosovo, have granted particular importance to the support and strengthening of rule of law institutions. These broad-based approaches have been followed in more recent peace missions, such as Sierra Leone, Haiti, Liberia, Burundi or Sudan,³ regardless of the existence of executive authority. Many of the existing literature on ITAs is therefore relevant in other situations, inasmuch as many peace missions now include substantial civilian components, similar in many ways to ITA's.⁴ These civilian activities have also been defined as

¹ In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005, para.132.

² Wilde, 'From Danzig to East Timor and Beyond: The Role of International Territorial Administration' 95 *AJIL* (2001) 583; 'Taxonomies of International Peacekeeping: An Alternative Narrative' 9 *ILSA Journal of Intl & Comparative Law* (2003) 391; 'Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor' 7 *ILSA Journal of Intl & Comparative Law* (2001) 455; Chesterman, *You, The People: The United Nations, Transitional Administration, and State-Building* (2004) spec. chapters 1 and 2; J. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-building in East Timor' (2001) 33 *NYU Journal of Intl Law and Politics* (2001) 1101; Miller, 'UNMIK: Lessons from the Early Institution-building Phase' 39 *New England Law Review* (2004) 9; C. Stahn, 'Justice under Transitional Administration: Contours and Critique of a Paradigm' 27 *Houston Journal of Intl Law* (2005) 311.

³ Mandate of the United Nations Mission in Sierra Leone (UNAMSIL), SC Res. 1270 (1999), 22 October 1999, and 1289 (2000), 7 February 2000; see also the mandate of the United Nations Mission in the Democratic Republic of Congo, SC Res. 1291 (2000) 24 February 2000, SC Res. 1493 (2003), 28 July 2003, SC Res. 1565 (2000), 1 October 2004; the United Nations Assistance Mission in Afghanistan (UNAMA) SC Res. 1401, 28 March 2002; the United Nations Stabilization Mission in Haiti, UNSC Res. 1542 (2004), 30 April 2004; the United Nations Operation in Burundi (ONUB) SC Res.1545 (2004) 21 May 2004; the United Nations Mission in Sudan (UNMIS) SC Res. 1590, 24 March 2005.

⁴ R. Caplan, 'International Authority and State Building: The Case of Bosnia and Herzegovina' 10 *Global Governance* (2004) 53-54; E. Mortimer, 'International Administration of War-Torn Societies' 10 *Global Governance* (2004) 7, 8-9; the *Handbook on United Nations Multidimensional Peacekeeping Operations* mentions amongst the tasks of peace operations: 'administer a territory for a transitional period, thereby carrying out all the functions that are normally the responsibility of a government', it also includes amongst civilian responsibilities

state-building, referring thereby to ‘extended international involvement (...) that goes beyond traditional peacekeeping and peacebuilding mandates and is directed at constructing or reconstructing institutions of governance capable of providing citizens with physical and economic security.’⁵ For the reasons given above and to ensure greater consistency with current UN practice, the broader concept of multidimensional peacekeeping operations, or peace missions, is thus used in the present contribution.⁶

2. Rule of Law, Security and Development: A Historical Overview

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 regarded as 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 and economic growth. In other words, the rule of law agenda has now become a critical component of the current debate on peacebuilding strategies. It is primarily in its role as a ‘full service provider for broken societies’,⁷ that the United Nations has progressively integrated rule of law programs -ranging from constitutional and legislative advice, judicial, law enforcement and penal reforms, to support to civil society and human rights organizations, and the establishment of transitional justice mechanisms- in its operations.⁸

A. Rule of Law, Development and Human Rights

Much 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.⁹ Yet, support for rule of law institutions has been part of development policy for much longer than is usually acknowledged, hidden under the guise of public sector reforms or good governance and democratization.¹⁰ Jensen identifies three waves of rule of law reforms starting after WWII until the end of the cold war. While 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 postconflict 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,

‘setting up a transitional administration of a territory as it moves towards independence’ p.2, Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, United Nations, December 2003.

⁵ Chesterman, *supra* note 2, 5.

⁶ *Handbook on UN Multidimensional Peacekeeping Operations*, *supra* note 4, 1.

⁷ R. Wedgwood, ‘United Nations Peacekeeping Operations and the Use of Force’ 5 *Washington University Journal of Law & Policy* (2001) 69, 73.

⁸ Hurwitz and Peake, *Strengthening the Security-Development Nexus: Assessing Policy and Practice in the 1990s*, International Peace Academy, Conference Report, April 2004, 13.

⁹ See for example Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, (2002) 54.

¹⁰ Jensen, ‘The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses’ in: Jensen and Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003) 336, 345-6.

as reflected in the methodology of the UNDP human development reports, the adoption of the 1968 Proclamation of Tehran and the 1986 General Assembly Resolution on the right to development, and culminated with the mainstreaming of rights-based approaches into development policies.¹¹ The World Bank also took notice and adopted specific standards on internal displacement and the protection of indigenous people.¹²

It is 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’.¹³ This evolution was formally acknowledged in *An Agenda for Development*, which lists a series of ‘typical’ rule of law activities as part of UN work on good governance, such as constitution drafting, support to domestic human rights laws, enhancing judicial structures or training human rights officials.¹⁴ 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.¹⁵ 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 both security and development actors, as a relatively hollow concept, at least in the international context, which could be used and interpreted in many different ways.¹⁶ A different, yet not unrelated interpretation would highlight the move from an approach based on individual rights and human dignity, to one focused on institutional processes, coinciding with the emergence of the state-building or nation-building discourses.¹⁷

This emphasis on the rule of law was particularly evident in USAID’s approaches, one of the most active development agencies in this field. This involvement started in the 1980s, in

¹¹ 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.

¹² See World Bank, Revised Draft Operational Policy on Indigenous Peoples (Revised Draft OP 4.10),

<http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/PoliciesRevisedDraftOperationalPolicyonIndigenousPeoplesRevisedDraftOP410>, 25 April 2005; World Bank, Operational Policy on Involuntary Resettlement OP 4.12, December 2001; World Bank, Procedure on Involuntary resettlement BP 4.12, December 2001, <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/65ByDocName/Policy>, 25 April 2005.

¹³ Jensen, *supra* note 10, 347.

¹⁴ *An Agenda for Development*, Report of the Secretary-General UN Doc. A/48/935, 6 May 1994, para.124.

¹⁵ B. Rajagopal, ‘Rule of Law and Security, Development and Human Rights: International Discourses, Institutional Responses’, A. Hurwitz (ed.) *Rule of Law and Conflict Management: Towards Security, Development and Human Rights?* Forthcoming 2005.

¹⁶ *Ib.*

¹⁷ See for example R. Paris, *At War’s End: Building Peace After Civil Conflict* (2004); ‘International Peacebuilding and the “Mission Civilisatrice”’ 28 *Review of International Studies* (2002) 637-56; see also Wilde, ‘The Skewed Responsibility Narrative of the “Failed States” Concept’ 9 *ILSA Journal of Intl & Comparative Law* (2003), 425; for an analysis of the discrepancy between an institution-based approach and one highlighting the ends of rule of law programs, see R. Kleinfeld Belton, ‘Competing Definitions of the Rule of Law: Implications for Practitioners’ Carnegie Papers, No.55, January 2005, p.6-7.

Latin America, including in countries in the wake of the peace settlements brokered with the support of the international community such as El Salvador and Guatemala. USAID programs focused on criminal justice and judicial reform and were generally implemented by subcontracted consulting firms.¹⁸ By 2001, it is reported that almost half of US development assistance went to rule of law programming.¹⁹

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. This was done as early as 1990 by the Organization for Security and Cooperation in Europe (OSCE), whose participating States declared 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 human personality and guaranteed by institutions providing a framework for their full expression.²⁰

The United Nations, which had been particularly successful in its support for the conclusion and implementation of international human rights instruments since the end of WWII, also used both concepts in conjunction, but with less clarity as to the respective scope and differences between the two.²¹ 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, now OHCHR, in strengthening rule of law institutions at the national level.²² 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.²³

B. Rule of Law and Peace Operations

¹⁸ ‘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 1999, 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* (2003) 295-6; see also Call, ‘Democratization, War and State-Building: Constructing the Rule of Law in El Salvador’ 35 *Journal of Latin American Studies* (2003) 827, 849.

¹⁹ Call, Introduction, in: *Constructing Justice and Security After Wars*, forthcoming, on file with the author, p.1.

²⁰ Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, 3, <http://www.osce.org/docs/english/1990-1999/hd/cope90e.pdf>.

²¹ For an analysis of the relation between human rights and rule of law, see R. Mani, *supra* note 9, 29.

²² UNGA Res.48/132 on strengthening of the rule of law, 20 December 1993.

²³ 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.

The integration of these new approaches in conflict management policy came up around the same period, as evidenced by the two founding documents of the early 1990s that drove policy development in the peacebuilding area, the *Agenda for Peace* and its *Supplement*. The *Agenda for Peace* mentioned improved policy and judicial systems and human rights monitoring among the manifold activities of postconflict peacebuilding,²⁴ while the rule of law was mentioned as part of democratic practices.²⁵ The *Supplement to An Agenda for Peace* made specific reference to the collapse of state institutions, especially the police and judiciary that characterized many of the intra-state conflicts in which the United Nations had been asked to intervene. While expressing reluctance regarding the involvement of the United Nations in these matters, it recognizes that ‘international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government.’²⁶

The progressive integration of rule of law activities into peace missions started with the deployment of field operations that were mandated to monitor the implementation of the peace agreements in El Salvador, Haiti, and Guatemala.²⁷ 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 report 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,²⁸ 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 1993.²⁹

The organization’s role in supporting transitional justice mechanisms constitutes another major element in the development of UN expertise in this area. The establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda in 1993 and 1994³⁰ was the first stage in a

²⁴ *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.

²⁵ *Ib.*, para.59.

²⁶ *Supplement to An Agenda for Peace*, paras.13-14.

²⁷ 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.

²⁸ *Ib.*, p.9.

²⁹ United Nations Transitional Authority in Cambodia (1992-1993), UNSC Res.74 (1992), 28 February 1992; Chesterman, *supra* note 2, 74.

³⁰ UNSC Res. 808, 22 February 2003; UNSC Res.955, 8 November 1994.

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 which 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 programmes in supporting transitional justice mechanisms established at the national level, recognizing thereby that a more effective way to address human rights violations and seek reconciliation is to support rule of law institutions at the national level.³¹

The Brahimi report issued in 2000 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.³²

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.

These policy and institutional developments have now been almost fully digested. At headquarters, they eventually led to the establishment in 2003 of a criminal law and judicial advisory unit, within DPKO, in accordance with the recommendations of the UN task force on rule of law strategies established as a subsidiary of the Executive Committee on Peace and Security (ECPS).³³ Recent peacekeeping mandates equally reflect these policy changes. In Liberia, for instance, the UN mission has integrated under the rule of law component civil affairs, civilian police, human rights, legal and judicial issues, corrections, and the gender office.³⁴ Another example is the Security Council Resolution on the latest Haiti mission, which details the task of MINUSTAH in the support for rule of law institutions, including the police, the judiciary and the prisons.³⁵ Regional organizations involved in civilian crisis management have followed the same trend: the European Union has deployed over 200 rule of law specialists in its various

³¹ Call, Introduction, *supra* note 19, 9; see Report of the OHCHR Transitional Justice Workshop 'Rule of Law tools for Post Conflict States', 27-29 September 2004, on file with the author.

³² *Report of the Panel on UN Peace Operations*, UN Doc. A/55/305, 21 August 2000.

³³ Handbook on United Nations Multidimensional Peacekeeping Operations, *supra* note 4, 97; Final Report of the ECPS Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations, August 2002, on file with the author.

³⁴ United Nations Mission in Liberia (UNMIL) established under SC Res. 1509 (2003), 19 September 2003, for further information <http://www.unmil.org/>

³⁵ United Nations Stabilization Mission in Haiti, UNSC Res. 1542 (2004), 30 April 2004 on Haiti; See also the mandate of the United Nations Assistance Mission in Afghanistan (UNAMA) SC Res. 1401, 28 March 2002; United Nations Mission in the Democratic Republic of Congo, SC Res. 1291 (2000) 24 February 2000, SC Res. 1493 (2003), 28 July 2003, SC Res. 1565 (2000), 1 October 2004, the United Nations Operation in Burundi (ONUB) SC Res.1545 (2004) 21 May 2004.

operations.³⁶ 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.’³⁷

The Brahimi report is also remembered for its analysis of transitional administrations and its recommendations on ways to improve UN capacity in this area. Yet, the report showed some ambivalence as to the value of these missions, inasmuch as it raised ‘the larger questions of whether the United Nations should be in this business at all, and if so, whether it [transitional administration] should be considered an element of peace operations or should be managed by some other structure.’³⁸ Since then, Lakhdar Brahimi, in his capacity as Special Representative of the Secretary General for Afghanistan, took a much clearer position on the question, by adopting the so-called ‘light footprint’ approach, which basically consisted in entrusting primary responsibility for the task of rebuilding the state with the Afghans themselves.³⁹ Brahimi recently confirmed his belief that the UN should have modest ambitions, and that international territorial administrations may be neither necessary nor feasible in the vast majority of cases. The UN ‘übernegotiator’ defended the position that ‘a light footprint should be the objective that we should work for, we should improve our tools (...), to identify partners in the country as soon as possible’ and concluded that Kosovo and East Timor were therefore exceptional cases, that could not be replicated in most of the settings where the United Nations becomes involved.⁴⁰ This analysis seems to be confirmed by the policy documents that have been submitted as part of the ongoing UN reform process. The Secretary-General’s report which puts particular emphasis on the role of the United Nations in preventing and resolving violent conflicts, focuses on greater institutional support for peacebuilding work, through the establishment of a peacebuilding commission and peacebuilding support office, without making specific reference to transitional administrations.⁴¹

C. Towards Security, Development and Human Rights? Rule of Law and UN Reforms

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, the Secretary-General issued a report on rule of law and transitional justice in conflict and postconflict societies, which was then discussed in an open debate at the Security Council in October 2004.⁴² 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

³⁶ Security Council Open Debate on Civilian Aspects of conflict management and peace-building, UN Doc. S/PV.5041, 22 September 2004, 5.

³⁷ Call, Introduction, *supra* note 19, 3.

³⁸ *Supra* note 32, para.78.

³⁹ Chesterman, *Tiptoeing Through Afghanistan: The Future of UN State-Building*, International Peace Academy, September 2002, 3.

⁴⁰ An Interview with Lakhdar Brahimi, by Sack and Samii, 58 *Journal of International Affairs* (2004) 239, 244-5.

⁴¹ For a discussion on peacebuilding, see Hampson, ‘Can Peacebuilding Work’ 30 *Cornell International Law Journal* (1997) 701, 702-5.

⁴² *Justice and the rule of law: the United Nations role*, UN Doc. S/PV.5052, 6 October 2004.

and comprehensive rule of law strategies.⁴³ 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.⁴⁴ 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 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:⁴⁵

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.⁴⁶

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.⁴⁷ The report is structured around four main 'clusters', 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 rule of law, human rights, and democratization. Most noteworthy are the endorsement of the principle of the 'responsibility to protect', the creation of a democratization fund, and the establishment of a human rights council to replace the human rights commission.⁴⁸ 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 support office also recommended in the report.⁴⁹

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 current efforts to adopt strategies and follow processes that ensure genuine participation and ownership by the populations of postconflict countries where peace operations are deployed.

⁴³ Secretary-General's 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 and 23-26.

⁴⁴ *Ib.*, para.65.

⁴⁵ *Ib.* para.14-22, para.27-37.

⁴⁶ *Ib.* para.17.

⁴⁷ *In larger freedom: towards development, security and human rights for all*: Report of the Secretary-General [hereinafter in larger freedom], UN Doc. A/59/2005, 21 March 2005.

⁴⁸ *Ib.* para.144.

⁴⁹ *Ib.*, para.137.

3. Enhancing the Legitimacy of Postconflict 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 postconflict countries, such as Sierra Leone or Afghanistan, most developing countries do not yet feel that this issue is of particular relevance to them. This lack of interest may also stem from some level of uneasiness with rule of law activities, comparable to the reluctance to formalize the concept of international territorial administration.⁵⁰ Both issues are indeed intimately connected with the question of humanitarian intervention, which remains highly controversial amongst many developing countries.⁵¹ The aggregation in the Secretary General's report on UN reforms, of the rule of law agenda with the support for the 'responsibility to protect', will certainly reinforce this view.⁵²

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 of developing countries on current international approaches, in particular with regard to the failure of rule of law strategies to address the socio-economic situations of post-conflict countries. The representatives of Brazil, for instance, 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.⁵³

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.'⁵⁴ 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

⁵⁰ Mortimer, *supra* note 2, p.12-13.

⁵¹ Ayoob, 'Third World Perspective on Humanitarian Intervention and International Administration' 10 *Global Governance* (2004) 99, 101.

⁵² In larger freedom, *supra* note 47, para. 135.

⁵³ *Security Council Ministerial Level Debate on Civilian aspects of conflict management and peace-building*, UN Doc. S/PV.5041, 22 September 2004, 17.

⁵⁴ 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.

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.’⁵⁵

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 and justice in societies that have undergone serious civil conflicts.⁵⁶

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,⁵⁷ and even less so, in the case of UNDP. Thus, UNDP’s Bureau for Crisis Prevention and Recovery has a team devoted to justice and security sector reform,⁵⁸ but its rule of law portfolio does not seem to include programs directly addressing economic and social rights, which would seem to be at the heart of UNDP’s mandate on social and economic development.⁵⁹ 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*,⁶⁰ for sustainable human development.’

The issue of housing, land and property (HLP) issues is an excellent example of these shortcomings. Postconflict environments are characterized by large-scale displacement,

⁵⁵ *Ib.*, 19; see also the statement of the representative of Uganda, UN Doc. S/PV.5052 (resumption 1), 10.

⁵⁶ *Ib.*, 29.

⁵⁷ 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, 8-17.

⁵⁸ *Justice and Security Sector Reform: BCPR’s Programmatic Approach*, November 2002, 4.

⁵⁹ 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.

⁶⁰ Emphasis added.

abandoned land and housing, illegal HLP occupation, overlapping claims, reduced housing stock and lack of HLP records. Simply put, if not addressed, HLP 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 and are not adequately integrated into postconflict 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 illustration of the consequences of *ad hoc* approaches on long-term land, property and housing issues.⁶¹ 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.’⁶² While immediate measures to temporarily allocate public and abandoned properties were taken,⁶³ the absence of a property or land claims commission⁶⁴ led to legal uncertainty around temporary allocation, and opened the way for the multiplication of competing claims and to social unrest.⁶⁵ In Afghanistan, which is also plagued with land and housing problems, in particular landlessness and conflict around grazing and pasture lands, piecemeal 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.⁶⁶ Advocates and experts therefore recommend 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.⁶⁷

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.

To be fair, the proposals that will be submitted to heads of State at the Millenium+5 Summit of September, seek to address some of these criticisms, both in substance and institutionally. First, the 2005 interim report on the millennium development goals submitted by Jeffrey Sachs, highlights the connection between socio-economic development and the rule of

⁶¹ see also 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*, 143, 144.

⁶² Fitzpatrick, ‘Land Policy in post-conflict circumstances: some lessons from East Timor’ UNHCR Working Papers, February 2002, 12.

⁶³ *Ib.*, 7.

⁶⁴ 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’, 15.

⁶⁵ Fitzpatrick, *supra* note 62, 5; du Plessis, 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.

⁶⁶ Alden Wiley, ‘Land and the Constitution’ AREU Policy Brief, September 2003, 4.

⁶⁷ Fitzpatrick, *supra* note 62, 23.

law, as a wider principle of good governance, in particular with regard to social inclusion, property and tenure rights or the fight against corruption.⁶⁸

In institutional terms, the limited legitimacy of the rule of law agenda within UN membership is partly due to the relative absence of General Assembly involvement and the overwhelming prerogatives of the Security Council in this policy area. A search on the General Assembly database reveals its limited involvement 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.⁶⁹

Two crucial recommendations have been made on the institutional front. The first one relates to the enlargement of Security Council membership, with a view to make it more representative and therefore, more legitimate. Unsurprisingly it is not yet clear whether there is relative agreement on the details of this proposal.⁷⁰ The real new idea, however, is the proposal to establish a peacebuilding commission, which according to the Secretary-General, would 'effectively address the challenge of helping countries with the transition from war to lasting peace.'⁷¹ This new body would be mandated to organize the planning of early recovery efforts, help provide the necessary funding for these operations, coordinate the activities of the various external actors involved, and provide a forum to discuss these issue with a view to bring greater coherence between the various external initiatives.⁷² Most importantly, the Commission would be composed of members of the Security Council, the Economic Social Council, leading troop contributors (generally developing countries) and where relevant, major donors.⁷³ While the exact relation between this new institution and the UN's main bodies is still unclear, this specific proposal has gathered strong support both amongst Security Council members, including the United States and the United Kingdom, and developing nations, which have for long called for the improvement of peacebuilding support mechanisms within the United Nations.⁷⁴ In fact, of all the recommendations made in the Secretary-General's report, it is the one that may have the greatest chance of being endorsed by heads of State at the September Summit.

⁶⁸ Millenium Project, *Investing in Development: A practical plan to achieve the Millenium Development Goals*, Report to the Secretary-General, 2005, 136-7, 141-2

⁶⁹ UNGA Res.57/221, 27 February 2003.

⁷⁰ The report suggest two possible avenues for Security Council reform: model A would create six new permanent seats (without veto) and three new two-year non-permanent seats divided among the major geographical areas, Model B would not create new permanent seats, but a new category of eight four-year renewable-term seats one new-year non-permanent seat, *In larger freedom*, *supra* note 47, para.170.

⁷¹ note 47, para.113.

⁷² note 47 above, para.115.

⁷³ note 47 above, para. 117.

⁷⁴ International Peace Academy 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, http://wsp.dataweb.ch/wspapplets/data/Documents/Final_Conference_Document.pdf

4. Enhancing the Legitimacy of Rule of Law Programs in Postconflict 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 by embracing the concept of local ownership of rule of law reforms.⁷⁵ The importance accorded to local ownership was triggered by the realization that there were still abysmal differences between people's aspirations and the approaches and outcomes of rule of law programming. A recent 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 (...). Post-war JSSR efforts are generally state-initiated or externally directed, top-down reforms to state institutions that have marginalized citizen input.'⁷⁶ This is particularly the case in postconflict countries where societal institutions and processes have been profoundly disrupted. What is impressively consistent, is the lack of consistency and the erratic approaches of international actors in their efforts to involve local expertise 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.⁷⁷

The endorsement of local ownership by international agencies, while relatively recent, is the latest incarnation of concepts of 'participation' or 'local voices', which have been for long 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 DAC's manifesto.⁷⁸ Yet, the very concept of local ownership is loaded with ambiguity. 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 dirección 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 political elite who is probably 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 handy, 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

⁷⁵ Rule of Law Report, *supra* note 43, 5, para.17; see also Quast, 'Nation-Building: Lessons from the Past and Challenges Ahead: Rule of Law in Post-Conflict Societies: What is the Role of the International Community?' 39 *New England Law Review* (2004) 45, 47.

⁷⁶ Call, Conclusions, in: *Constructing Justice and Security After War*, on file with the author; Quast, 'Rule of Law in Post-Conflict Societies: What is the Role of the International Community?' 39 *New England Law Review* (2004) 45, 46.

⁷⁷ Chesterman, *supra* note 2, 165-6; Miller, *supra* note 2, 15-18; Stahn, *supra* note 2, 328.

⁷⁸ Chesterman, 'The Trope of Ownership' in: A. Hurwitz (ed.) *Rule of Law and Conflict Management: Towards Security, Development and Human Rights?* International Peace Academy, New York, Lynn Rienner Boulder / London, forthcoming.

postconflict 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: responsiveness of international actors, consultation, participation, accountability, effective control and the ultimate objective, which is full sovereignty.⁷⁹ 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. These are now regarded as essential processes in rule of law reforms,⁸⁰ and studies on popular perceptions and opinions based on quantitative research and polling methodology are flourishing. A first category of reports focuses on local opinions regarding transitional justice mechanisms, that were undertaken partly as a response to criticisms regarding the priority granted to transitional justice in international approaches. The International Center For Transitional Justice commissioned such studies for East Timor and Iraq.⁸¹ 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.⁸² In contrast, more recent research undertaken in Uganda showed that amnesty is regarded as a crucial conflict resolution tool in Northern Uganda and as more conform to local understandings of justice.⁸³ Finally, the Asia Foundation has examined popular perceptions on more broadly defined judicial reform in Indonesia and East Timor.⁸⁴ This growing body of quantitative studies on popular

⁷⁹ Chesterman, *supra* note 78, 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.

⁸⁰ Rule of Law Report, *supra* note 43, para.17.

⁸¹ Pigou and 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 (2004); see also Fletcher and 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; see also *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 of representatives from postconflict countries.

⁸² 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* (2005).

⁸³ Refugee Law Project, *Whose Justice? Perceptions of Uganda's amnesty Act 2000: The Potential of Conflict Resolution and Long-Term Reconciliation*, Working Paper No.15, February 2005. The report was based on interviews with 409 individuals, 8-9

⁸⁴ Asia Foundation, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations*, survey research from AC Nielson (2001); USAID and Asia Foundation *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor*, (2004); see also Foundation for

opinions about rule of law reforms is certainly an encouraging development; 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 expertise in these mechanisms, with mixed results.⁸⁵ In Afghanistan, for instance, 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.⁸⁶ 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. The first level is *reinvention*, which is recommended where the previous system was abusive, completely dysfunctional or disappeared as a result of the war, and consists of creating a new local administration, therefore requiring 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.⁸⁷

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 in rule of law projects, and have them adjusted to operational contexts.⁸⁸ Yet, anthropological understanding would not fully resolve the inherent ambivalence in international support to participatory approaches. Chopra and Hohe make the point that 'approaches will (...) vary according to the degree of social change intended and the scale of time required to alter existing structures.'⁸⁹ 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

Coexistence, Ethnic Relations and Human Security in Eastern Sri Lanka, *A Report based on individual interviews*, Asia Foundation (2004).

⁸⁵ See for example Center for Democracy and Governance (USAID), *Governance: A Conceptual Framework* (1998); *Decentralization and democratic local governance handbook*, (2000) http://www.usaid.gov/our_work/democracy_and_governance/publications/dgtpindx.html#pnach300

UNDP, *Decentralized Governance: A Combined Practice Note on Decentralization, Local Governance and urban/rural Development* (2004) <http://www.undp.org/policy/docs/practicenotes/dgdgnintra.doc>

⁸⁶ Chopra and Hohe, 'Participatory Intervention' 10 *Global Governance* (2004) 289-204, 294.

⁸⁷ *Ib.*, 299-303.

⁸⁸ *Ib.*, 296 and 298.

⁸⁹ *Ib.*, 293.

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.⁹⁰ Chesterman identifies another facet of this tension of international interventions which have become necessary as a result of the very ‘failure’ of ‘local owners’ to govern their communities, but still vow to endorse local ownership.⁹¹

The problem is then compounded by the inadequacies of current international mechanisms and structures. First, humanitarian and developmental approaches are by their very nature, difficult to reconcile.⁹² In this respect, there seems at least to be concrete improvements under discussion, with the proposed Peacebuilding Commission examined above, which was conceived to address the crucial transition between short-term stabilization and longer term development. Second, under the current system, peace operations are, in political terms, primarily accountable to the Security Council and external donors. The responsiveness and accountability of international actors towards the local population 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.’⁹³ Thus, in the early stages of the Kosovo mission, donor programs did not provide funding for effective local consultations.⁹⁴ Meanwhile, ‘[East Timor] mission’s approach to state-building has been driven by the need to maintain centralized control, minimize the short-term risk of failure and maximize short-term visible gains. Only under intense protest from the East Timorese did UNTAET begin to shift its approach toward more long-term development-oriented policies.’⁹⁵

This lack of responsiveness is also exacerbated by the absence of effective legal accountability mechanisms, undermining the very principles that the mission is supposed to promote.⁹⁶ Mortimer explained the situation in the following terms:

In the absence of clear rules governing their conduct, international officials find themselves endowed with more or less absolute power. (...) they may feel entitled, even compelled, to act in an authoritarian or arbitrary way, and they may consider that giving power to representatives of the local population, however desirable in the long term, is a recipe for disaster in the short term. (...) The [Security]

⁹⁰ *Ib.*, 297; see also Beauvais, *supra* note 2, 1126.

⁹¹ Chesterman, *supra* note 2, 153; see for example Quast, who states that ‘it is critical that the international community act as a stabilizer in post-conflict societies to facilitate a return to localized management of the judicial process. It must not act as a substitute government during the post-conflict transition,’ *supra* note 76, 47.

⁹² Beauvais, *supra* note 2, 1113.

⁹³ Chopra and Hohe, *supra* note 86, 290-1; see also Beauvais, on the shortcomings of UN recruitment procedures and the lack of accountability of UNTAET, *supra* note 2, 1140-1 and 1169.

⁹⁴ Miller, *supra* 2 note, 14.

⁹⁵ Beauvais, *supra* note 2, 1106 and 1166.

⁹⁶ On accountability mechanisms, see Chesterman, *supra* note 2, 146-153; Marshall and Inglis, ‘The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo’ 16 *Harvard Human Rights Journal* (2003) 96-146; Wilde, ‘Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor’ 7 *ILSA Journal of International & Comparative Law* (2001) 455, 456; Stahn, *supra* note 2, 329-31.

Council, does not really have any mechanism and its members seldom have much appetite, for scrutinizing the conduct of an administration in detail. As for the administered, they have little recourse unless they can reach the media and public opinion of influential member states. If they are learning to govern themselves democratically, it is not exactly by example.⁹⁷

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 postconflict countries. DPKO has officially adopted a zero tolerance policy and advocated support for rule of law policies that would prevent and counter human trafficking,⁹⁸ but it is the most recent UN report on sexual exploitation, which clearly highlighted the UN's fundamental institutional weaknesses that have enabled perpetrators to go unpunished. Besides the difficulty posed by the legal arrangements between the UN and troop-contributing countries,⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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,¹⁰² while committing the United Nations to 'strengthen the internal capacity of the United Nations to exercise oversight of peacekeeping operations.'¹⁰³

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 postconflict 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

⁹⁷ Mortimer, *supra* note 4, p.13.

⁹⁸ 'Human Trafficking and United Nations Peacekeeping', DPKO Policy Paper (2004).

⁹⁹ The UN Model Status-of-Forces Agreement for Peacekeeping Operations provides that 'military members of the military component of the United Nations peacekeeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host country/territory]', UN Doc. A/45/594, 9 October 1990.

¹⁰⁰ *Comprehensive Review of the Whole Question of peacekeeping operations in all their aspects*, UN Doc. A/59/710, 24 March 2005; note that responsibility of peacekeepers for violations of international humanitarian law was addressed through the promulgation of the Bulletin on the Observance by United Nations Forces of International Humanitarian Law, see Shraga, UN Peacekeeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-Related Damage, 94 *AJIL* (2000) p.406, 408.

¹⁰¹ See also Wilde, *supra* note 96, 459.

¹⁰² In larger freedom, *supra* note 47, para. 113,188 and 191.

¹⁰³ *Ib.*, para.113.

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.’¹⁰⁴

‘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.¹⁰⁵ 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, (...) smuggling, trafficking ...’¹⁰⁶ Another program consists in assisting the competent Bosnian Ministry in adopting a comprehensive strategy in migration and asylum, drafting asylum and immigration legislation, train the police forces in ‘migration procedures and asylum awareness’, and assist 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’ priorities, deserves to be raised.

Within the United Nations system, the recent focus on counter-terrorism has also impacted rule of law programming priorities and outcomes in postconflict countries. In accordance with Security Council Resolution 1373, Member States are bound 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...¹⁰⁷ A Counter-Terrorism Committee was established as a subsidiary organ of the Council, to monitor the implementation of these measures.¹⁰⁸ Member States are expected to report regularly to the committee on the progress made in the implementation of the Resolution, including 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 the Resolution.¹⁰⁹ Due to ‘reporting fatigue’, a Counter Terrorism Executive Directorate (CTED) was created in 2004 and undertakes country visits in members states with a view to assess how Resolution 1373 is being implemented.¹¹⁰ In this area as well, EU assistance is significant. In the CTC directory, EU programmes for Mexico, Guatemala, Colombia, Panama and Peru are said to target specifically networks ‘associated with

¹⁰⁴ Pugh and Cooper with Goodhand, *War Economies in a Regional Context: Challenges and Transformation* (2004) 204.

¹⁰⁵ Justice & Home Affairs, Assistance Projects, Asylum, Migration, Border Management, Customs, Bosnia and Herzegovina, 2003, on file with the author.

¹⁰⁶ *Ib.* p.37.

¹⁰⁷ 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.

¹⁰⁸ *Ib.*, para.6.

¹⁰⁹ 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.

¹¹⁰ UN Doc. S/Res./1535, 26 March 2004; see also Press Release SC/8333, ‘Country Visits Signals New Phase of Work for United Nations Counter-Terrorism Body, 14 March 2005.

terrorism' through judicial reform, support for the rule of law and promotion of good governance.¹¹¹

Even more preoccupying is the trend to conveniently assimilate repressive practices against political opponents to 'counter-terrorism policies'.¹¹² Thus in Yemen, Amnesty International reported that the efforts to support processes supportive of the rule of law and human rights have been seriously undermined by counter-terrorist activities:

One of the setbacks brought on by the events of 11 September and the subsequent sidelining of the rule of law was the negative impact on civil society and its role as human rights protector. Mass arrests, detention and deportations, backed up by political discourse from the highest authorities of the government portraying those targeted by security forces as "terrorists", generated a climate of fear. (...) Faced with these fears, members of civil society felt that they had no option but to remain silent in the face of the onslaught on human rights by security forces.'¹¹³

This mounting interest in a repressive law enforcement approach to rule of law reforms driven by external concerns on terrorism or illegal immigration, does not only seem to send the wrong signal to autocratic governments; it antagonizes the very 'reform constituencies' that the United Nations and external actors involved in rule of law programming are supposed to embolden.

5. Conclusion

As noted by David Harland, the head of the Best Practices Unit of DPKO, 'all international administration, however benign, is to some extent illegitimate', yet, the United Nations remains undoubtedly 'the least illegitimate of all possible outside actors.'¹¹⁴ While the recent US occupation of Iraq certainly seems to support this statement, most observers agree that important reforms are still needed for the United Nations' rule of law strategies to become operationally effective, and gain greater legitimacy at the multilateral and country levels.

Rule of law reforms have now been progressively 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 on rule of law reforms undertaken by international actors. Yet, it is unlikely that this progress will bring about major improvements in the current context, primarily because some crucial mechanisms and processes 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, effective criminal and administrative accountability. The presence of 'prophylactic' agendas in rule of law programmatic activities is another facet of the legitimacy

¹¹¹ <http://domino.un.org/ctc/CTCDirectory.nsf/0/>, 1 April 2004.

¹¹² Human Rights Watch, *Hear no evil, see no evil: The UN Security Council's Approach to Human Rights Violations in the Global Counter-Terrorism Effort*, August 2004.

¹¹³ Amnesty International, *Yemen: The Rule of Law Sidelines in the Name of Security*, (2003), <http://web.amnesty.org/library/Index/ENGMDE310062003?open&of=ENG-YEM>.

¹¹⁴ Harland, 'Legitimacy and Effectiveness in International Administration' 10 *Global Governance* (2004), p.15.

problem and should alert us to the inherent limitations of international interventions to reestablish full sovereignty in postconflict countries.

At the multilateral level, the reforms proposed by the Secretary-General, in particular with regard to the enlargement of the Security Council and the establishment of the Peacebuilding Commission, would definitely help ensure broader-based support for rule of law strategies. Further efforts to address more consistently the protection of social and economic rights, 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.