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Human Rights and the UN Security Council, peacekeeping and the rule of law: The unruly cousin or the bedrock of the family?

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Human Rights and the UN Security Council, Peacekeeping and the Rule of Law: the Unruly Cousin or the Bedrock of the Family?

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Introduction

> Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.
> (Universal Declaration of Human Rights)

> The Security Council noted "with deep regret and concern the systematic violations of human rights and fundamental freedoms and the general absence of rule of law in the Congo'.
> (Security Council Resolution 161, 1961)

As these early UN references highlight, the inter linkages between human rights and rule of law have long been recognised, even if the nature of the relationship has not always been clear. The first quote above is taken from the preamble to the Universal Declaration of Human Rights (UDHR), as adopted by a Resolution of the General Assembly in 1948. The relevant phrase, that 'human rights should be protected by the rule of law', seems to suggest that human rights are outside the scope of the rule of law, but that rule of law is the mechanism by which human rights are to be protected. The text is also interesting for positing a clear relationship between the outbreak of violence, in terms of rebellion against tyranny and oppression (what might be categorised as a threat to peace and security) and situations where human rights are not protected by the rule of law. The second quote is the first reference to the 'rule of law' to be found in a Security Council Resolution, that of Security Council Resolution 161 (1961) dealing with the Congo. In that text, the relationship between human rights and the rule of law is more ambiguous. The Council notes 'violations of human rights and fundamental freedoms and the general absence of rule of law'. It might be debated as to what was envisaged: whether human rights violations were seen as a component, or one example of the lack of rule of law, or quite separate to the rule of law or even overlapping with the rule of law in a Venn diagramme sense. Whichever interpretation is adopted, what is common to both texts is that human rights and rule of law were regarded as sufficiently and intimately connected so as to be discussed together.

What I would like to do in this paper is to examine the role of human rights in contemporary UN rule of law discourse and practice. The answer provided by those examining the rule of law and international assistance in this field is not always straightforward. Within the thematic paper prepared in advance of this workshop, for instance, human rights is dealt with variously as part of the *broader culture* of the rule of law, an *intersecting feature* with the rule of law, and/or a *central feature* of 'rule of law' institutions (in so far as transitional justice institutions have been included under the heading of 'Strengthening Rule of Law Institutions'). To this variety of images, I would like to add another, that of a '*human rights based approach to the rule of law*.'

Academic debate continues to thrive as to the proper parameters of the base concept of the rule of law, with particular disagreement as to whether compliance with human rights standards constitutes an element of the rule of law. However, an examination of specialised UN reports, and doctrine (policies and guidance

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material) demonstrates the way in which human rights have increasingly been placed at the heart of the UN conceptualisation of the rule of law. In practice, the work of the UN in promoting and protecting human rights plays an essential role in strengthening the rule of law at the country level and a human rights based approach is critical to the design and implementation of effective rule of law assistance. Undoubtedly, there remain a number of challenges at both the conceptual and operational levels. Ongoing attention is required to ensure proper integration and policy coherence, particularly given the proliferation of actors involved. However, overall, it is to be welcomed that that human rights has been recognised as a vital underpinning for the rule of law, even if at times the desirability of maintaining close relations may be subject to debate.

In order to consider the current practice of UN peace missions in context, [1] this paper adopts the following structure:

I. Human Rights and the Rule of Law within the academic discourse.
II. Current UN Definitions and Policies
III. UN Practice: The Contribution of a Human Rights Based Approach in Select Areas
    (a)Transitional Justice and Accountability;
    (b) Constitutional Processes
    (c) Monitoring, Training and Provision of Technical Assistance
IV. Some outstanding Challenges.

I. Human Rights and the Rule of Law within the academic discourse.

Theorists continue to grapple with the definition of the 'rule of law'. Determining the place (if any) of human rights within this concept continues to be subject to debate. While the concept historically was applied primarily in a domestic setting, it has come now to be applied also in discussions of actions at an international level. Yet, there remains no one agreed definition of the rule of law. While many theorists and practitioners agree on some core principles, the rule of law concept tends to be reflexive and fluid, aspirational and pragmatic. It has been developed by philosophers and jurists in a variety of contexts. Some have been seeking to explain how power relations should be governed in a nation, while others have been concerned to establish the superiority of a particular legal system.[2] In the area of international assistance, the increasing usage of rule of law programmes in blueprints for action has led one commentator to compare the rule of law to a 'product sold on late night television', in which the rule of law is 'touted as able to accomplish everything from improving human rights to enabling economic growth to helping win the war on terror'.[3] The rule of law concept has been challenged as a specific cultural construct and it is evident that many articulations of the rule of law have often grown out of, and been tied to, notions of western State

[1] Whilst drawing particular examples from operations administered by DPKO involved uniformed personnel (military/police) and civilian components, given the focus of this workshop on peacekeeping, some examples are also drawn from other missions mandated by the Security Council in post conflict situations: eg political missions administered by either DPKO or DPA with substantial rule of law programmes. This permits a discussion of the Security Council and the rule of law in relation to peace missions more broadly.
[2] Dicey for instance, whose conception of the rule of law is widely quoted, was concerned to demonstrate the superiority of the English system over French constitutionalism. Dicey proposed three elements for the rule of law: namely (i) that government is based upon and abides by law (as opposed to the exercise of wide, arbitrary, or discretionary powers of constraint);(ii) that all are subject (equally) to the law (administered by the courts), and (iii) that courts will be the bodies to determine rights: see: AV Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, London, 1915, Chapter IV.
[3] The 'late night television product' illusion is drawn from Rachel Kleinfeld, 'Competing Definitions of the Rule of Law', in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington, 2006, p. 31. Note the other quote beginning Kleinfeld's analysis, that of Michael Oakeshott is equally potent: 'The rule of law breaks no bread, it is unable to distribute loaves and fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised': *ibid*.

institutions. Historically, rule of law assistance programmes have been linked also to development partners' political objectives: such as promoting economic development (using a market economy model) and democracy.[4] Notwithstanding these critiques, the rule of law remains an important foundational concept for States.[5]

Within academia, the place of substantive human rights guarantees remains a particular friction point as between those advocating a thin, primarily procedural, definition of the rule of law, focusing on the establishment and operation of rule of law institutions/systems, and those proposing a 'thick' definition, incorporating qualitative notions such as consistency with human rights. The latter approach permits an inquiry into the quality of laws, and the manner in which the institutions are operating in terms of their impact on individual's rights as part of evaluating the rule of law in a State. Within the Australian academy, for instance, Charles Sampford has argued for a 'thin' theory of the rule of law to be evaluated separately from other values such as democracy and human rights in Zifcak's collection of essays, *Globalisation and the Rule of Law*.[6] In the same volume, Spencer Zifcak considers the rule of law should be understood in terms of the global values of legality, equality, legitimacy, accountability and commitment to fundamental human rights. The debate has been replicated in earlier papers in this workshop series. Some commentators who have been looking specifically at UN practice have voiced concerns that the UN in practice often overreaches the boundaries of the rule of law.[7] Rajagopal has argued further rule of law discourse has come to be seen as a 'convenient substitute for human rights' avoiding the transformative and emancipatory implications of human rights.[8] In Rajagopal's view, rule of law 'does not promise the achievement of any substantive, social, political or cultural goal. It is much more empty of content and capable of being interpreted in many diverse, sometimes contradictory ways.'[9]

II. Current UN Definitions and Policies

The UN Definition of the Rule of Law

As noted in the workshop outline, the key definition from the UN perspective is that found in the Secretary General's 2004 report to the Security Council entitled *The Rule of Law and transitional justice in conflict and post-conflict societies*.[10] After acknowledging the multiplicity of definitions used for the rule of law, the report articulated a definition of the rule of law which picked up both the general ends of the rule of law as well as the means to achieve them. The 'rule of law' was said to refer to:

> *a principle of governance* in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly

[4] T Carothers (ed), *op. cit*, p.17. Carothers dates the current 'rule of law aid movement' from the end of the Cold War and distinguishes it from the earlier 'law and development' movement of the 1960s and 1970s which was built upon a modernisation paradigm.

[5] See, for instance, Justice Kirby's statement that the traditional ideal of the rule of law in a society such as Australia is 'relatively straightforward': M Kirby, 'Globalizing the rule of law? Global challenges to the traditional ideal of the rule of law', in S Zifcak, *Globalisation and the Rule of Law*, Routledge, London, 200, p. 65. Note Grote's conclusion that the idea 'belongs to the category of open-ended concepts which are subject to permanent debate': R Grote, 'Rule of Law, Rechstaat and Etat de Droit' in C Starck (ed), *Constitutionalism, Universalism and Democracy: A Comparative Analysis*, Baden Baden, 1997, p. 271.

[6] C Sampford, 'Reconceiving the rule of law for a globalising world': and S Zifcak, 'Globalizing the Rule of Law: rethinking values and reforming institutions', in Zifcak, S (ed.), *Globalisation and the Rule of Law*, *op. cit.*

[7] Agnes Hurwitz, 'Civil war and the Rule of Law: Towards Security, Development and Human Rights', in A Hurwitz (ed), *Civil War and the Rule of Law: Security, Development and Human Rights*, Lynne Rienner Publishers, 2008, p. 6.

[8] B. Rajagopal, 'Invoking the Rule of Law: International Discourses', in A Hurwitz (ed), *op. cit.*, p. 53.

[9] *Ibid*.

[10] *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General*, UN Doc S/2004/616, 23 August 2004 ('2004 SG Report')

> promulgated, equally enforced and independently adjudicated, and *which are consistent with international human rights norms and standards*.[11] (italics added)

The Report elaborated supportive measures also required by the rule of law:

> It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[12]

So according to this definition, consistency with human rights standards is one of the critical components for the rule of law. Human rights notions are also highly visible in the 'supportive measures' stipulated: eg notions of equality before the law, accountability to the law (in human rights terms: a remedy for violations), fairness in the application of the law (which can pick up elements of non-discrimination) and participation in decision making and procedural and legal transparency (which can pick up elements of fair trial/due process). Normative foundations for UN assistance also picked up the international human rights framework and associated legal regimes: with explicit mentioning of the Charter of the UN, international human rights law, international humanitarian law, international criminal law and international refugee law — and the wealth of United Nations human rights, crime prevention and criminal justice standards.

The inclusion of human rights as part of the principle of governance also confirmed that the rule of law was to be regarded as more than a set of functioning institutions such as the judiciary or judicial related institutions. Under this definition, the rule of law potentially relates just as much to the equal application of, for example, laws on demonstrations, or ensuring those laws adhere to human rights standards as it does to for example, having clear, public laws on a particular subject. It also opens itself to an approach whereby the Parliament and the Executive are equally subjects of rule of law concern alongside the 'traditional rule of law institutions', namely the judicial, police and corrections systems. In practice, however, most of the rule of law architecture and programming within the UN has remained focused on 'traditional rule of law' institutions. [13]

Turning to the most recent report in this series, the 2011 Secretary General's report on *The Rule of Law and transitional justice in conflict and post-conflict societies*, one can see the beginning of a more detailed treatment of human rights. In that report, there is a greater emphasis on accountability for human rights violations, and gender equality and to some extent, a greater openness to considering issues associated with economic, social and cultural rights. The summary of the October 2011 document, for instance, explains that:

[11] *Ibid.* para. 6.

[12] *Ibid*. Interestingly, this listing does not explicitly refer to the functioning of the courts, though it is one of the two primary areas (the administration of justice) presented in the introductory statements. Formal judicial mechanisms are discussed in the paragraph defining 'justice'.

[13] In practice, there is still a tendency for 'rule of law' institutions to be equated with criminal justice related institutions (see for instance the listing of institutions in the 2006 table of responsibilities of UN agencies in the field of the rule of law). This approach also is apparent in the agenda for this Workshop. Note a broader conception is included in the Secretary General's Guidance Note on Rule of Law which, for instance, includes reference inter alia to 'Institutions of justice, governance, security and human rights' in discussing institutions, as well as including broader human rights/legislative concerns, though retaining somewhat of a bias towards civil and political rights.

> In conflict and post-conflict settings the United Nations assists countries in establishing the rule of law by ensuring accountability and reinforcing norms, building confidence in justice and security institutions, and promoting gender equality.[14]

In the body of the report itself, reference is made to Security Council action in relating to integrating rule of law and transitional justice, accountability mechanisms in the protection of civilians, gathering information and holding States accountable for grave child rights violations, women's justice and security needs, as well as referring to UN action on rejecting endorsements of amnesties for genocide, war crimes, crimes against humanity or gross violations of human rights. Human rights are also mentioned in a wider number of contexts such as ensuring respect of the human rights of stateless persons as part of the rule of law work, or promoting dialogue on the realization of family and land rights issues, thus bringing into the discussion some aspects of economic, social and cultural rights.[15] The broadening of approach may well be attributable to the larger number of agencies now actively involved in the 'rule of law' space and contributing to the report, with the voices of UNHCR, UN Women, UNICEF and OHCHR being heard in the final text of the report. These reports do not purport to embrace the whole of the UN's human rights work under the heading of 'rule of law', but they are consistent with a viewing of human rights as a lens/base for rule of law work.

UN Guidance and Policies

Turning from definitions to operational guidance and policies, the increasing integration of human rights within the rule of law framework is evident in the burgeoning number of texts designed to govern UN mission activities. In 2005, the Secretary General's Policy Committee Decision on Human Rights in Integrated Missions was released which directed that human rights be integrated into peace missions.[16] Looking at the guidance provided for rule of law programming, or specialised policies developed for individual components of a peace mission, it is evident that human rights form a base platform for rule of law related work (albeit largely within a 'traditional rule of law institutions' framework). To take an example from each category:

(1) Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance (2008)

This Guidance Note picks up the broad definition of the rule of law provided for in the Secretary General's 2004 report and provides an outline of guiding principles for UN work in the rule of law sphere and the framework required for a strong rule of law. The contents are aimed at all rule of law operations, whether carried out in the context of crisis, post-crisis, conflict prevention, conflict, post conflict or development.[17] There is language in the document which presents human rights as separate, but interlinked with the rule of law: eg '[a]ll human rights, the rule of law and democracy and mutually reinforcing',[18] but human rights is also envisaged as at the heart of the normative basis for rule of law assistance. The first guiding principle is basing assistance on international norms and standards, in particular international human rights law, international humanitarian law, international criminal law and international refugee law. These are described as 'universally applicable standards', incorporating a legitimacy that 'cannot be said to attach to exported

[14] *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary General*, UN Doc. S/2011/634, 12 October 2011, Summary. ('2011 SG Report')
[15] *Ibid*.
[16] Secretary General Policy Committee Decision No. 2005/24 on Human Rights in Integrated Missions
[17] *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance*, April 2008, Introduction, p.2.
[18] *Ibid.*

national models reflecting the values or experience of donors and assistance providers'.[19] Thus, there is no 'cultural cringe' to be attached to unashamedly basing assistance on such standards. Advancing human rights and gender justice is explicitly listed as another guiding principle.[20] The principles dealing with national ownership and national reform constituencies implicitly support individuals' right of participation and the importance of consultation, with particular mention of those marginalised within a community. Particular human rights standards are quoted as the yardstick in the framework section: eg in recalling that prison laws and regulations need to be consistent with the Standard Minimum Rules for the Treatment of Prisoners, or that laws on the judiciary need to reflect the Basic Principles on the Independence of the Judiciary.[21] Included in the institutional framework are '[i]nstitutions of justice, governance, security and human rights' including the legislature, oversight bodies including national human rights institutions and independent commissions on human rights and ombudsman offices consistent with the Paris Principles.[22] Transitional justice processes and mechanisms receive explicit attention with specific mention of ad hoc criminal tribunals, truth commissions, vetting processes and reparations processes.[23] In dealing with civil society, attention is called to not only equal access to justice, but a 'system of governance that promotes a culture of legality, legal empowerment and ensures the public is aware of and educated in the full-range of its rights and responsibilities'.[24]

(2) **Justice Components in United Nations Peace Operations** (2009).

The Justice Components in UN Peace Operations policy adopted by DPKO and DFS does not purport to be dealing with all rule of law functions. Instead, it details the objectives, principles and functions of 'justice components' of UN peacekeeping operations and special political missions managed by DPKO.[25] Reference is made to the Rule of Law Assistance Guidance Note, with a listing of key principles to govern the work and many of the key principles are similar to those presented in the Guidance Note. Thus, the first principle is the same: basing the work on the international norms and standards, which brings back the normative pillars of 4 areas of international law mentioned in the rule of law report.[26] Advancing gender justice is elevated to the second principle in this document. Coordination, ensuring national owernship and supporting national reform constituencies (through consultation) is also given prominence as in the Rule of Law Guidance Note.

However, one finds several more detailed references to the role of human rights in shaping analyses and responses. There is a specific reference, for instance, to the utility of mapping of justice systems in close cooperation with the human rights component, so that the mapping exercise is used as a basis for ongoing assessments of the capacities of the justice system to address widespread patterns or trends of human rights violations and the systematic factors that hinder compliance.[27] Recognition is also given to the fact that laws, including the constitution may be unclear, outdated or incompatible with international norms and standards, and there may be gaps in the law which prevent the justice system from addressing certain crimes (with war crimes, sexual and gender based violence being amongst the examples given).[28] Specific reference is also made to other human rights topics, such as the independence of the judiciary, access to justice and victims'

[19] *Ibid*., p. 2.
[20] Ibid, Guiding Principle 4, p. 3.
[21] *Ibid*., p. 5.
[22] *Ibid*., p. 6.
[23] *Ibid*., p. 7.
[24] *Ibid*.
[25] *Justice Components in United Nations Peace Operations,* Adopted by DPKO and DFS, 1 December 2009, para. 1.
[26] Ibid., paras. 8 and 8.1.
[27] *Ibid*., para. 9.4.
[28] Ibid., para. 10.3.

rights, gender justice, justice for children, and customary/traditional justice mechanisms (including work around enhancing compliance with international human rights standards).[29] The document ends by listing relevant international treaties and soft law standards, with human rights standards being the dominant sources.[30]

Thus, even despite the fact that these documents could be critiqued as equally unclear on the precise relationship between human rights and the 'rule of law' and the heavy emphasis on 'traditional rule of law institutions', it is also apparent that human rights are seen, at a minimum, as an essential part of conceptualising and operationalizing rule of law assistance. So what occurs in practice?

III. UN Practice: The Contribution of a Human Rights Based Approach in Select Areas

In practice, human rights can and does make a difference to rule of law programming. Taking a human rights based approach is not necessarily going to make the UN popular in all instances, but it does assist the UN with making informed, principled programmes that can assist in contributing to the long term strengthening of the rule of law.

Without limiting the areas of contribution, I would highlight in particular the role of a human rights perspective in providing assistance: for example, in relation

-in helping to answer the <u>why</u> question: that is, why is the UN providing assistance in this field: directing attention to such principles as equality before the law, access to justice and the need to ensure accountability;
-<u>who</u> to speak to in the course of planning and implementing programmes;
-<u>what</u> initiatives to carry out and what standards to use to assess/evaluate institutions, laws and programmes;
-<u>when</u> to provide particular assistance
-<u>where</u> to focus energies; and
-<u>how</u> to carry out activities.

There are obviously a myriad of subject matters to pick from in relation to the world of 'human rights and the rule of law', but this paper focuses upon three, namely: (i) transitional justice and accountability, (ii) constitutional processes and (iii) monitoring, training and technical assistance (within the justice sector). In each area, the impact of a human rights based approach is highlighted, leading to the conclusion that it would be entirely artificial to separate out human rights from the arena of 'rule of law assistance'.

Transitional Justice

'Transitional justice' in this context is an umbrella term used to refer to both judicial and non-judicial mechanisms which assist a country address, recover and move forward from a period of gross human rights violations. It is intended to cover the range of potential initiatives including investigation and prosecutions, truth-seeking initiatives, reparations programmes, and institutional reform.[31] The term 'transitional justice' headlines the Secretary General's report along with the general 'rule of law' term, perhaps giving the impression that transitional justice is separate from the rule of law. However, the 2011 Secretary General's Report on the

[29] *Ibid*., para. 10.
[30] *Ibid*., p. 13.
[31] 2004 SG Report, para. 8; Guidance Note on Transitional Justice, pp 7-10. Note the Guidance Note includes national consultation as a separate component of transitional justice.

Rule of Law and Transitional Justice in conflict and post conflict societies affirmed that transitional justice initiatives have become 'well-established components of the wider United Nations rule of law framework and indispensable elements of post-conflict strategic planning.'[32] The Report also refers to transitional justice and capacity building programmes as mutually reinforcing. Appropriate transitional justice initiatives reinforce respect for human rights and help to nurture or rebuild eroded trust in the system of governance and law following conflict, including through promoting accountability.[33] Conversely, if transitional justice takes place outside this framework, it can undermine other efforts within the rule of law area. The issue arises most prominently in discussions of the 'accountability' side of transitional justice. To state it baldly, how can you re-establish trust in the justice system if it does not deal equally with all? How can you expect respect for a legal system which prosecutes a murderer today, but does not hold responsible someone responsible for crimes against humanity involving hundreds of deaths from last year? As the High Commissioner stated at the General Assembly in 2011:

> Judicial training workshops, co-mentoring judges and lawyers and assisting in the reform of the criminal procedure code will only make a difference when the State takes seriously its legal obligations to meaningfully investigate and punish past and ongoing crimes and atrocities.[34]

In 2010, the Secretary General issued a Guidance Note on the UN Approach to Transitional Justice which adopts a human rights and victim centric approach to transitional justice. Emphasis is placed on victims' rights to truth, justice and reparations. The baseline standards are drawn from international human rights, humanitarian and criminal laws and the guidance provided in soft-law instruments such as the *Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law* adopted by the General Assembly in 2006 and the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* of 2005.[35] The Guidance note also highlights certain red lines for the UN: for example, that the UN will not endorse provisions in peace agreements that include amnesties for genocide, war crimes, crimes against humanity, and gross violations of human rights.[36] The stance that amnesties for international crimes are contrary to international law has more broadly meant that the UN has declined to assist truth and reconciliation initiatives which include such amnesties and senior officials have intervened in proceedings involving the death penalty.[37] UN mediators are made aware of the importance of commitments to combat impunity and to uphold the protection of human rights in peace agreements. Within the UN, OHCHR has the lead in relation to transitional justice matters, though a variety of other agencies may also be involved including UNDP, UNICEF, UN Women and UNODC.

The Guidance Note specifies a variety of human rights related factors as guiding considerations (including striving to ensure women's rights, and supporting a child-sensitive approach).[38] At the broader level, the incorporation of a human rights perspective on transitional justice remains of particular importance in

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[32] *Ibid*., para. 18.
[33] 2011 SG Report, para. 17.
[34] General Assembly Interactive Thematic Debate on The Rule of Law and Global Challenges, New York, 11 April 2011.
[35] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147, 21 March 2006; *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, UN Doc E/CN.4/2005/102/Add.1, 8 February 2005.
[36] *Guidance Note of the Secretary General: United Nations Approach to Transitional Justice*, March 2010, p 4. ('Guidance Note on Transitional Justice').
[37] Note also the involvement of the High Commissioner for human rights in submitting amicus briefs on particular death penalty cases : eg before the Iraqi High Tribunal in the case of Taha Yassin Ramadan (one of the co-defendants of Saddam Hussein) in February 2007.
[38] Guidance Note on Transitional Justice, p. 5.

emphasising the importance of national consultations, and supporting a holistic approach to transitional justice which is consistent with international human rights law and other relevant standards and which prioritises the rights of victims.

National consultations on Transitional Justice

Central to a human rights based approach to transitional justice is that the affected community (in particular victims of violations) be consulted on the means and shape of transitional justice initiatives. In several countries, the UN has thus become involved in providing assistance in the design and implementation of consultation programmes. In Burundi, for instance, the Human Rights and Justice Division of BINUB took a key role in assisting the Government with respect to the organization of national consultations.[39] In 2011, other contexts in which OHCHR provided assistance included Guinea and Uganda.[40] Advocacy and assistance relating to consultations remains a particular priority of initial assistance in the field to avoid the situation (or address the situation) of a government rushing to institute transitional justice initiatives without proper consultation.

Supporting a Holistic Approach to Transitional Justice Consistent with International Human Rights Law and other Relevant Standards

A human rights based approach to transitional justice also emphasises the plurality of measures needed to 'come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.[41] In line with this integrated approach, one does not seek to work on truth seeking (eg through a TRC) at the expense of prosecutions, or vice-versa, but instead initiatives are viewed as complementary. Another reason why the recognition of transitional justice and its plurality of measures as a key part of the rule of law is interesting is that it extends the rule of law work out beyond traditional rule of law institutions: eg in dealing with issues of reparations. It is important for States to develop transitional justice solutions that fit their national context and history. Whilst respecting this, the UN plays a particular role in underlining the importance of ensuring compliance with international human rights law, international humanitarian law and international criminal law and providing guidance and capacity building on relevant international norms and standards.

Examples drawn from OHCHR's work, for instance, include its work on:

- *Prosecutions*: Human rights components regularly assist national systems in investigating and prosecuting international crimes and other human rights violations , through sharing material (where possible without infringing confidentiality or endangering witnesses), and assistance with legal frameworks, capacity building initiatives aimed at the investigative, prosecution, defence or judicial levels. Human rights components also advise on critical issues such as victim and witness protection, and fair trial rights. In some cases, assistance extends to providing personnel to work with national authorities. In Timor Leste, for instance, the Human Rights and Transitional Justice Section of UNMIT has played a significant role in assisting prosecutions of those named by the UN Independent Special Commission of Inquiry for Timor Leste of 2006 through funding for an international Prosecutor (together with UNDP).[42] In the DRC, the Joint Human Rights Office has provided personnel for Joint Investigation Teams to gather information which will assist in the opening of criminal investigations

[39] See OHCHR Report 2009, p.87, and OHCHR Report 2010, p. 129.
[40] OHCHR Report 2011, pp 56-57.
[41] Guidance Note on Transitional Justice, p. 2.
[42] The latest report concerning UNMIT notes, however, that progress has been slow in relation to the prosecutions: as of January 2012, 7 cases had proceeded to final judgement, with another 4 cases closed: Report of the Secretary General on UNMIT, UN Doc S/2012/43, para.33.

and prosecutions.[43] Extensive 'mapping exercises' to overview patterns of violations of international human rights and/or humanitarian law have been carried out in some contexts such as the DRC, or Nepal. OHCHR has also supported a variety of International Commissions of Inquiry whose mandates have also related to examining patterns of violations. The reports of each type of body can be a valuable source for national authorities pursuing investigations.

Within the field of prosecutions, it is also important to consider the contribution of international and hybrid tribunals. In recent years, referrals to the ICC have attracted particular controversy, yet where a State fails to act or its efforts show that it is unwilling or unable to properly investigate and prosecute international crimes, the possibility of international justice is important. OHCHR was heavily involved in investigation of international crimes in Darfur (through support of the ICOI on Darfur which pre-dated the Security Council's referral of the situation to the ICC). More recently, the High Commissioner for Human Rights has been active in calling for the referral of the Syrian situation to the Security Council, making reference to the findings of the ICOI supported by OHCHR.[44]

- *Truth seeking*: Truth and Reconciliation Commissions (TRCs) are the most common form of national response to seeking the truth following conflict. They allow for a much broader investigation into the causes of a conflict, the nature of violations, the needs of victims and means of institutional reform than the criminal justice system alone permits. OHCHR was active in supporting a range of truth and reconciliation commissions in 2011 in contexts as diverse as Burundi, Côte d'Ivoire, and Togo.[45] From the human rights perspective, it is important to consider whether the conditions are ripe for a TRC (particularly in relation to whether the violence has ended and there is sufficient security for witnesses coming forward, as well as adequate community and government support for a Commission), [46] and that the TRC is established in accordance with international standards.

- *Reparations:* While reparations is a key area of transitional justice in theory, it is one of the most neglected aspects in practice, often due to concerns about the financial implications of reparations programmes.[47] OHCHR's work focuses on promoting compliance with key international principles : in particular victims' right to a remedy, including reparations ; the need to consult with victims in designing an appropriate system of reparations, the need to employ appropriate definitions of victims, as well as to use transparent processes, and to ensure gender is taken into account.[48] OHCHR has also increasingly been involved in seeking to mobilise funding for reparations programmes. In Sierra Leone, for instance, the human rights component of UNIOSIL was a member of the Government organised Task Force to look at reparations. It also supported an application with the UN Peacebuilding Fund which allowed the reparations programme to commence. Community symbolic reparation events and partial benefits being delivered to 20 000 of the 32 000 registered victims.[49] In the Democratic Republic of the Congo, the UN High Commissioner for Human Rights deployed a High Level Panel in

[43] Support has also provided for court hearings, with Congolese courts in 2011 delivering 276 judgments, leading to 22 convictions for serious crimes under international law, including war crimes and crimes against humanity: OHCHR Report 2011, p. 55.
[44] The more general topic of cooperation with the ICC can also be of particularly sensitivity. Note the overall framework for UN cooperation within the Negotiated Relationship Agreement between the International Criminal Court and the United Nations.
[45] OHCHR Report 2011, pp. 56-57.
[46] OHCHR, *Rule of Law Tools for Post-Conflict States: Truth Commissions*, 2008, UN Doc. HR/PUB/06/1, p. 2.
[47] Note for instance, de Greiff's reflection that the international community rarely provides significant resources for reparations schemes because of a view that reparations are not the equivalent of a (victims of) crime insurance scheme, but instead need to be linked to acknowledged responsibility for the violations: P de Greiff, 'Addressing the Past: Reparations for Gross Human Rights Abuses', in A Hurwitz (ed), *op. cit*, p. 182.
[48] See OHCHR, *Rule of Law Tools for Post-Conflict States: Reparations Programmes*, 2008, UN Doc. HR/PUB/08/1.
[49] OHCHR Report 2011, p. 57.

2010 to hear directly from victims of sexual violence of their needs and their perceptions of remedies and reparations available to them. Work is continuing on the development of options for the provision of reparations to victims of sexual violence.[50]

- *Institutional Reform, including Vetting*: The nature of institutional reform necessary to respond to the violations which have occurred and to prevent repetition will vary from context to context. The need might relate to embedding civilian control over the military or introducing accountability mechanisms for the military and police and/or strengthening the judiciary, to take but a few examples. In many cases, there will also be a need to look at the vetting of those exercising public power to exclude those responsible for human rights violations, both to rebuild trust in the institutions and respond to calls for justice. MINUSTAH is an example of a mission in which there was large-scale vetting of the police. Between 2006 and 2010, 3 500 background checks of police were completed and handed over to national authorities, and vetting resumed in 2011 (following the interruption caused by the earthquake and the damage to the vetting database).[51] Human rights information is obviously necessary in order to carry out the substantive inquiry, but a human rights perspective is also important to ensure due process to those involved.

- *Building a legacy for national authorities from international/hybrid tribunals*. Somewhat more belatedly, attention has also been focused on maximising the positive legacy for the domestic legal system from international assistance, particularly as it relates to the intensive international assistance for international/hybrid courts. In Sierra Leone, for instance, the Human Rights and Rule of Law Section of the peace missions have been collaborating with the Special Court on a legacy programme: including a project to establish a Peace Museum within the complex of the Special Court, the archiving of transitional justice documents and a capacity building programme with national actors.[52]

(b) ***Constitutional Processes***

Assuming that in a particular post conflict situation, there has been a decision that a new Constitution is needed,[53] the process then embarked upon is often critical for human rights protection within a country. From the grass-roots discussion occurring during the process to the debates within whatever body is established to draft the document, the process involves basic questions about the nature of power, the constraints on that power and within that discussion, the community's expectations of one of the key determinants of the governmental/individual relationship, namely human rights. As the High Commissioner for Human Rights has stated:

> it is not by coincidence that the principles of the 1948 Universal Declaration of Human Rights have been reflected in the constitutions of more than 90 countries…To summarise, constitutional processes can and must be stepping stones for the attainment of larger areas of freedom, justice and wellbeing.[54]

[50] As to the follow up being undertaken, see OHCHR Report 2011, p. 57.
[51] UN Police Magazine, January 2012, p. 10.
[52] For a description of the Special Court of Sierra Leone's Legacy projects, see: http://www.sc-sl.org/LEGACY/tabid/224/Default.aspx.
[53] M. Brandt, J. Cottrell, Y. Ghai, A. Regan, *Constitution Making and Reform: Options for the Process*, Interpeace, 2011 highlights the fundamental nature of the first question as to whether a new Constitution is needed : p. 36.
[54] Address by Navanethem Pillay, UN High Commissioner for Human Rights, University of Nairobi, 8 June 2010.

The Secretary General adopted a revised Guidance Note entitled *UN Assistance to Constitution Making Processes* in April 2009.[55] In the guiding principles, the first principle stated is 'seizing the opportunity for peacebuilding'.[56] The second place is 'encouraging compliance with international norms and standards'.[57] In fuller explanation, the Guidance Note states:

> The UN should consistently promote compliance of constitutions with international human rights and other norms and standards. Thus, it should speak out when a draft constitution does not comply with these standards, especially as they relate to the administration of justice, transitional justice, electoral systems and a range of other constitutional issues. The UN should be the advocate of the standards it has helped to develop. Accordingly, the UN should engage national actors in a dialogue over substantive issues, and explain the country's obligations under international law and the ways in which they could be met in the constitution. The UN should address the rights that have been established under international law for groups that may be subjected to marginalization and discrimination in the country, including women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons. For example, the principle of equality between men and women should be embedded in constitutions, and stated should be encouraged to consider special provisions on children recognizing their status as subjects of human rights.[58]

The inclusion of this paragraph is highly significant. In directing UN officials to speak out on human rights related issues associated with a Constitution, it provides authority for strong advocacy and combats the occasional hesitancy from senior UN officials motivated by fear of 'interfering' with a sensitive sovereign process. The document of course does not state who should engage in the advocacy, and it remains the case that reliance is placed on OHCHR, the High Commissioner for Human Rights or other specialised agencies to raise many of the human rights questions, particularly those deemed 'sensitive'.[59] Greater comfort seems associated with commenting on having clear division of legislative powers or civilian control over military, rather than, for example, economic, social and cultural rights. However, it does provide a basis for a united UN approach in relation to the importance of human rights.

Another aspect of the Guidance Note is the paragraph on supporting inclusivity, participation and transparency:

> The UN should make every effort to support and promote inclusive, participatory and transparent constitution making processes given the comparative experiences and the impact of inclusivity and meaningful participation on the legitimacy of new constitutions. A genuinely inclusive and participatory constitution making process can be a transformational exercise. It can provide a means for the population to experience the basics of democratic governance and learn about relevant principles and standards, thus raising expectations for future popular engagement and transparency in governance. Inclusive and participatory processes are more likely to engender consensus around a constitutional framework agreeable to all. The UN must encourage outreach to all groups in society, and support

[55] *Guidance Note of the Secretary General: UN Assistance to Constitution Making Processes*, April 2009. ('Guidance Note on Constitution Making').
[56] Guidance Note on Constitution Making, p. 3.
[57] Guidance Note on Constitution Making, p. 4.
[58] *Ibid*.
[59] To take one example from the author's experience, in Timor Leste, the then SRSG and political advisers were somewhat cautious about making official submissions to the Constituent Assembly, but were happy for the High Commissioner for Human Rights to make a submission drafted by the human rights component. ILO tends to be called upon in relation to issues of the protection of minority rights, and UNHCR in relation to issues of refugee rights.

public education and consultation campaigns. Human rights defenders, associations of legal professionals, media and other civil society organisations, including those representing women, children, minorities, indigenous peoples, refugees, and stateless and displaced persons, and labour and business should be given a voice in these processes. Consultations with children themselves should also be envisaged.[60]

Human rights field presences are increasingly involved in stressing the need for 'participatory constitutionalism', which is not only open at a general level to participation of all, but explicitly acknowledges and seeks to address pre-existing marginalisation and discrimination on bases such as sex, race, age, and disability. Concrete steps that the author has been involved in, for instance, vary from advocacy for outreach activities by the Constituent Assembly (and provision in the interim of notes of assembly discussions which could be disseminated) in Timor L'este, and the hosting of key conferences to bring together decision makers and civil society actors to discuss human rights matters in Timor Leste and Nepal. This type of facilitative work continues in many human rights component: for example in 2011, the Human Rights Unit of the United Nations Political Office for Somalia (UNPOS) promoted two dialogues to bring together human rights defenders, civil society groups and Government officials to review the draft constitution from a human rights perspective.[61]

(c)Monitoring, Training and Technical Assistance

In order to have properly targeted assistance for 'traditional rule of law institutions',[62] it is vital to have solid analyses of gaps and weaknesses, and to be able, on an ongoing basis, to evaluate the impact of assistance provided. Human rights standards offer the normative framework for assessing functioning and impact. Human rights components regularly monitoring police practices in relation to detention and the use of force, court proceedings, correctional services and the State's response to alleged human rights violations (including the alleged discriminatory application of laws and programmes). In relation to one 'traditional rule of law institution', that of the courts, collecting information on matters such as the independence and impartiality of the judiciary, whether courts provide basic rights to litigants and persons facing criminal prosecution, barriers to access to justice, and how courts deal with gender based violence are as vital as quantitative data on the number of court rooms, the numbers of lawyers etc. The importance of human rights indicators in this assessment process for the justice sector is reflected in the fact that OHCHR and DPKO have worked together in developing UN Rule of Law Indicators to measure progress of institutions of criminal justice in post-conflict States.[63]

Partly due to resources constraints, but also due to prioritisation exercises, the focus of monitoring is often human rights related cases (rather than general monitoring). In Nepal, for instance, OHCHR-Nepal focused on monitoring the progress of emblematic cases involving human rights violations, whilst the Human Rights and Rule of Law Section within the peace mission in Sierra Leone has been monitoring cases related to the political violence. Monitoring generally leads to both formal and informal dialogues with the national authorities, and public reporting which also catalyses further pressures for change.[64] In keeping with the

[60] *Ibid*.
[61] OHCHR Report 2011, p. 46.
[62] Whilst not endorsing the continued focus on 'rule of law institutions', this paper has concentrated on the monitoring, training and technical assistance of such institutions to reflect the emphasis in the Thematic Paper disseminated by the Workshop organisers.
[63] The UN Rule of Law indicators are available on line at:
http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf
[64] For a recent study of the impact of monitoring activities, see L. Mahony, R. Nash, *Influence on the Ground: Understanding and Strengthening the protection impact of United Nations human rights field presences*, Fieldview Solutions, 2012.

emphasis on ensuring feedback from affected communities, in some contexts human rights components support 'grass roots feedback' on the justice system. In Sierra Leone, for instance, UNIPSIL's Human Rights and Rule of Law Section supports justice coordination fora at district level which allow those involved in the justice sector (whether government representatives, lawyers or civil society) to raise concerns and for strategies to be developed to assist. As a result, problems such as the ill-treatment of detainees, or the inaccurate determination (sometimes deliberate inflating) of ages of accused and hence inappropriate treatment of minors are being addressed.[65] On a daily basis, human rights officers are involved with monitoring aspects of 'rule of law institutions' and raising concerns directly with authorities: in the criminal justice field, for instance, relating to such issues as the arbitrary detention of persons, torture or ill-treatment, lack of access to lawyers, unfair trials or inhumane conditions of detention.

In some cases the effect of monitoring and public reporting is immediately apparent. In South Sudan, for instance, following a report of the UNMISS' Human Rights Division outlining human rights violations by the Southern Sudan Police Service, a high level inquiry was ordered by the President of South Sudan. The Minister of the Interior also responded by taking steps to address some of the concerns raised.[66] In 2011, the human rights component of UNMAMA released a report on the treatment of conflict related detainees held by the National Directorate of Security (NDS) and Afghan National Police (ANP). As a result, Government and ISAF made changes to their policies, including the introduction of a system for tracking detainees handed over by ISAF to the Afghan Government, and the Afghan Government commenced setting up an internal oversight commission of the NDS.[67]

Alongside and informed by the results of human rights monitoring are also technical assistance and training programmes. Technical assistance programmes often focus on assisting national authorities with compliance with international standards, whether the subject is criminal law, family law, inheritance laws, national human rights institutions, transitional justice or other topics. Assistance has also been provided in relation to the Government's development of relevant strategic plans: eg assistance with justice sector plans. Similarly, human rights is regularly recognised as important in eg drafting manuals for the police and in providing advice on disciplinary proceedings. From my experience in Timor, the contribution of the human rights component was critical in helping to shape standard operating procedures to be applied by national authorities, and advocating for more rigorous systems of accountability, including the internal disciplinary process. Most human rights components have a training programme which permits training on international human rights standards to be provided to officials from 'traditional rule of law institutions' such as judges, lawyers, police and corrections staff. Within the UN itself, training also extends to having modules on human rights within the training provided to senior leaders, UN peacekeepers, UNPOL, and judicial affairs officers.

[65] OHCHR Report 2011, p. 51.
[66] OHCHR Report 2011, p. 55.
[67] OHCHR Report 2011, p. 51.

IV Some outstanding Challenges

As indicated in the sections above, progress has been made in having human rights integrated into UN rule of law discourse and practice. There are, however, a number of key challenges that remain. Amongst the key issues I would identify are:

- *Avoiding the reduction of the rule of law conceptualisation to the sum of institutional programming.*

Conceptualisation of the 'rule of law' within the UN remains vulnerable to being reduced to the sum of institutional programming. In a phase in which particular energy has focused on improving coordination between UN actors, the emphasis on institutional mandates is perhaps understandable. However, in the long term, it remains necessary for the UN to approach the rule of law holistically to realise the vision of the 2004 definition of the rule of law. Linked to this exploration will also be continued discussions of the means of harnessing the contributions of specialised agencies (a matter raised further below).

- *Accepting the need for prioritising, sequencing and incremental change whilst retaining the commitment to human rights.*

In any country context where the rule of law challenges are great, but resources are limited (both within that State and in terms of international assistance), it is necessary to accept that change may be incremental and there will inevitably need to be prioritising and sequencing in addressing gaps within the field. However, contrary to the argument of some commentators, this does not necessarily equate to abandoning a more substantive notion of the rule of law,[68] in particular the commitment to a human rights based approach. To take a concrete example, if a State was rehabilitating the justice sector (opening court houses and managing case-loads) in circumstances where it had resources to support only 50% of cases, preference could still be given to a plan which, for instance, re-opened half of the courts initially, rather than limiting the courts to hearing certain types of cases (eg only criminal justice matters, and not family law matters, an outcome likely to have a particular gendered impact).

- *Maximising the contributions of all relevant areas within the UN and leveraging the benefits of multiple actors*

As noted in most sources examining UN rule of law operations, there are a large number of UN actors involved in the rule of law space, even in the relatively narrow field of traditional rule of law institutions. Coordination continues to be an area requiring attention. To flesh out different models for rule of law architecture at either the global or country level would require a separate paper, but for present purposes, I would note that it will remain critical to be able to effectively harness the contributions of all within the UN system who have specialist expertise and to leverage the benefits of agencies' specific mandates and expertise.

- *Recognising the need for attention to broader rule of law culture*

[68] For a recent study suggesting the UN abandon the 'thick' approach to the rule of law in most post conflict environments, see C Kavanagh, B Jones, *Shaky Foundations: An Assessment of the UN's Rule of Law Support Agenda*, NYU Center on International Cooperation, November 2011.

Even in systems with sufficient legal frameworks and systems of enforcement, crises of the rule of law can occur. Some might be linked less to weaknesses in particular rule of law institutions, than to weaknesses within the rule of law culture: eg the extent to which all (particularly those exercising power) share the conception of power being constrained by pre-determined laws and processes. This remains a relatively limited area of training and technical assistance in an operational sense, yet is worthy of greater attention.

- *Acknowledging and addressing nervousness around the political sensitivities in the human rights field*

Significant progress has occurred with the development of Guidance Notes that explicitly direct personnel to engage in robust advocacy for human rights topics. However, what is still needed is a consolidation and full internalisation of these standards. Even though highlighting gaps and calling for reform and accountability can create tensions with national authorities, failure to do so risks weakening the long term impact of the « rule of law » assistance programmes and would be inconsistent with abiding UN principles.

- *Promoting policy coherence: ensuring human rights principles are applied in all aspects of UN operations.*

In order to be effective in its human rights and rule of law operations, it is critical that the UN is able to speak from a position of credibility. The handling of topics such as sexual exploitation and abuse by peacekeepers or UN civilian staff and the operationalization of its Human Rights Due Diligence Policy for UN support to non-UN Security Forces are of particular importance in this field. It is likewise important for inter-governmental bodies, including the Security Council, to act in accordance with human rights principles, including due process and the importance of accountability, in deciding how to exercise its powers (eg in relation to its power of referral of a country situation to the ICC) or following up State inaction in relation to investigation and appropriate action in relation to human rights violations.

Conclusion

To come back to the opening question posed in this paper, it is apparent that UN discourse and practise has adopted a substantive view of the rule of law, such that human rights are seen as a means of judging whether the rule of law exists. Even whilst the focus of UN rule of law work remains largely on ‘traditional rule of law institutions’, there are some signs of a broadening approach (eg within the inclusion of the holistic approach to transitional justice). Debate may usefully continue on issues such as the appropriate rule of law architecture and the appropriate sequencing of rule of law initiatives. However, it would be counterproductive to suggest that rule of law could be divorced from a human rights perspective. Human rights provide the basis for how we look at an effective operating justice system, as well as more broadly, the exercise of power by institutions which enjoy the trust of the community and exercise their power in accordance with agreed pre-determined limits. Whilst the sensitivity of some human rights topics means that some actors might still see human rights as an ‘unruly cousin’, increasingly there is recognition that human rights form a vital part of the bedrock for effective rule of law assistance.