

# United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies

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with  
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## I. INTRODUCTION AND OVERVIEW

The reform of the United Nations (“U.N.”) is a priority both for the organization itself and for its member states. In recent years, a multitude of reports exploring the future path of the organization and its role in a troubled world have been published.<sup>1</sup> While all of these documents stress the importance of reforming the U.N., questions remain as to how reforms will be implemented and what impact they will have.

One area that is repeatedly mentioned both in terms of U.N. reform and the future role of the organization is in building the “rule of law” in developing countries in general and post-conflict societies in particular. This Article discusses what is meant by the “rule of law” and which aspects of the rule of law are relevant to the U.N.’s current and future work. This Article also explores how the organization can use its resources and expertise, in coordination with other actors, to help build the rule of law in societies devastated by armed conflict.

While post-conflict societies differ from each other in significant respects, they all encounter common problems, including addressing crimes committed

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1. See, e.g., The Secretary-General, *Report of the Secretary-General: In larger freedom: towards development, security and human rights for all*, U.N. GAOR, 59th Sess., U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In larger freedom*]; The Secretary-General’s High Level Panel on Threats, Challenges, and Change, *Report of the Secretary-General’s High-level Panel on Threats, Challenges and Change: A more secure world: our shared responsibility*, U.N. GAOR, 59th Sess., U.N. Doc. A/59/565 (Dec. 2, 2005), available at <http://www.un.org/secureworld> [hereinafter *High Level Panel Report*]; The Secretary-General, *Report of the Secretary-General: Road map towards the implementation of the United Nations Millennium Declaration*, U.N. GAOR, 56th Sess., U.N. Doc. A/56/326 (Sept. 6, 2001).

during the conflict, reestablishing a functioning government, and healing residual animosities and divisions within the society. In addition to post-conflict issues, these societies must also address problems such as poverty, corruption, and the lack of a legal infrastructure—problems that confront other underdeveloped countries. One should be careful not to create a false dichotomy between traditional rule of law development work and efforts to build the rule of law in post-conflict societies. In fact, many of the strategies employed in the former are also relevant to the latter.

This Article first addresses what is meant by the “rule of law” and, more fundamentally, what can be done to help develop it in post-conflict societies. In order to give effect to the rule of law, these societies must address the crimes committed during the conflict, create sound legal infrastructure, and build functioning institutions. We next address what role the U.N. can most effectively play in fostering this process. This discussion focuses on the proposals of the Secretary-General’s High Level Panel on Threats, Challenges and Change (“the Panel”),<sup>2</sup> which aimed to make recommendations for change and serve as the blueprint for U.N. reform.

One of the principal institutional weaknesses identified by the Panel is that the U.N. lacks the capacity to address adequately the needs of countries in transition from war to peace. The Panel makes a number of proposals to address this issue, including the establishment of a Peacebuilding Commission supported by the Peacebuilding Support Office (“PSO”) and the Rule of Law Assistance Unit (“RLAU”).<sup>3</sup> An important component of this effort to increase the U.N.’s capacity to support and assist countries in the transition from war to peace is rule of law assistance.

In view of these proposed reforms, we discuss and examine these new institutions. We will focus particularly on the RLAU, which is slated to play the key role in pushing forward the rule of law agenda in post-conflict societies. During the course of this discussion, it is important to take into account other actors with which the U.N. cooperates and to outline the respective roles played by the U.N. and its partners. Finally, in an effort to determine how the U.N. system as a whole might evolve to more effectively support the development of the rule of law in these societies, we explore the connection between these efforts and U.N. reform more broadly.

## II. DEFINING AND APPLYING THE RULE OF LAW

### A. *What Is the Rule of Law? Which Rule of Law?*

The phrase “the rule of law” is found in most discussions regarding post-conflict societies, and those about the work of the U.N. generally. Indeed, the rule of law is seen by many to be of primary importance in post-conflict societies. For example, Lord Ashdown, then High Representative for Bosnia-

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2. *High Level Panel Report*, *supra* note 1, ¶¶ 261–269.

3. *Id.*

Herzegovina, noted: “In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and the courts.”<sup>4</sup> This view is widely shared by governments and non-governmental actors alike.<sup>5</sup>

Despite the ubiquity of its usage and the importance of the idea, the rule of law, much like the concepts of “justice” or “transitional justice,” is endowed with “a multiplicity of definitions and understandings . . . even among the [U.N.’s] closest partners in the field.”<sup>6</sup> There are a number of approaches to defining the rule of law or at least identifying the principal elements that constitute the concept. For example, the Secretary-General has defined it in these terms:

The rule of law is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to 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.<sup>7</sup>

This is a good “black letter” definition of the rule of law because it covers the principal elements that lawyers expect in terms of how the law is created and applied. However, an important element is missing from any such definition. As Gerhard Casper puts it, “the rule of law is not a recipe for detailed institutional design. [It is] an interconnected cluster of values.”<sup>8</sup>

Casper articulates a number of approaches to defining the rule of law, ranging from a minimalist approach whereby the rule of law is simply a set of rules administered by an independent judiciary, to the idea that the rule

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4. Paddy Ashdown, *What I Learned in Bosnia*, N.Y. TIMES, Oct. 28, 2002, at A2.

5. Sir Emyr Jones Parry, U.K. Permanent Representative to the U.N., Address to the International Security and Global Issues Research Group and the David Davies Memorial Institute Seminar (Nov. 10, 2004) (transcript available at [http://www.ukun.org/articles\\_show.asp?ArticleType=17&Article\\_ID=813](http://www.ukun.org/articles_show.asp?ArticleType=17&Article_ID=813)) (“This view of the critical importance of justice and the rule of law both pre- and post-conflict is not one held only by a few western democratic governments . . . the [U.N.] Secretariat, NGOs and academics are all agreed.”).

6. The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 5, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rule of Law Report*].

7. *Id.*, ¶ 6. See also Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998).

8. Gerhard Casper, Rule of Law? Whose Law? Keynote Address, 2003 CEELI Award Ceremony and Luncheon, San Francisco, Cal. (Aug. 9, 2003) quoting Martin Krygier, INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 13404 (Smelser & Baltes eds., 2001), available at [http://iis-db.stanford.edu/pubs/20677/Rule\\_of\\_Law.pdf](http://iis-db.stanford.edu/pubs/20677/Rule_of_Law.pdf).

of law is a set of substantive rules requiring a democratic political system.<sup>9</sup> Given these various approaches, “the concept of the rule law is a fairly empty vessel whose content, depending on legal cultures and historical conditions, can differ considerably and, therefore, can give rise to vast disagreements and, indeed, conflicts.”<sup>10</sup> One can easily see how differences in the various approaches might lead to conflict. For example, in Iraq there has been considerable debate regarding the extent to which *Shari’a* law, as opposed to secular approaches, should be incorporated into the Iraqi constitution and legal system.<sup>11</sup>

In view of these various approaches and possible differences in definition, Casper also indicates that there are several universalist approaches to the rule of law.<sup>12</sup> Of these, he notes that public international law, which primarily derives “its authority from agreement, consensus, and custom among nation states,” at least with respect to human rights law “is, if not considered binding worldwide, then at least highly authoritative.”<sup>13</sup> Almost all countries have acceded to the United Nations Charter and an overwhelming majority of states are parties to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>14</sup>

Thus, while countries with different legal systems have varied approaches to both procedural and substantive law, there is widespread agreement on the essential elements of the rule of law, as distilled in international human rights law.<sup>15</sup> These include basic due process rights—such as the right to counsel, the right of an accused person to know the charges against him or her, and the presumption of innocence—as well as a number of other civil rights including freedom of religion, freedom of expression, and freedom of association.<sup>16</sup> Given the widespread acceptance of these human rights norms, they serve as a reference point from which to answer the question of what is meant by “the rule of law.” Of course, this is only a partial answer to the question of the substantive norms that societies must adopt and implement before they are said to have established the rule of law. International human rights law only establishes the minimum procedural and substantive legal

9. *Id.*; see generally Agnes Hurwitz & Kaysie Studdard, Policy Paper, International Peace Academy, Rule of Law Programs in Peace Operations 3 (Aug. 2005), [http://www.ipacademy.org/Programs/Research/ProgReseSecDev\\_Pub.htm](http://www.ipacademy.org/Programs/Research/ProgReseSecDev_Pub.htm).

10. Casper, *supra* note 8.

11. Q&A: *Wrangling Over Iraq's Constitution*, N.Y. TIMES, July 27, 2005.

12. Casper, *supra* note 8 (identifying three principal strands of the universalist approach: divine law, natural law and public international law).

13. *Id.*

14. See International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

15. Casper describes it in this way:

[W]e take the nation states by their word when it comes to their basic commitment to the rule of law and to human rights. Given the overwhelming international agreement, virtual consensus, concerning fundamental rights and rule of law, we should assume that the burden of proof has shifted to those countries that would deny the rule of law in principle.

Casper, *supra* note 8.

16. See ICCPR, *supra* note 14, arts. 14, 18, 19, 21, 22.

guarantees; it does not define the substance of other laws to be adopted. More importantly, the almost universal formal adoption by states of these human rights norms does not guarantee that they will be implemented. Indeed, it is clear that in some countries these rights are honored sporadically at best. Finally, as we have discussed above, the rule of law is not simply a bundle of rules, but rather a “cluster of values.”

In sum, there exists a set of rules—international human rights norms—that establish the minimum of what must be in place before a state or society can move toward the rule of law. This approach also addresses, at least at the theoretical level, issues that arose in the law and development movement<sup>17</sup> of the 1960s. That movement has been criticized, *inter alia*, as a form of neo-colonialism for its efforts to transplant legal norms from North America to developing countries.<sup>18</sup> Defining the rule of law in terms of widely accepted international norms therefore allows for the emergence of the concept of the rule of law at an international level without the taint of undue Western influence.

We now move from the essential legal norms to a discussion of how these norms can be given effect in a post-conflict society. In particular, we explore how, in societies devastated by conflict and destruction, the norms established by widely accepted human rights instruments move from the printed page to enforcement in courts and legal processes. We also explore the role of a reformed U.N. in that process.

### B. A Framework for Supporting the Rule of Law in a Post-Conflict Society

#### 1. Addressing the Past: Holding Those Responsible to Account

Addressing the past is, initially, the most pressing issue in a post-conflict society. To do so in an effective manner requires that individuals who have committed serious crimes during the conflict be held accountable through a mechanism that delivers justice to victims and punishment to perpetrators. This is a particularly difficult task when there is an absence of trust between different ethnic communities or political groupings and no functioning judicial system. Given the U.N.’s unique mandate to promote peace and security, it has a critically important task in helping to establish appropriate mechanisms to address the crimes of the past without reigniting the prior conflict.

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17. Thomas Carothers describes the law and development movement in the following terms:

Programs emphasized legal education, particularly the goal of trying to recast methods of teaching law in developing countries in the image of the American Socratic, case-oriented methods . . . [and] encouraged lawyers and legal educators in developing countries to treat the law as an activist instrument of progressive social change.

THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 24 (1999).

18. See Varda Hussain, *Note, Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crimes Tribunals*, 45 VA. J. INT’L L. 547, 551–58 (2005).

The process of holding accountable those responsible for serious violations of international humanitarian law<sup>19</sup> is a recent development. One might believe that in the past, these crimes were seemingly forgotten as societies tried simply to “move on.” However, one need only examine the continuing debate over the slaughter of Armenians at the beginning of the twentieth century,<sup>20</sup> the ongoing attempts to hold military and political leaders accountable in South American countries decades after atrocities were committed,<sup>21</sup> and the repeated cycles of violence in the Balkans<sup>22</sup> to conclude that societies have consistently demanded some form of justice for mass crimes.<sup>23</sup> The basis of the rule of law is that no person, no matter his or her position, is above the law. There can be little hope for a society that continues to be governed by those who have committed mass crimes with impunity. Thus, without some accountability for such crimes, there can be no basis for a post-conflict society to establish the rule of law.

Of course, there are some who argue that justice and peace sometimes conflict, in that the leaders of a country, no matter how tainted by “war crimes,” may be essential to negotiating peace. If this argument were correct, attempts to impose justice could undermine efforts to establish peace.<sup>24</sup> However, while there are legitimate debates to be had on the timing of justice initiatives, this argument creates a false choice between peace and justice, at the expense of the rule of law. A peace arrangement that leaves in place leaders who have committed crimes is simply buying time until the seeds sown by those crimes

19. International Humanitarian Law is a set of rules which seeks to protect people who have not participated, or who are no longer participating, in hostilities. It also restricts the methods and means of warfare. *See, e.g.*, Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, T.S. 403; Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539; the four Geneva Conventions of Aug. 12, 1949 [hereinafter Geneva Conventions]; the Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951). The Geneva Conventions include Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons of Time of War, Aug. 12, 1949, 6 U.S.T. 6516, 75 U.N.T.S. 287. The Geneva Conventions were supplemented by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Aug. 15, 1977, U.N. Doc. A/32/144; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Aug. 15, 1977, U.N. Doc. A/32/144.

20. *See, e.g.*, Bertil Duner, *What Can Be Done About Historical Atrocities? The Armenian Case*, 8 INT'L J. HUM. RTS. 217 (2004).

21. *See, e.g.*, Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT'L & COMP. L. REV. 419 (2002).

22. *See generally* MISHA GLENNY, *THE BALKANS 1804–1999: NATIONALISM, WAR AND THE GREAT POWERS* (1999).

23. *See, e.g.*, 1 TRANSITIONAL JUSTICE: GENERAL CONSIDERATIONS xxii (Neil J. Kritz ed., United States Institute of Peace Press 1995) (“[T]here is a growing consensus that, at least for the most heinous violations of human rights and international humanitarian law, a sweeping amnesty is impermissible.”).

24. *See, e.g.*, Judge Hisashi Owada, *Some Reflections on Justice in a Globalizing World*, 97 AM. SOC'Y INT'L L. PROC. 181 (2003).

undermine that society again. Failure to address past crimes thus hinders the restructuring of a post-conflict society because it disregards the rule of law.

While acknowledging that post-conflict situations are highly complex, it is worth noting the example of post-war Germany, where considerable efforts were made to address past crimes through both international and domestic trials, setting the stage for a society based on the rule of law.<sup>25</sup> On the other hand, in the former Yugoslavia, the failure to address the past, including crimes committed during World War II, has been cited as one of the causes of the eruption of violence in the 1990s.<sup>26</sup>

The next challenge in terms of accountability is the manner in which to hold individuals responsible in a fragile post-conflict society. Following the trials at the end of World War II, there were very few developments in terms of international mechanisms to hold individuals accountable for such crimes.<sup>27</sup> During this time, international norms, established by the Geneva Conventions and subsequent protocols, the Genocide Convention, and a plethora of other normative treaties,<sup>28</sup> have developed and have been widely adopted. However, with the exception of certain domestic prosecutions, most notably the Eichmann trial,<sup>29</sup> these laws were largely not enforced.

This lacuna has begun to be addressed over the past two decades, in a variety of ways.<sup>30</sup> For example, South Africa and many Latin American countries have wrestled with histories where state officials committed extensive human rights abuses including torture, murder and “disappearances.”<sup>31</sup> The response to these crimes has been varied, with at least thirty countries, including South Africa and a number of Latin America states, pursuing truth and reconciliation commissions.<sup>32</sup> While the approach differed in the various countries, these were usually non-judicial mechanisms<sup>33</sup> in which testimony and other evi-

25. See generally 2 TRANSITIONAL JUSTICE: COUNTRY STUDIES 1–69 (Neil J. Kritz ed., United States Institute of Peace Press 1995) (discussing post-Nazi Germany).

26. See generally TIM JUDAH, THE SERBS: HISTORY, MYTH AND THE DESTRUCTION OF YUGOSLAVIA (1997) (analyzing Serbian history, politics and war).

27. See Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 13–39 (1997).

28. E.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 660 U.N.T.S. 195 (entered into force June 26, 1987).

29. See *Att’y Gen. of Israel v. Adolf Eichmann*, 36 I.L.R. 5 (Isr. D.C., Jerusalem, Dec. 12, 1961), aff’d, 36 I.L.R.277 (Isr. S. Ct., May 29, 1962). See also HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Faber and Faber 1963).

30. In a somewhat related development, in the post-1989 era a number of Eastern European countries introduced lustration laws, which provided for excluding certain persons from participating in public life and were used for screening and “prosecuting” former communist leaders, candidates for office and selected public employees. These laws were adopted in Germany, Bulgaria, Hungary, Albania, Romania, and certain former Soviet Republics. See, e.g., Act from 5 July 1996 on Civil Service, Dz.U.96.89.402 (Poland).

31. See Declaration on the Protection of All Persons from Enforced Disappearances, G.A.Res. 47/133, 47 U.N. GAOR Supp. (No. 49), at 207, U.N. Doc. A/47/49 (Dec. 18, 1992).

32. *Rule of Law Report*, *supra* note 6, ¶ 26.

33. In South Africa, there was a judicial effect in that amnesty was granted in exchange for truthful testimony. See Rosemary Nagy, *Violence, Amnesty and Transitional Law: “Private” Acts and “Public” Truth in South Africa*, 1 AFR. J. LEGAL STUD. 1 (2004).

dence was considered, a record establishing the facts relating to the conflict was created to the extent possible, and victims were permitted to tell their stories in an official forum.<sup>34</sup> These non-judicial proceedings accord with the basic human rights notion that victims should know the truth about crimes committed against them and their loved ones.<sup>35</sup> This right to know was initially articulated by the U.N. Human Rights Commission in its *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, and has been widely recognized in international judicial rulings.<sup>36</sup> These include decisions by the U.N. Human Rights Committee, acting under the International Covenant for Civil and Political Rights, as well as in the case law of the Inter-American Court of Human Rights and the European Court of Human Rights.<sup>37</sup>

International judicial mechanisms to hold individuals accountable for serious violations of international humanitarian law recently emerged for the first time since the Nuremburg and Tokyo trials with the creation of the International Tribunal for the former Yugoslavia (“ICTY”) in 1993. This was soon followed by the establishment of the International Criminal Tribunal for Rwanda (“ICTR”). These two ad hoc tribunals, so-named due to their limited subject matter, temporal, and territorial jurisdictions,<sup>38</sup> have a number of achievements to date. They were each created by the U.N. Security Council acting under Chapter VII of the U.N. Charter. They thus have an international legal basis and avoid the label of “victor’s justice,”<sup>39</sup> one commonly attached to their Nuremburg and Tokyo predecessors which were established by the victorious Allies.

These tribunals have established a comprehensive body of law, both substantive and procedural, which has helped to break the historical pattern of impunity in the post–World War II era. They have been widely viewed as conducting fair trials,<sup>40</sup> providing a measure of justice to victims, and re-

34. See Elizabeth Stanley, *Truth Commissions and the Recognition of State Crime*, 45 BRIT. J. CRIMINOLOGY 582 (2005).

35. See U.N. Hum. Rts. Comm’n, *Independent Study on Best Practices, including recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity*, U.N. Doc. E/CN.4/2004/88 (Feb. 27, 2004) (prepared by Prof. Diane Orentlicher) [hereinafter *Independent Study*].

36. U.N. Econ. & Soc. Council, Comm’n on Human Rights, *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, § II(A), U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

37. *Independent Study*, *supra* note 35, § II(A) (discussing the right to know and surveying the jurisprudence recognizing that right).

38. Statute of the ICTY, May 25, 1993, 32 I.L.M. 1203; Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598.

39. See Hervé Ascensio, *La Justice Pénale Internationale de Nuremberg à La Haye* [International Criminal Justice from Nuremberg to The Hague], in LA JUSTICE PÉNALE INTERNATIONALE 29–44 (Simone Gaboriau et al. eds., Presses Universitaires de Limoges, 2002). See also Kenneth Anderson, *Humanitarian Inviolability in Crisis: The Meaning of Impartiality and Neutrality for U.N. and NGO Agencies Following the 2003–2004 Afghanistan and Iraq Conflicts*, 17 HARV. HUM. RTS. J. 41, 65–67 (defending the idea of “victor’s justice”).

40. Erik Møse, *Impact of Human Rights Conventions on the Two ad hoc Tribunals*, in HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN: ESSAYS IN HONOUR OF ASBJØRN EIDE 179, 191–93

moving war criminals from the seats of power and thus “clearing the ground” for more responsible government. The long-term deterrent impact of the tribunals is unclear, but overall they have accomplished much under difficult circumstances,<sup>41</sup> not the least by putting the respective leaders of the Federal Republic of Yugoslavia (Milosevic) and Rwanda (Kambanda) on trial.

The ad hoc tribunals do, however, have their critics.<sup>42</sup> Some claim that their limited jurisdictions, which allow for the trial of human rights violators from Rwanda and Yugoslavia but not from stronger countries, undermine their legitimacy.<sup>43</sup> This argument, however, appears to have lost much of its force with the advent of the International Criminal Court (“ICC”), which has a much broader mandate, and which would not have been possible without the ad hoc tribunals’ trailblazing work. Moreover, while the critics have a point when they note the inequity of treatment from one country to the next, this hardly justifies not holding to account some perpetrators of mass atrocities simply because others cannot presently be held accountable.

Others claim that the tribunals are slow and too costly.<sup>44</sup> Though there is some merit to such claims, the slow pace and the high expense stems in part from the difficulties of establishing institutions situated outside the subject country and without the coercive powers typically available to other courts. Moreover, there are costs associated with translations, travel, U.N. bureaucracy, and the sheer difficulties of the cases. With respect to costs, the expense of the trials actually compares favorably with similarly complex trials in developed countries such as the United States.<sup>45</sup> A careful examination of the facts show that these tribunals have achieved much in very difficult circumstances and have had a positive impact on the rule of law both within their respective jurisdictions and beyond.

A more telling criticism is the lack of connection that these tribunals have with the countries over which they exercise jurisdiction.<sup>46</sup> Both tribunals have experienced difficulties explaining their records to the people in the former Yugoslavia and Rwanda, respectively, and have had little impact on the long-term development of legal infrastructure in these countries. While there were legitimate reasons for establishing the ad hoc tribunals outside their respective regions—it would have been impossible to establish the ICTY in war-torn Yugoslavia—nonetheless the physical separation created serious issues.

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(Morten Bergsmo ed., 2003).

41. David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 9 (2002), available at [http://www.abanet.org/ceeli/publications/other\\_pubs/tolbert\\_fletcher\\_forum.pdf](http://www.abanet.org/ceeli/publications/other_pubs/tolbert_fletcher_forum.pdf).

42. See, e.g., Ralph Zacklin, *The Failures of the Ad Hoc Tribunals*, 2 J. INT’L CRIM. JUST. 541 (2004).

43. See generally Jose Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT’L L. 365 (1999) (discussing Rwandan genocide).

44. Zacklin, *supra* note 42.

45. See generally David Wippman, *The Costs of International Justice* (2006) (unpublished draft, on file with author) (comparing costs of international tribunals with costs of U.S. trials).

46. See Tolbert, *supra* note 41.

This explains in large measure the move toward different approaches when conflicts arose in Sierra Leone, East Timor, and Kosovo, and also the belated establishment of a tribunal to try the crimes committed by the Khmer Rouge in Cambodia in the 1970s.<sup>47</sup> In each of these cases, a “hybrid” or “mixed” court was established in-country, composed of international judges and prosecutors working together with their domestic counterparts.<sup>48</sup> The underlying premise is twofold: (1) by being located in the country, and to the extent possible also applying domestic law, justice is brought closer to the local population; (2) the mixture of international and domestic legal professionals allows for training and development of local judges and lawyers.

The hybrid courts are attractive in that they have a more direct impact on the population and on the development of legal professionals. On the other hand, it is simply not possible to try every high-level accused in-country, as the political and security situation may not allow it. There are also problems in attracting the appropriate international staff to countries decimated by conflict. Nonetheless, such hybrid courts and tribunals have an important role to play, both in delivering justice and in building local capacity through the mentoring of domestic judges and prosecutors.<sup>49</sup>

It is also worth noting that the Special Court for Sierra Leone<sup>50</sup> (“SCSL”), a hybrid court established by agreement between the U.N. and the Government of Sierra Leone, operated simultaneously alongside a truth and reconciliation commission. The Court has jurisdiction over individuals bearing “the greatest responsibility” for crimes committed during that conflict, while the Commission investigates and establishes a historical record of the conflict and promotes reconciliation.<sup>51</sup>

The ICC has taken into account the importance of domestic prosecutions of serious violations of international humanitarian law by adopting a “complementarity” regime as its jurisdictional basis.<sup>52</sup> Under this regime, the ICC cannot proceed unless the local authorities “cannot or will not” initiate a

47. See Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1 (2005).

48. See Laura A. Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENV. J. INT'L L. & POL'Y 23, 26–39 (2002).

49. It is also possible for an international tribunal to transfer certain lower-level cases to domestic or hybrid courts, as is now occurring between the ICTY and courts and prosecutors in the countries of the former Yugoslavia. The state court in Bosnia-Herzegovina is a hybrid court. See The Secretary-General, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, ¶¶ 123–124, 138, 142–143, 174, U.N. Doc. A/60/267/S/2005/532 (Aug. 17, 2005).

50. Agreement Between the U.N. and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.–Sierra Leone, Jan. 16, 2002, U.N. Doc. S/RES/1315, available at <http://www.specialcourt.org/documents/Agreement.htm>.

51. The Secretary-General, *Eighth Report of the Secretary-General on the United Nations Mission in Sierra Leone*, ¶ 7, U.N. S/2000/1199 (Dec. 15, 2000). See also William A. Schabas, *The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone*, 25 HUM. RTS. Q. 1035 (2003) (discussing the various functions of the Truth and Reconciliation Commission in Sierra Leone).

52. Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 37 I.L.M. 999, [hereinafter Rome Statute].

prosecution.<sup>53</sup> Thus, unlike the ad hoc tribunals which exercise primacy over local judicial authorities, the ICC attempts a partnership with domestic courts and acts only as a court of last resort. Moreover, states ratifying the ICC Statute are required to adopt the law as established by the ICC Statute. In this regard, the contribution of the ICC has been to establish clearly the current state of international humanitarian law and to require ratifying states to adopt it.<sup>54</sup>

There are, therefore, a number of approaches to dealing with crimes and other past events in a post-conflict society.<sup>55</sup> Truth commissions and local processes, such as *Gacaca*,<sup>56</sup> have a role to play in establishing the historical record of a conflict and providing a forum for victims. There are two further points to be made about these mechanisms. The first concerns instances where the truth and reconciliation process complements a criminal process, such as in the case of Sierra Leone or Rwanda. In Rwanda, the scale of the crimes and the number of perpetrators are too great for international or domestic courts to try each and every perpetrator. Similarly, in Sierra Leone, certain perpetrators may not be of an age suitable for prosecution.<sup>57</sup> In these cases, members of the senior political and/or military leadership “most responsible” are held accountable for mass crimes, while other perpetrators are dealt with through parallel mechanisms such as the truth commissions and local processes. Second, it is arguable that certain lower intensity conflicts might be better addressed by a truth and reconciliation commission. Nonetheless, we would strongly argue that this cannot be at the expense of justice: the principal perpetrators must be held to account in a criminal process.<sup>58</sup> Otherwise, the attempt to build the rule of law will begin on faulty footing and the society risks slipping back into conflict.

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53. *Id.*, art. 17.

54. See Turner, *supra* note 47.

55. One development that runs counter to local prosecutions is the adoption of universal jurisdiction for certain international crimes. That is, a state can assert jurisdiction over certain crimes (e.g., crimes against humanity) on account of the nature of the crime without a factual nexus between the crime and that jurisdiction. Universal jurisdiction, however, seems to have hit its high water mark, and is now being approached more cautiously. In any event, it suffers from some of the drawbacks of the ad hoc tribunals, such as lack of connection to place of the crimes, without the legitimacy that the tribunals have derived from being U.N. organs. For these and other reasons, its role is likely to be limited. See generally MITSUE INAZUMI, UNIVERSAL JURISDICTION IN MODERN INTERNATIONAL LAW: EXPANSION OF NATIONAL JURISDICTION FOR PROSECUTING SERIOUS CRIMES UNDER INTERNATIONAL LAW 269 (2005).

56. *Gacaca* refers to a traditional Rwandan method of conflict resolution. When social norms were broken or disputes arose, meetings were convened between the aggrieved parties. Contemporary *Gacaca* jurisdictions deal not with local disputes but with genocide, and are a modified form of the traditional tribunals. See William A. Schabas, *Genocide Trials and Gacaca Courts*, 3 J. INT'L CRIM. JUST. 879 (2005).

57. Ann Davison, *Child Soldiers: No Longer a Minor Incident*, 12 WILLAMETTE J. INT'L L. & DISP. RESOL. 124, 133–34 (2004).

58. See Jeanne M. Woods, *Reconciling Reconciliation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 81, 103–04 (1998). It is noteworthy that the South African experience (where full amnesty was possible) had unique features, as illustrated by a South African delegate's comment on the Rule of Law Report: “We are the first to concede that our South African experience may not be applicable to other countries emerging from conflict and the lessons we have learned may not travel well.” U.N. SCOR, 59th Sess., 5052d Mtg. at 13, U.N. Doc. S/PV/5052 (Oct. 6, 2004) [hereinafter 5052d Mtg.].

It appears that the world will not return to the approach of the post-war period when leaders committed atrocities with total impunity. What remains unclear is how accountability mechanisms will evolve. Despite their achievements, it is unlikely that there will be new ad hoc tribunals in the near future. Instead, the ICC and hybrid courts will likely come to play the central role in international judicial mechanisms. Because of its limited resources, the ICC will only be able to try the most serious crimes and the leaders of the highest level. Thus, other mechanisms, particularly hybrid courts of various types, will need to be established.

The United Nations will continue to play a key role in establishing these mechanisms. Although the ICC is not a U.N. organ, it was established under U.N. auspices and has a number of important links to the U.N., including the possibility of referrals by the U.N. Security Council,<sup>59</sup> as has now occurred with Darfur.<sup>60</sup> While a number of U.N. Member States, including Security Council members, have not ratified the ICC Statute and, in the case of the United States, actively oppose the ICC, the Darfur example illustrates that in certain cases the ICC will work on the basis of a U.N. mandate. Other international hybrid courts have been established primarily through the efforts of the U.N., either by agreement with the relevant state, as with the Extraordinary Chambers for Cambodia,<sup>61</sup> or under the auspices of U.N. Peacekeeping Operations, as in Kosovo and East Timor.<sup>62</sup>

The U.N.'s role in establishing these international and hybrid courts has been crucial, as no other organization has the legitimacy or the expertise to establish such courts. One need only compare the generally supportive response of the international legal community to the courts established by the U.N. with the critical response that the Iraqi Special Court has received from experts and nongovernmental organizations ("NGOs") alike, to see the credibility and legitimacy that the U.N. bestows upon a process.<sup>63</sup> Since the promotion of peacebuilding and the rule of law are both critical elements of a reformed U.N., the institution must use its credibility and experience to build upon its past work in these areas.

The ad hoc tribunals were created with little thought to their long-term effects and with an inadequate understanding of their relationships with the affected regions.<sup>64</sup> Though subsequent efforts like the SCSL have tried to

59. For referral of situations by the Security Council, see Rome Statute, *supra* note 52, art. 13(b). Pursuant to Art. 16 of the Statute, the Security Council can also defer investigations and prosecutions before the Court for a (renewable) period of twelve months. *Id.* art. 16.

60. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005). Significantly, the United States abstained rather than vetoing this resolution, despite its opposition to the ICC.

61. G.A. Res. 57/228, U.N. Doc. A/RES/57/228 (May 13, 2003).

62. See S.C. Res. 1244 ¶ 5, U.N. Doc. S/RES/1244 (June 10, 1999) (approving the deployment of international civil and security presences in Kosovo); S.C. Res. 1410, U.N. Doc. S/RES/1410 (May 17, 2002) (discussing the situation in East Timor).

63. E.g., Cherif Bassiouni, *Post-Conflict Justice in Iraq: An Appraisal of the Iraqi Special Tribunal*, 38 CORNELL INT'L L.J. 327 (2005).

64. See Tolbert, *supra* note 41.

build on the lessons learned, they have done so unsystematically. It is therefore clear that there are a number of concrete and specific steps that can be undertaken by the proposed RLAU to buttress accountability mechanisms and support the rule of law in post-conflict societies. First, given the importance of the ad hoc tribunals and the truth and reconciliation commissions,<sup>65</sup> the RLAU should make it a priority to thoroughly study challenges to international justice efforts. What should be the relationship between international or hybrid courts and truth and reconciliation commissions? What is the best structure for these courts? What procedures should be adopted, and how can the procedures and practices of existing international tribunals and hybrid courts be adapted for the future? What has worked from a procedural point of view? How might the ICC interact with a hybrid court? What legislative mechanisms or legislation could be proposed to enhance international cooperation for these courts and tribunals, which have been hampered by the failure of certain states to cooperate on arrests and other obligations? How can the Security Council use its powers to be more supportive of these courts and tribunals?

While many of these topics may be addressed by academics and other interested parties, the RLAU should systematize these studies, commissioning special reports and research and establishing links with partner organizations. The RLAU could also play a key role in identifying personnel for future courts. New categories of lawyers and investigators have emerged in recent years with the ad hoc tribunals and hybrid courts. There are now legal professionals with experience investigating, prosecuting, defending against, and judging international criminal charges. These individuals have valuable experience that can be used again in other locales. A systematic attempt must be made to capture their knowledge and to call on them again.

## 2. *Creating a Legal Framework: U.N. Transitional Administrations; Issues of Applicable Law*

Basic governance ranks high on the list of problems that a post-conflict society must address. Without a functioning government, the chaotic situation left by the conflict will invariably lead to human misery and instability that may expand beyond a country's borders.<sup>66</sup> All post-conflict societies experience, to varying degrees, the breakdown of the institutions of governance.<sup>67</sup> Thus, in almost all recent post-conflict situations, with the notable exception of Iraq, the U.N. Security Council has established U.N. transitional ad-

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65. *In larger freedom*, *supra* note 1.

66. Also, it is clear from recent events—such as in the Democratic Republic of the Congo and Liberia—that instability caused by a collapse of basic governance can lead to regional instability. See, e.g., Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARV. HUM. RTS. J. 207 (2004).

67. See, e.g., Mark A. Drumbl, *Rights, Culture and Crime: The Role of the Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT'L L. 349, 351 (2004).

ministrations to provide a temporary governing authority<sup>68</sup> and has vested them with responsibility for rebuilding the justice system and re-establishing the rule of law. As putative governments, these transitional authorities are the key players in efforts to promote the rule of law in their respective countries.

Transitional authorities face many issues, including the provision of essentials such as adequate food and shelter.<sup>69</sup> However, with respect to governance, the critical issue to be addressed initially is what law is enforceable in the country. While institutional development is important, either a legal code or a set of rules adopted by a transparent process must first exist. This is particularly true in a country that has seen the manipulation of the law by a previous regime or one that has not yet developed legal norms.

Unfortunately, in many instances, the mandates of these transitional administrations have been unclear or hopelessly broad, making it difficult to interpret their authority and the legal framework within which they operate. As one commentator notes, “[Security Council] resolutions are often too vague or too ambiguous to provide secure guidance for post-conflict justice.”<sup>70</sup> This is a problem that should be tackled through U.N. reform efforts. The failure to craft clear mandates no doubt arises in part due to the urgency of the conflict situation, but also because lessons from previous situations have not been adequately learned. There are important roles to be played by the new PSO and RLAU, which under the Panel’s Report will play the key roles in supporting the Peacebuilding Commission and in implementing U.N. policy. The reform of U.N. transitional administrations is an important part of their work and thus the PSO and RLAU should consider it a priority to examine problems with the mandates in Kosovo, East Timor, and other transitional administrations, and develop model mandates that incorporate the lessons of the past. Naturally, these models will have to be adapted to the particular situation. Nonetheless, the availability of such models will put the Security Council in a better position to construct clearer mandates in the future.

Although a clear mandate is important for establishing the legal powers of a transitional administration, significant issues remain. Respective peacekeeping missions have made efforts to establish or identify the law applicable in their territory, but these efforts have largely been on an ad hoc and temporary basis. This situation leads to confusion regarding the applicable law and to the application of law not in conformity with relevant international human rights norms. Therefore, there is often no proper set of laws for a transi-

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68. See Anna Roberts, “Soldiering in Hope”: *United Nations Peacekeeping in Civil Wars*, 35 N.Y.U. J. INT’L L. & POL. 839 (2003).

69. These needs are essential human rights under the International Covenant of Economic, Social and Cultural Rights, *supra* note 14; however, post-conflict societies are not generally in a position to adjudicate these issues through legal systems, which are instead addressed through international relief and development agencies. See, e.g., Ivan Simonovic, *Post-Conflict Peace-Building: The New Trends*, 31 INT’L J. LEGAL INFO. 251 (2003).

70. Carsten Stahn, *Justice Under Transitional Administration: Contours and Critique of a Paradigm*, 27 HOUS. J. INT’L L. 311, 320–24 (2005) (citing Kosovo and East Timor as prime examples); see also Hurwitz & Studdard, *supra* note 9, at 7.

tional authority or government to implement or build upon. This is sometimes referred to as the problem of “applicable law” and was alluded to in both the Secretary General’s report on the rule of law in post-conflict societies (“Rule of Law Report”) and the report of the Panel on United Nations Peace Operations.<sup>71</sup>

Although there are variations among jurisdictions, certain baseline norms of criminal law and procedure must be implemented for the rule of law to take root. If these basic elements are disregarded in the initial phase of a transitional administration, rule of law efforts will be hampered. Fortunately, certain steps are currently being taken to address the issue of “applicable law” which the U.N. can subsequently build upon. The University of Galway and the United States Institute of Peace have been working with international experts to develop transitional legal codes that “create a coherent legal framework” and which “draw upon lessons learned in past peace operations and are tailored for the specificities of a . . . post-conflict environment.”<sup>72</sup> Moreover, they draw from various legal systems and therefore “represent[ ] a cross-cultural model inspired by a variety of the world’s legal systems.”<sup>73</sup>

These transitional codes contain laws covering such matters as the protection of witnesses, the treatment of victims, and other matters critical to hybrid or local courts dealing with past crimes. There is, therefore, a potentially significant supplementary role that transitional codes can play in supporting local “war crimes” prosecutions in either domestic or hybrid courts.

As of the time of writing, these transitional codes have yet to be made public. However, by providing a ready-made legal framework, such codes potentially represent an important step in assisting post-conflict societies to move toward the rule of law. The efficacy of these codes could be considerably enhanced if the U.N. were to endorse them after appropriate review. Moreover, these codes and other efforts to establish a legal framework in post-conflict societies will need to be regularly updated and adapted to the needs of each country to which they are applied. This seems a role well-suited to the RLAU, as it is in a position to give legitimacy to such codes and, through working with other parties, to update these efforts and ensure that they are adapted accordingly.

The adoption of transitional codes is important, but it must be followed by appropriate elections and the reform of the country’s laws. Some such programs

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71. Panel on United Nations Peace Operations, Aug. 21, 2000, *Report*, U.N. Doc A/55/305-S/2000/809, available at [http://www.un.org/peace/reports/peace\\_operations/docs/a\\_55\\_305.pdf](http://www.un.org/peace/reports/peace_operations/docs/a_55_305.pdf); Rule of Law Report, *supra* note 6.

72. See National University of Ireland, Galway, Model Codes for Post-Conflict Criminal Justice Project, [http://www.nuigalway.ie/human\\_rights/Projects/model\\_codes.html](http://www.nuigalway.ie/human_rights/Projects/model_codes.html) (providing a description of the transnational codes project) [Hereinafter Model Codes]. In addition, the U.N. Office on Drugs and Crime has been involved in reviewing a set of comprehensive draft model codes for post-conflict criminal justice; see generally Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, Apr. 18–25, 2005, *Making standards work: fifty years of standard-setting in crime prevention and criminal justice*, available at <http://daccessdds.un.org/doc/UNDOC/GEN/V05/813/56/PDF/V0581356.pdf?OpenElement>.

73. Model Codes, *id.*

are already being implemented by various organizations. For example, the Organization for Security and Co-operation in Europe, the Carter Center, and a variety of other organizations currently monitor elections. Other groups, such as the National Democratic Institute, provide technical assistance for elections, political parties, and the democratic process. Although it is not necessary for the U.N. to further develop this form of technical expertise, it does need to continue to play a role in the timing and sequencing of elections, as elections held before a country is ready may be counter-productive.<sup>74</sup>

Legislative assistance programs are also needed because parliamentarians are often inexperienced and need training and guidance in their new roles. They may also be inclined to resort to counterproductive means. Some may even consider reigniting the embers of the previous conflict. Similarly, government officials frequently have little background experience for their new jobs and need training and support. However, it is notoriously difficult to have an impact in this area, in large part because of corruption and a lack of understanding of local factors.<sup>75</sup>

Numerous NGOs and donors are already involved in providing legislative assistance. The U.N., therefore, need not engage in additional programmatic efforts on this front, but it could serve a useful function by facilitating cooperation and planning between the implementers and by coordinating legislative assistance programs with other rule of law programming, as outlined below.

### 3. *The Next Steps: Building Legal Institutions*

The above discussion has focused on the building blocks of rule of law efforts in a post-conflict society: defining the rule of law, dealing with past crimes, and establishing a legal framework. The next analytical step is to examine the essential elements needed to breathe life into the rule of law: establishing an independent judiciary, a vibrant legal profession, and a robust system of legal education. The distinction between the two steps is somewhat artificial, as war crimes trials or related mechanisms will likely proceed alongside programs to support, for example, an independent judiciary. Furthermore, efforts to hold war criminals accountable for their actions can and should assist in other aims, such as developing the legal profession and the judiciary. However, for analytical purposes, the topics discussed below follow sequentially from the discussion above. It is true that other areas critical to the establishment of the rule of law are not addressed here, notably policing, law enforcement, and anti-corruption programs.<sup>76</sup> However, they are separate conceptually from the approach taken herein, which focuses on the legal

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74. Carothers, *supra* note 17, at 123–55 (“It is true that a rush to elections is not always advisable in transitional countries.”).

75. *Id.* at 177–87 (“If asked to name the area of democracy assistance that most often falls short of its goals, I would have to point to legislative assistance.”).

76. See, e.g., William Burke-White, *A Community of Courts: Towards a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1 (2002).

norms and institutions necessary for the creation, interpretation, and application of the law, as opposed to its enforcement.

While the following subjects bear a closer relationship to the discipline of development<sup>77</sup> than the earlier discussion, and often apply not only to post-conflict societies but also to underdeveloped countries generally,<sup>78</sup> they are nonetheless essential for post-conflict societies. For example, it is axiomatic that without functioning courts and a judiciary system, there can be no rule of law. An independent judiciary is therefore at the heart of establishing the rule of law for a post-conflict society, just as it is for a developing country. Because developing and post-conflict societies often face similar obstacles, it would be unwise to make false distinctions between traditional rule of law development and specific rule of law efforts in societies recovering from conflict. At the same time, we must take into account the special problems that post-conflict societies face.

The key institutions needed for the protection of the rule of law are not difficult to identify. However, they are exceedingly hard to build or re-build. In doing so, the key challenge is not so much the question of court buildings and technology, or even the passage of relevant laws, but rather of changing the attitudes of legal professionals and society at large toward these essential institutions. Furthermore, programs must try to import a “cluster of values” that underlie the rule of law and not simply adhere to some rote definition of law. Outside assistance cannot impose these values. These groups must find ways to facilitate the development of the rule of law rather than impose it. Bearing this in mind, the discussion turns to the key institutions: the judiciary, the legal profession, and legal education.

### C. *The Role of the Bench and the Bar*

Strengthening judicial independence is not merely a common focus of strategies for the promotion of the rule of law in post-conflict societies. Frequently, it is also the starting point for efforts to establish law and order and to ensure accountability for human rights abuses and war crimes. An independent judiciary is a central pillar of the rule of law and in many ways a guarantor of the fundamental human rights of individuals and groups. Moreover, an independent judiciary that administers justice and resolves disputes in a peaceful, predictable, and transparent manner enables good governance,

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77. See Agnes Hurwitz, *Towards Enhanced Legitimacy of Rule of Law Programs Multidimensional Peace Operations*, Workshop paper at the European Society of International Law Forum on International Law (May 26–28, 2005), available at <http://www.esil-sedi.org/english/pdf/Hurwitz.pdf> (“[S]upport 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.”).

78. See Eric Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers*, in *BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW*, at 336, 345–46 (Erik G. Jensen & Thomas C. Heller eds., 2003) (identifying three waves of law reform efforts: reform of administrative organs, the law and development movement, and current efforts, which include for the first time post-conflict societies).

economic development, and social equality.<sup>79</sup> The absence of an independent judiciary, capable of applying the law without discrimination and holding state authorities as well as individuals accountable for crimes and abuses of power, can threaten the success of other aspects of post-conflict reconstruction and reform. In this way, justice sector reforms that promote judicial independence defuse tensions that could otherwise reignite violence and give rise to authoritarian rule.

In 1985, the U.N. promulgated a concise set of universally recognized principles of judicial independence that describe the core elements essential to any modern judicial system. The United Nations Basic Principles on the Independence of the Judiciary (“BPIJ”),<sup>80</sup> was endorsed by the U.N. General Assembly in two resolutions.<sup>81</sup> The General Assembly thus affirmed the central role judges play in the administration of justice. It is imperative that post-conflict societies put into effect the structural safeguards and other guarantees discussed in the BPIJ, particularly those that facilitate the judiciary’s independence from all other branches of government, most notably the executive branch. These safeguards include the constitutionalization of judicial independence, the prohibition of improper interference in judicial decision-making, the explicit recognition of jurisdiction over judicial matters, the authority to decide issues of statutory competence, and the right of judges to form associations to promote the interests of the profession and its independence. The BPIJ also outlines international standards on the qualifications, selection, and training of judges, imposes conditions of service and tenure, and creates standards for discipline, suspension, and removal of judges from the bench.

Considerable resources have been devoted to promoting judicial independence around the world in accordance with the international standards expressed in the BPIJ and similar documents.<sup>82</sup> Yet significant challenges remain. This is, in part, because in many post-conflict societies and countries with authoritarian legacies, the judiciary was often used to protect the parochial interests of ruling elites rather than the rights of the general population.

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79. See, e.g., Jeremy Pope, *TRANSPARENCY INTERNATIONAL SOURCEBOOK 2000*, Ch. 8, available at <http://www.transparency.org/sourcebook/08.html> (last visited Mar. 11, 2006) (“An independent, impartial and informed judiciary holds a central place in the realization of just, honest, open and an accountable government.”). See also Denis Galligan, *Principal Institutions and Mechanisms of Accountability*, in *COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARDS AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY* 34 (Van Puymbroeck ed., 2001) (“Judicial supervision of the administration is an essential feature of a system of government and administration based on the rule of law.”).

80. See generally Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 26–Sept. 6, 1985, *Basic Principles on the Independence of the Judiciary*, available at [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm).

81. See G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (Nov. 29, 1985), available at <http://www.un.org/documents/ga/res/40/a40r032.htm>; see also G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985), available at <http://www.un.org/documents/ga/res/40/a40r146.htm>.

82. See, e.g., The Judicial Group of Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct* (Nov. 25–26, 2002), available at [http://www.unodc.org/pdf/crime/corruption/judicial\\_group/Bangalore\\_principles.pdf](http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf).

Therefore, rule of law reform strategies in these transitional environments must continue to focus on promulgating and implementing constitutional and legislative frameworks that secure judicial powers. With some input in the selection process from the judiciary itself through judicial qualification commissions, judicial appointments should be made on the basis of objective criteria in order to foster the selection of independent, impartial, and well-qualified judges. Similarly, judges should be appointed for fixed terms that provide guaranteed tenure. Justice sector reform efforts should also seek to raise the qualifications of judges and judicial personnel through training, including the establishment of judicial training centers. Measures must be adopted to provide the judiciary with adequate resources and sufficient judicial personnel to manage caseloads and dispose of cases in a timely and efficient manner. Finally, efforts must be made to strengthen the role of judicial associations that promote the interests of the profession and encourage compliance with ethical standards.

These standards and procedures are particularly important in a post-conflict situation, where formerly warring groups do not trust one another to act in accordance with local professional practices. Therefore, it is important that reform-minded judges and those who reject nationalist or divisive approaches are aware of these standards and can use them appropriately. Much more could be done to support such judges through training on the BPIJ and other international standards. Moreover, the hybrid court model, discussed above in relation to war crimes cases, could also be utilized for other types of proceedings. In Bosnia-Herzegovina, this approach has been adopted with respect to organized crime cases, with international judges and prosecutors working alongside national judges,<sup>83</sup> just as it is done in war crimes cases and much like it was done in the Human Rights Chamber. The RLAU should evaluate the success of this endeavor and examine the possibilities of using international judges in other cases. In principle, nothing prohibits this approach, provided it can be shown to have substantial benefits.

An independent judiciary, widely considered *conditio sine qua non* of promoting the rule of law, is hardly the sole institutional requirement in this endeavor. Rule of law experts, local reformers, and other stakeholders rightly emphasize that an independent judiciary and mechanisms such as special tribunals and truth commissions are necessary in ensuring accountability for war crimes and human rights abuses in post-conflict societies.<sup>84</sup> However, focus on the judiciary must not come at the expense of establishing other institutions necessary for promoting, and perhaps more importantly sustaining, the

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83. See High Representative's Decision Appointing an International Prosecutor for the "Organized Crime Chamber" (Feb. 24, 2005), [http://www.ohr.int/decisions/judicialrdec/default.asp?content\\_id=34120](http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=34120).

84. Hansjorg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 60 (2001) ("[A] functioning judicial system can positively affect reconciliation and confidence-building efforts within often highly traumatized post crises societies, not least because it can bring to justice those responsible for grave violations of international humanitarian and human rights law.").

rule of law in post-conflict societies. A more comprehensive approach to accomplishing these goals must take other institutions and legal professionals into account, most notably criminal defense lawyers and public defenders.

In addition to judges, lawyers are the main actors in a country's legal system and are an important means by which individuals or groups gain access to justice and resolve disputes in a peaceful and transparent fashion. According to the U.N. Basic Principles on the Role of Lawyers ("BPRL"), lawyers play a vital role in "furthering the ends of justice and the public interest."<sup>85</sup> An independent legal profession comprised of a cadre of well-trained and ethical lawyers can ensure due process and protect fundamental rights by pursuing the necessary remedies when these rights have been infringed upon. Thus, lawyers can facilitate the public's confidence in the fairness and efficacy of the legal system, which is essential not only to the formal and institutional development of the rule of law, but also to instilling the values that make up the informal aspects of the rule of law in a democratic society. Moreover, as members of the broader legal profession as a whole, lawyers can contribute to the law reform process and serve as advocates for judicial sector reform and judicial independence.

Like the BPIJ, the BPRL sets forth international standards for establishing and safeguarding the independence and status of lawyers. That document also articulates standards for ensuring effective access of all persons to the legal services that they provide, including legal aid for the indigent and other vulnerable segments of the population. The BPRL also stresses the importance of the freedom of expression and association for lawyers, and outlines certain guarantees—such as protection from intimidation and improper interference—that help ensure lawyers are able to effectively carry out their responsibilities.<sup>86</sup> In addition, these principles emphasize standards that lawyers and professional associations of lawyers should abide by in areas such as education and training, legal services and representation, ethics and discipline, and promotion of the interests of the profession itself. The BPRL was first adopted in 1990 by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, and was welcomed by a U.N. General Assembly resolution calling states "to take them into account within the framework of their national legislation and practice."<sup>87</sup>

The BPRL principles are not legally binding on members of the U.N. Rather, the document is an expression of the international community's view on the role of lawyers in a democratic, law-based society. The potential value of the BPRL is in providing guidance to state authorities, the legal profession, and civil society organizations in drafting laws on the legal profession—

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85. Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 27–Sept. 7, 1990, *Basic Principles on the Role of Lawyers*, ¶ 10, available at [http://www.unhchr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhchr.ch/html/menu3/b/h_comp44.htm).

86. *Id.* ¶¶ 16–23.

87. U.N. G.A. Res. 45/166, ¶ 15, U.N. Doc. A/RES/45/166 (Dec. 18, 1990), available at <http://www.un.org/documents/ga/res/40/a40r146.htm>.

such as criminal and civil procedure codes, laws on advocates and lawyers, and standards on legal ethics—and ensuring the implementation of this legislative framework so that individuals have access to effective and affordable legal representation. Combined with the BPIJ, the BPRL can be used by internal and external actors alike to assess the progress toward the institutional development of the rule of law in emerging democracies and post-conflict societies. In both environments, the legal profession and lawyers often face considerable challenges in fulfilling their role in advancing the rule of law.

The unfortunate reality is that lawyers do not automatically enjoy the independence and status afforded to them by these international standards. Lawyers in many post-conflict societies, as well as those in former authoritarian countries, must first overcome structural impediments to the independence of their profession, including the existence of legislative frameworks that relegate the profession to a subservient position in a legal hierarchy dominated by the state prosecutor. In other instances, lawyers may be subject to excessive regulation in the form of licensing requirements and disciplinary rules overseen by the Ministry of Justice, as opposed to an independent national or regional bar association. Safeguards necessary to ensure effective legal representation and parity with the prosecution, including lawyer-client confidentiality and access to information, are often also absent. Moreover, it is not uncommon for lawyers to be harassed and intimidated when representing clients who have fallen out of favor with the authorities. In some cases, non-state actors such as organized crime organizations, warlords, and ethnic-based militias can also improperly influence and corrupt lawyers.

Given the above discussion, it is not surprising that lawyers sometimes function more like cogs in a machine designed to protect state, political, tribal or other parochial interests rather than serving as zealous defenders of their clients and the law. The blame cannot be placed solely on state authorities such as the Ministry of Justice. In many cases, the legal profession has been ineffective or incapable of regulating itself and improving standards for the qualification, integrity, and effectiveness of its members. Another problem is that bar associations may split along ethnic lines. For example, in post-conflict Bosnia-Herzegovina, it was difficult to form bar associations that encompassed all three ethnic groups involved in the conflict. This difficulty was exacerbated by the political division of the country—pursuant to the Dayton Accords—into two entities, thus giving credence to those who opposed an integrated bar association.<sup>88</sup> In such cases, intervention through U.N. or other transitional authorities may be necessary. However, these issues are sometimes generational and progress may ultimately depend on the emergence of a next generation of lawyers less influenced by the passions and hatreds of the conflict.

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88. Based on observations of one of the Authors from interactions and meetings with lawyers and bar association officials in the former Yugoslavia.

#### D. Legal Education and Training

The independence and status of legal professionals in post-conflict societies, much like in former authoritarian countries, are often undermined by the fact that many legal professionals, including both lawyers and judges, suffer from inadequate substantive knowledge, practical skills, and access to information required of the profession.<sup>89</sup> A law school graduate may possess a diploma, but this does not ensure that he or she has acquired the practical skills in legal research, writing, and reasoning, or the substantive knowledge of basic areas of domestic law required to perform his or her professional duties. Moreover, advanced training and continuing legal education for judges and lawyers is often lacking. As a result, familiarity with significant legal developments and specialized topics of law, including aspects of international human rights and humanitarian law, is particularly difficult to come by once someone enters the profession. If efforts to promote the rule of law in post-conflict societies are to succeed, judges and lawyers must be better prepared to practice law, to address the needs of society and their fellow citizens, and to promote the interests of the profession. Reforming legal education—both initial and advanced training—should therefore be a part of comprehensive rule of law promotion strategies.

Legal education reform is a complex undertaking, requiring the establishment of law school accreditation standards, the introduction of new courses into traditional curricula, and the improvement of teaching methods. This type of institutional reform requires considerable resources and is difficult even under optimal conditions. With international support and guidance, some progress is being made. However, in many fragile states seeking to overcome the legacies of authoritarian rule or armed conflict, legal education remains an ongoing challenge. One of the principal reasons is that legal education is largely unregulated by ministries of education and justice. As a result, there has been a proliferation of unaccredited law schools, many of which do not provide adequate education and training in the law. Also, many law schools continue to favor compulsory curricula comprised of courses in legal theory, constitutional law, civil law, and criminal law. There is now a slow experimentation with electives in areas such as international law, human rights, refugee law, gender issues, alternative dispute resolution, legal ethics, and other practice-oriented courses. But such experimentation is severely limited by insufficient resources and expertise. Lecture-based instruction also remains the norm, although legal clinics, moot court, and mock-trial activities are increasingly employed as means to increase the practical skills of students so that they are better prepared to enter the profession and to assume their responsibilities in rendering legal assistance and administering justice fairly and efficiently.

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89. Mark Dietrich, *Three Foundations of the Rule of Law: Education, Advocacy, and Judicial Reform*, in *LAW IN TRANSITION* 57 (2002), available at <http://www.ebrd.com/pubs/legal/5410.pdf>. See generally Christopher P. M. Waters, *Post-Conflict Legal Education*, 10 *J. CONFLICT & SECURITY L.* 101, 101–19 (2005) (describing how armed conflict and war affect legal education).

### III. U.N. REFORM AND THE RULE OF LAW IN POST-CONFLICT SOCIETIES

#### A. *The Challenges*

The difficulties in implementing the various programs discussed above should not be underestimated. As the Secretary-General has said: “Restoring the capacity and legitimacy of national institutions is a long-term undertaking.”<sup>90</sup> Even in the context of less devastated countries, Thomas Carothers finds that “what stands out . . . is how difficult and often disappointing [rule of law assistance] work is.”<sup>91</sup> In post-conflict societies with no functioning judiciary (or, in some cases, with complete lawlessness), there is often very little upon which the rule of law can be built.

Peacekeeping missions have faced daunting tasks in reestablishing order and basic infrastructure,<sup>92</sup> making mistakes and arguably undermining efforts to establish the rule of law. For example, the U.N. Mission in Kosovo (“UNMIK”) has been criticized for failing to take “a coherent approach to criminal justice reform,” leading to the conclusion that “the failure is so profound that it puts at risk the transition as a whole.”<sup>93</sup> UNMIK has also struggled with the question of the applicable law for criminal matters, a process that continued for years.<sup>94</sup> Other criticisms include, *inter alia*, ill-conceived training for judges, inadequate measures to protect witnesses, and poor use of international judges and prosecutors.<sup>95</sup> Finally, UNMIK and other missions have been faulted for failing to consider adequately local sensibilities, thus imposing their will in a manner that some have characterized as violating human rights norms and thus undermining the rule of law.<sup>96</sup>

Whether the criticism of UNMIK and other transitional administrations<sup>97</sup> is fully justified can be debated. However, there has generally been a lack of coherent planning regarding the judicial sector in U.N. missions.<sup>98</sup> This is,

90. *Rule of Law Report*, *supra* note 6, ¶ 27.

91. Carothers, *supra* note 17, at 170.

92. For example, UNMIK was tasked with “govern[ing] an entire province and re-establish[ing] a functioning public sector in the midst of substantial destruction, communal devastation, and the exodus of the former regime.” David Marshall & Shelley Inglis, *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 HARV. HUM. RTS. J. 95, 95 (2003).

93. *Id.* at 96. This criticism is echoed in Stahn, *supra* note 70, at 327 (“The U.N. failed, however, to develop a coherent approach to justice in the first phase of its engagement in mission.”).

94. Marshall & Inglis, *supra* note 92, at 115–17.

95. *Id.* at 116–46. Marshall and Inglis are critical of UNMIK’s approach on a variety of other rule of law and human rights issues and conclude that “the international intervention in postwar Kosovo has provided some sobering lessons in the area of criminal justice and human rights from which peacebuilding missions should learn.” *Id.* at 144. See also Wendy Betts, Scott Carlson & Gregory Gisvold, *The Post-conflict Transitional Administration of Kosovo and the Lessons-learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT’L L. 371 (2001) (providing an overview of efforts to establish the rule of law in post-conflict Kosovo).

96. Frederic Megret & Florian Hoffmann, *The U.N. as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314, 334–35 (2003).

97. Similar criticisms are made of other U.N. Missions. See, e.g., Stahn, *supra* note 70, at 333–38 (discussing U.N. Missions in East Timor, Afghanistan, and Iraq).

98. See Hurwitz & Studdard, *supra* note 9, at 2–4.

to some extent, understandable given the inherent difficulties, but the poor planning also starkly highlights the lack of coherent strategies, coupled with an insufficient knowledge of local conditions. Some of these issues can be more readily addressed than others. For example, transitional codes can partly remedy the problem of applicable law. Other problems, such as the protection of witnesses, pose difficult challenges, but there is considerable experience at the ad hoc tribunals and in national systems that could be utilized to address these issues.<sup>99</sup> At a more fundamental level, the U.N. must address the lack of coherent prior planning in these missions, which has frequently led to improvisation. While it is difficult to foresee precisely where crises will arise, it is less difficult to identify recurrent issues. Future missions must also draw lessons from past experiences.

This lack of planning is hardly limited to the U.N. Mark Malloch Brown, then administrator of the U.N. Development Program, noted: “[C]ooperation among donors is too often the exception rather than the rule resulting in a failure to accumulate information and lessons learned . . . [with donors] often engaged in overlapping or contradictory projects . . .”<sup>100</sup> Other examples abound<sup>101</sup> because the anarchic situation in a post-conflict society is often mirrored in a chaotic situation among the various donors and implementing groups. This is particularly true at the start-up phase of peacekeeping operations. At this stage, donors, NGOs, the World Bank, regional banks, private sector contractors, and the U.N. itself may all overlap on rule of law issues. The potential for duplication is immense. As one commentator puts it, “The issue of coordination or the lack thereof, is one of the most recurrent problems of post-conflict peacebuilding, from Guatemala to Cambodia to Sierra Leone . . .”<sup>102</sup> At present there is no formal arrangement to provide a forum for addressing inter-organizational coordination.

There are also issues related to the design of programs intended to assist the development of the rule of law. These issues have been identified in various places, including the Rule of Law Report,<sup>103</sup> and they apply with equal force to both post-conflict societies and other developing countries. A particular problem is the issue of designing programs that fit local needs, rather than the adoption of a “cookie cutter” approach that uses a standard model regardless of the nature of conflict or the society in question. It is important to note that while programs obviously must take local conditions into account, prior experience can also lead to the development of models and approaches

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99. See, e.g., Andreea Vesa, *Protective Measures for Witnesses and the Rights of the Accused*, CEELI Discussion Papers Series (June 15, 2003), available at [http://www.abanet.org/ceeli/publications/conceptpapers/icity\\_wit\\_prot.pdf](http://www.abanet.org/ceeli/publications/conceptpapers/icity_wit_prot.pdf) (discussing the ICTY’s experiences with witness protection measures, and its influence on international criminal law).

100. 5052d Mtg., *supra* note 58, at 4.

101. See, e.g., Carothers *supra* note 17, at 165.

102. Hurwitz & Studdard, *supra* note 9, at 10.

103. *Rule of Law Report*, *supra* note 6, ¶¶ 8–10.

that apply to numerous places. Donors and experts should not be discouraged from drawing on previous experience.

There are also difficulties with the use of international experts, on whom many NGOs and governments rely. Such experts are sometimes seen as “parachuting” into a situation, giving their pre-packaged presentation, staying in the best hotels available, making little effort to speak the local language, and then leaving. While this is clearly a caricature and is belied by the many dedicated experts who have given valuable and unselfish service,<sup>104</sup> there are real reasons for concern. First, although international expertise is vital, it is important that the society feel that the process is “theirs” and not the property of outsiders. If the process is seen as primarily imposed or created by foreign donors and experts, the programs are unlikely to be successful. Moreover, if the expert is simply trying to “transplant” his or her system into another country, he can create confusion and can, in effect, undermine the rule of law. This was certainly one of the key problems with the law and development movement and continues to be an issue with some American and other Western NGOs.<sup>105</sup>

In other instances, attempts are made to revamp a country’s law by moving from a civil law tradition to a common law system. This happened recently in Bosnia-Herzegovina,<sup>106</sup> with regard to criminal procedure. The result was that lawyers and judges must now deal both with the usual issues of a post-conflict society and also with learning new procedural law. While there are practices such as “telephone justice”—taking instructions from the party boss—that clearly need to be addressed, fundamental changes in existing legal systems should be approached warily. This does not mean that all changes in procedure should be avoided. A key strategy in the reform process must be to reform the laws, but not necessarily to change the underlying approach in that system. For example, in Russia, a number of important reforms were introduced to the criminal procedure code, shifting considerable powers from prosecutors to judges, without changing the system to an adversarial system.<sup>107</sup> The point to be stressed here is that experts must find ways to reform the system without introducing so much change that legal professionals are overwhelmed.

Another ongoing debate among organizations working in the rule of law arena involves “top down” versus “bottom up”<sup>108</sup> approaches. The “top down” model is characterized by reform of state institutions, with a focus on the judi-

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104. See generally Louis Aucoin, *The Role of International Experts in Constitution-Making*, 5.1 GEO. J. INT’L AFF. 89 (2004), available at [http://journal.georgetown.edu/Issues/ws04/ws04\\_le\\_aucouin.html](http://journal.georgetown.edu/Issues/ws04/ws04_le_aucouin.html).

105. Carothers, *supra* note 7.

106. See Helke Gramcko, *Can US-Type Court Management Approaches Work in Civil Law Systems? Experiences From the Balkans and Beyond*, 11(1) EUR. J. ON CRIM. L. POL’Y & RES. 97 (2005); The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT’L L. 102, 136–40 (2000).

107. See American Bar Association, Central European and Eurasian Law Initiative, *CEELI in Russia* (2005), <http://www.abanet.org/ceeli/countries/russia/program.html>.

108. See Carothers, *supra* note 17, at 157–251.

ciary, bar associations, prosecution services, legislatures, and related institutions. In contrast, the “bottom up” approach focuses on “civil society,” broadly defined as non-state and non-private business actors such as NGOs.<sup>109</sup> While the scope of NGOs is broad, in the context of rule of law assistance they are usually limited to such organizations as victims’ groups, legal reform advocacy groups, and groupings of lawyers such as women lawyers, young lawyers or law students, and human rights advocates.

There are strong advocates for both approaches. The “bottom up” approach, utilizing civil society actors, has arisen in part because of frustrations experienced in dealing with state institutions, which often employ individuals with no interest in reform. The idea is that such civil society groups will pressure the institutions to change and develop while younger individuals in these groups gain valuable experience, perhaps eventually joining the institutions and providing the impetus for reform. These civil society groups provide immense energy and commitment to change on a number of fronts including women’s rights, gender crimes and human trafficking, corruption, environmental issues, and human rights. These issues are important to the development of the rule of law, but are unlikely to have much traction in state institutions. Moreover, there is inherent value in having impassioned advocates pushing on these issues.

In recent years, there has been more focus on and more funding available for civil society groups, who nonetheless often struggle with long-term sustainability and impact. Others, such as victims’ groups, may initially play an important role in efforts to address war crimes but lose significance as time passes. Compared to the “top down” approach, civil society efforts may have a more indirect effect on the rule of law. However, in many instances the “top down” approach may be difficult if the state institutions are themselves not amenable to change or reform. The approach followed may depend on the state of the particular country and its institutions. Thus, the debate between the two approaches is a false choice in many respects, as elements of both approaches may ultimately prove necessary. The relevant issues concern how the two approaches may be utilized in a particular situation. Thus, it is important to examine how donors and others involved in reconstructing the legal systems make their choices and interact with one another. Such coordination could address such common problems as multiple donors over-funding a popular NGO at the expense of more pressing needs.

There are many difficult issues to be addressed in terms of rule of law assistance in a post-conflict or developing country. Many of those issues are substantive, but there are also important methodological issues. These include

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109. See Gordon White, *Civil Society, Democratization, and Development (1): Clearing the Analytical Ground*, 1(3) DEMOCRATIZATION 379 (1994) (defining civil society as “an associational realm between state and family populated by organizations which are separate from the state, enjoy autonomy in relation to the state and are formed voluntarily by members of society to protect or extend their interests or values” (quoted in Carothers, *supra* note 17, at 209)).

planning for both the short-term and the long-term, coordinating between donors, reconciling approaches between different donors, addressing problems relating to the use of international experts, and ensuring that local solutions are not sidelined by the “one size fits all” approaches of some donors and assistance providers. The next questions concern which groups are providing different types of assistance and what role a reformed U.N. might play in addressing these difficult and complex issues.

### B. *The Other Primary Actors*

As previously noted, numerous organizations and actors are engaged in rule of law promotion in post-conflict societies. In addition to various U.N. agencies, these include other international and multilateral organizations, donor governments, development banks and international financial institutions, and NGOs.<sup>110</sup> Increased international focus on rule of law promotion as an integral aspect of post-conflict reconstruction has spawned a virtual rule of law industry over the past two decades. Many actors, both public and private, now offer assistance to countries seeking to reform their legal and judicial systems by providing funding, resources, and technical expertise in drafting legislative frameworks and developing institutions to support rule of law programs. In addition to rebuilding the institutions of modern justice systems, these actors can also be instrumental in fostering the values and attitudes that make up a “rule of law culture” within a society, and in creating a demand for the rule of law at the political and grassroots levels.<sup>111</sup>

Individual governments, acting through their foreign assistance agencies, play a particularly significant role in rule of law promotion. This often takes the form of providing funding for legislative and institutional reforms. Organizations such as the United States Agency for International Development, the United Kingdom’s Department for International Development, and the German Agency for Technical Assistance, also provide bilateral technical assistance aimed at improving legislative drafting, raising the qualifications of legal professionals and law enforcement, and introducing material resources and modern technologies for more efficient administration of justice.

Similar initiatives are pursued on a multilateral basis by international organizations and financial institutions, including the Organization for Security and Cooperation in Europe, the Council of Europe, the European Union, the Organization for Economic Cooperation and Development, the European Bank for Reconstruction and Development, the Asian Development Bank, the World Trade Organization, and the World Bank. Aside from funding rule of law pro-

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110. Although the presence of many of these actors in a country often provides needed support and resources for rule of law promotion, it can also make for what has been referred to as a “circus atmosphere.” See Mary Theisen & Eliot Goldberg, The Stanley Foundation, *Post Conflict Justice: The Role of the International Community* 7 (1997), available at <http://www.stanleyfoundation.org/reports/Vantage97.pdf>.

111. Ronald J. Daniles & Michael J. Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT’L L. 99 (2004).

grams, these organizations are also able to focus the attention of local stakeholders and policy-makers on specific rule of law issues like combating corruption, strengthening alternative dispute resolution in both commercial and non-commercial matters, and improving access to justice for minorities and vulnerable segments of society. Through its Conflict Prevention and Reconstruction Union and the Post-Conflict Fund, the World Bank supports post-conflict reconstruction efforts of governments, NGOs, and U.N. agencies in dozens of countries such as Afghanistan, Cambodia, Kosovo, Sierra Leone, Timor-Leste, and the Palestinian Territories.

NGOs are also central to rule of law promotion efforts in post-conflict societies. Many of the day-to-day operational aspects of rule of law promotion are carried out by NGOs, which typically receive their funding from governments and international organizations. In contrast to their donors, which often operate through political and diplomatic channels, NGOs such as the American Bar Association Central European and Eurasian Law Initiative (“ABA/CEELI”), Freedom House, Transparency International, International Development Law Organization, and the International Center for Transitional Justice (“ICTJ”), mostly work on rule of law promotion and related activities at the grassroots or “bottom up” level. Some advocacy-oriented organizations use civic education programs, war crimes documentation, and “naming and shaming” campaigns to educate and mobilize the public in order to hold governments accountable for violating human rights. The ICTJ, for instance, has facilitated dialogue among civil society activists and supported public consultation initiatives on questions of justice and accountability in Afghanistan, Indonesia, and Sri Lanka. While there has been a tendency among NGOs to work in opposition to governments, it is increasingly common for NGOs to cooperate with public authorities in rule of law promotion and justice initiatives such as the establishment of truth and reconciliation commissions. However, most NGO activities still involve working with civil society organizations and fostering relationships with local stakeholders in order to build the capacity and sustainability of institutions like professional associations of lawyers and judges, law school faculties, judicial training centers, and civil society organizations.

Part of this work also involves diagnostic assessments of key aspects of the rule of law which can be used by civil society organizations and governments, as well as by the international donor community, to develop reform strategies and initiatives to promote the rule of law. For instance, ABA/CEELI has developed and implemented the Judicial Reform Index (“JRI”) and the Legal Profession Reform Index (“LPRI”) to assess judicial independence and the status and effectiveness of the defense bars in conflict-affected societies such as Kosovo, Bosnia, Macedonia, and Tajikistan.<sup>112</sup> Similarly, the International Legal Assistance Consortium (“ILAC”) mobilizes teams of international experts in

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112. See generally American Bar Association, Central European and Eurasian Law Initiative, <http://www.abaceeli.org>.

rule of law to assess post-conflict justice systems and to make recommendations to host governments and others on types of assistance that is needed to reestablish a functioning legal system and judiciary.<sup>113</sup> Following its 2003 assessment mission to Iraq, ILAC has provided trainings on international humanitarian and human rights law to Iraqi judges, prosecutors, and lawyers as part of its support for the justice sector in Iraq.

### C. A New Role for the United Nations

The blueprint for U.N. reform has been established in the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change ("the Report"). The Report notes that there is currently no place in the U.N. system "to assist countries in their transition from war to peace," and proposes a Peacebuilding Commission to take on that and related tasks.<sup>114</sup> In proposing this, the Report first described some of the organization's greatest strengths:

The [U.N.'s] unique role in this area arises from its international legitimacy; the impartiality of its personnel; its ability to draw on personnel with broad cultural understanding and experience of a wider range of administrative systems, including the developing world; and its recent experience in organizing transitional administration and transitional authority operations.<sup>115</sup>

The Report proposes that the Commission, *inter alia*, assist transitions from war to peace and "marshal and sustain the efforts of the international community in post-conflict peacebuilding over whatever period may be necessary."<sup>116</sup>

To support the Commission, the Report has proposed that the PSO be established in the U.N. Secretariat, with a relatively small staff and an inter-agency advisory board, chaired, quite appropriately, by the Chair of the U.N. Development Group. The Report also makes reference to developing "a robust capacity-building mechanism for rule-of-law assistance."<sup>117</sup> Accordingly, the Secretary-General has indicated that the RLAU will be located in the PSO.<sup>118</sup> At the time of writing, few other details are publicly available about the plans for the RLAU. The comments that follow are, thus, somewhat speculative.<sup>119</sup>

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113. ILAC is composed of over thirty organizations from around the world. These include member organizations such as the International Bar Association, International Commission of Jurists, the Union Internationale de Avocats, Inter-American Bar Association, Arab Lawyers Union, Pan African Lawyers Union, and the Conseil Consultatif de Bearreau Europeens. For more information on ILAC, see <http://www.ilac.se>.

114. *High Level Panel Report*, *supra* note 1, ¶ 261.

115. *Id.*

116. *Id.*, ¶ 264.

117. *Id.*, ¶ 177.

118. The Secretary-General, *Report of the Secretary-General: Strengthening the U.N. Crime Prevention and Criminal Justice Programme*, U.N. GAOR, 59th Sess., U.N. Doc. A/59/205.

119. See Hurwitz & Studdard, *supra* note 9, at 12 ("[RLAU] should be given a leading role in policy

The creation of the RLAU is to be welcomed, although given the enormity of the task it is disconcerting that the present plans call for a relatively small unit. In U.N. parlance, a “unit” generally includes around ten staff members. The Report envisions the entire PSO to be comprised of about twenty posts. Hopefully, with the high profile of peacebuilding and rule of law assistance both in the Report and in general discussions regarding U.N. reform, these resource issues will be given further consideration. If these critically important areas are under-resourced, there will be significant cause for concern with respect to the seriousness of the U.N.’s commitment to reform. Moreover, if staffing is limited, the U.N. is likely to continue in a more ancillary role in rule of law assistance, rather than the robust one envisaged by the Report.

Assuming sufficient resources are available, the U.N. is in a position to play a significantly enhanced role in rule of law support. It has, as the Report has identified, unique assets such as its neutrality, the geographical breadth and experience of its staff, and its international legitimacy. These are features that no government, donor, or NGO possesses. In addition to these factors, peacekeeping missions are conducted under U.N. auspices and, therefore, many of the transitional justice issues are already clearly within the U.N.’s portfolio. International and hybrid tribunals are the creation or partial creation of the U.N. The U.N. is thus also well-positioned to address issues relating to these tribunals and to provide them with support. The case for active U.N. involvement on these issues becomes even stronger once we consider other U.N. agencies with mandates covering human rights, development, and other post-conflict and development-related matters.

However, U.N. involvement also has certain disadvantages. The U.N. can be a highly bureaucratic organization that is difficult to mobilize and that suffers from political paralysis when its members do not work in harmony. Its “management culture” and internal accountability mechanisms have sometimes come under severe criticism.<sup>120</sup> Moreover, in certain circumstances, some of the greatest strengths of the U.N. can become weaknesses. For example, the diversity of its staff can sometimes lead to lack of focus and conflicting approaches that confuse the very domestic professionals that they are meant to assist.

With these assets and liabilities, what should be the strategic plan of the new PSO and the RLAU? One place to start is by assessing the lessons of the past and developing models which address the difficult issues that post-conflict societies face. This includes a thorough understanding of accountability mechanisms, including the ad hoc tribunals, hybrid tribunals, and truth commissions. Until these past efforts have been credibly assessed, future decisions

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development and coordination of rule of law assistance, and should contribute to the U.N.’s adoption of a coherent strategic approach and a common methodology for sound analysis, planning and implementation.”).

120. *See, e.g.*, Independent Inquiry Committee into the UN Oil-For-Food Programme, *The Management of the UN Oil-For-Food Programme*, Vol. 1 (2005), [http://www.iic-offp.org/Mgmt\\_Report.htm](http://www.iic-offp.org/Mgmt_Report.htm).

on these critically important issues will be based merely on anecdotal evidence. That is hardly a recipe for success.

One of the significant problems facing transitional administrations and post-conflict societies is a lack of coordination between donors, implementers, and other parties. Since transitional administrations operate under a Security Council mandate, the RLAU is well-placed to engage in a planning process that rationalizes the strengths and abilities of the various actors—both national and international—working in rule of law and related arenas. This process would take place in two steps.

First, as part of its long-term planning goals, the RLAU must work with principal donor governments and NGOs to establish an overall blueprint for rule of law activities in post-conflict situations. This blueprint, which should draw on the knowledge of all concerned, can then serve as the basis for the much more rapid planning that occurs on the ground following a conflict. It is essential that transitional administrations have an office for rule of law matters which is closely connected to the RLAU. The ideal role of the U.N. would be to allow the various NGOs and donors to work effectively within a structure that seeks to avoid duplication and wasted effort. While NGOs and donors may not react well to a heavy-handed approach, experience has shown that there is also less duplication and waste in countries where there is at least informal coordination. In a post-conflict situation, the U.N., with a properly staffed office dealing specifically with these matters both in headquarters and in the field, should be able to help fill a void that might otherwise undermine their efforts. It is important to emphasize that the U.N. rule of law efforts must also be present in the field operation. If there is no field presence, the U.N. will lack the credibility or local knowledge to fulfill the task.

In addition to these practical issues, the RLAU must also carve out a role to address some of the difficulties plaguing rule of law providers. “The rule of law” is still frequently misunderstood, even by some of those engaged in the work itself. Thus, it is important to closely examine the current methods by which it is implemented. For example, the use of foreign experts is a mainstay of virtually every rule of law program, with foreign experts conducting training and research and making proposals about countries that they may know very little about. There has been much criticism, including in the Rule of Law Report, of the use of these experts. There have also been calls for a greater reliance on local expertise and solutions.<sup>121</sup> However, there is virtually no information, much less empirical evidence, on which to base these conclusions. Rule of law assistance has developed rapidly over the last decade and a number of questions regarding its implementation remain.

For example: what type of foreign expert is the most effective in terms of training, drafting legislation, and providing advice, and what types of training could make them more effective? How are experts received by post-conflict

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121. *Rule of Law Report*, *supra* note 6, ¶ 13.

societies? How does the public perceive these programs? Which programs are most effective? There is some evidence that it is difficult to make an impact, but it is not clear which of the program is most effective. This kind of information can be obtained through public surveys and polling data. Accordingly, it makes sense to spend a small amount of resources to measure the impact prior programs have had on legal professionals and on the population as a whole. For example, Eric Stover has, in a somewhat different context, interviewed witnesses about their experiences at the ICTY and their perceptions of the Tribunal both before and after the experience.<sup>122</sup> His conclusions have been very useful in making adjustments to programs supporting victims and witnesses. While, at first glance, such proposals may appear unorthodox, there is much to be learned from the social sciences in this regard. The rule of law is too important to be left to guesswork and anecdotes.<sup>123</sup>

Consideration also needs to be given to the roles non-lawyers might play in rule of law assistance work. Mark Malloch Brown says that “rule of law is too important to be left to the lawyers.”<sup>124</sup> Others have suggested that reliance on lawyers has led to “a conflation between rule of law and lawyers, and a realization that multidisciplinary teams” might be more adept at addressing issues of rule of law.<sup>125</sup> While the design of programs should certainly include experts in other fields, it is questionable whether non-lawyers could actually serve as implementers, since it may be difficult to obtain the necessary respect from judges and lawyers to be effective in these roles. However, these insights and proposals deserve close examination.

Two other areas identified by the Report in which the RLAU could play a useful role are in establishing best practices and in identifying expertise. In a field with many donors and assistance providers, a systematic approach to identify best practices among the sundry actors could achieve real benefits. While there have been exchanges between organizations regarding best practices, the Unit, if properly resourced, could serve as the convener for such discussions. Related to this is the need to identify experts both within and outside the U.N. system and to compile a roster of these experts. A database with pertinent information about these experts can allow for better selections to be made in the future, rather than relying on the informal contacts that have dominated past efforts. Specific attention should be given to ensuring that “new” experts from post-conflict societies—that is, professionals who have been on the domestic side of assistance programs and have developed their own expertise—are included in such a database. This involves a cultural shift for the U.N., as it

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122. MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY (Eric Stover & Harvey M. Weinstein eds., 2004).

123. Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 9 (Carnegie Endowment, No. 34, 2003), <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1169> (“Rule-of-law practitioners have been . . . [working] more out of instinct than well-researched knowledge.”).

124. 5052d Mtg., *supra* note 58.

125. Hurwitz & Studdard, *supra* note 9, at 9.

means that in-house expertise must be developed in order to identify the right trainers and experts. In this regard, the U.N. can learn from some of its NGO partners who often do a better job of identifying the best people for these tasks.

To facilitate the above steps and to show the U.N.'s renewed commitment to, and more active involvement in, supporting the rule of law, consideration should be given to convening a symposium or forum under U.N. auspices to address the issues noted above and to take stock of current efforts. This would give the U.N. the opportunity to test out these and other ideas and to begin to establish its new role. A second step would be to convene regular meetings of the donor governments, NGOs, and others involved in rule of law assistance work. Most of these groups are represented in New York or Washington and would probably welcome such regular interaction. More importantly, such regular coordination meetings should be replicated in the relevant field operations. The U.N. representative in these field operations could also serve a useful role by acting as a repository for information on best practices, quality of experts, and other matters so that this information is not lost through the inevitable shifting and departure of personnel.

Ultimately, whether these specific ideas are pursued by a reformed U.N. is less important than whether these new organs, particularly the RLAU, can think creatively. The challenges are immense and past efforts have often proved disappointing. Thus, the Unit should not only put forward practical proposals through increased coordination and expertise, but should also facilitate new thinking about these issues. In these efforts, it must work closely with other partners and make new relationships in the social sciences and in academia so that it can fulfill its new and expanded role.

#### IV. CONCLUDING REMARKS

Building the rule of law encompasses many issues, from defining the term to making it a reality. Despite the difficulties, even critics of rule of law efforts acknowledge its importance in societies moving from conflict to peace.<sup>126</sup> A variety of strategies and programs have been developed to assist in building legal institutions and to impart the "cluster of values" that lies at the heart of the rule of law. However, in light of the many difficult obstacles, these efforts are often only partially successful. It is clear that if any progress is to be made, certain key issues must be addressed. First, societies must deal with crimes of the past through any one of a variety of mechanisms, so long as it ensures that those most responsible are held criminally accountable in a transparent and legitimate process. The society must also establish a broad legal framework in which the rule of law can flourish. The next phase focuses on developing the legal institutions, including an independent judiciary, competent lawyers, and effective legal education. An active and vibrant civil society

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126. See Carothers, *supra* note 123.

composed of domestic NGOs and activists is critical to reform both the relevant institutions and the attitudes of legal professionals and society at large. As has been argued above, it is important that these strategies be understood as complementary rather than as in competition with each other.

There is widespread agreement that rule of law assistance should focus on these matters, but there is also considerable uncertainty regarding the effectiveness of the various strategies and techniques. This uncertainty is rooted in the considerable knowledge gaps which remain in rule of law areas. This situation is accompanied by an often chaotic approach to rule of law programming in field operations and a lack of planning and coordination by primary actors such as donor governments, NGOs, private contractors, and international agencies. Until these issues are more effectively addressed, efforts to support the rule of law will continue to face significant obstacles.

United Nations reform efforts create an opportunity to start to fill these gaps and to strengthen rule of law efforts. If the Report's recommendations are realized, the U.N. will be in a better position to provide the necessary leadership. It is the only actor that has the credibility and legitimacy to provide the research and conceptual thinking to address some of the epistemological issues that confront this field, as well as to address practical coordination issues on the ground. Hopefully, these reforms will not be watered down, leaving the U.N. under-resourced and overwhelmed in the face of immensely difficult issues. There is an important role for a reformed U.N. to play, but there must be the resources and the will to achieve these reforms. Otherwise, U.N. reform will fail, leaving post-conflict societies in desperate, if not hopeless, straits.