Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template

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Abstract

A common position adopted by the international community is that establishing the rule of law after violent internal conflict is an essential prerequisite in the transition from war to peace. In practical terms, this often translates into projects and programmes directed at the criminal justice sector. Rarely is rule of law acknowledged in relation to administrative law, public governance and economic management. This has several negative effects, particularly in societies where public mismanagement, bad economic governance and corruption run high, and especially if one considers these issues as constituting a large part of the reason for state 'failure'. But, a new trend is now vaguely discernible in the practice of the international actors involved in rebuilding war-shattered societies that gives priority to the rule of law in relation to public sector reform. Liberia provides, in this regard, an illustrative example through the agreement between the Transitional National Government of Liberia and donor agencies, where international experts will have co-signing authority over a number of budgetary issues, and where national judicial institutions will be strengthened in order to combat arbitrary governance and corruption.

1. The Role of Law in Post-Conflict Reconstruction

It has become a credo in the field of statebuilding¹ that for societies to manage the transition from conflict to durable peace, they must establish the rule of law.² Thus, in the rebuilding process of so-called 'failed states',³ rule of law promotion has become a popular reform activity including activities such as, reviewing and

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¹ Statebuilding is distinct from the more traditional crisis management forms of preventive diplomacy, peacemaking, peacekeeping and peacebuilding, see *Report of the Panel on United Nations Peace Operations*, UN Doc. A/55/305-S/2000/809, 21 August 2000; R. Caplan, *International Governance of War-Torn Territories* (2005); S. Chesterman, *You the People: The United Nations, Transitional Administration, and State-Building* (2004).

² See *Rule of law and Transitional Justice in Conflict and Post-conflict Societies* UN Doc. S/2004/616, 23 August 2004.

³ The concept of 'failed states' was first popularised by G. Helman and S. R. Ratner, 'Saving Failed States', (1993) *Winter Foreign Policy*, Issue 89. The concept represents a security perspective on states in crisis. The perspective from the development community

vetting criminal laws in light of international human rights standards; training of judges and other legal professionals; supporting the formation of police forces and establishing human rights commissions and truth and reconciliation tribunals.⁴ As some commentators sarcastically remarked in a recent study, rule of law is like apple pie and ice cream, it is a concept that no one can dislike.⁵ This 'rule of law template' or 'justice triad' approach is promoted in a wide variety of different post-conflict situations from Afghanistan to Kosovo, Liberia and Haiti.⁶

But, there is a contestant to the title of the most popular reform activity. This alternative to the standard menu says that in order to successfully address root causes to a conflict, one need also to focus on rule of law in relation to other areas, in particular to governance and economic management. Stripped to its essentials, this argument implies that it might be equally important to review the laws on public procurement as it is to review penal codes, and equally important as creating a human rights commission is the establishment of an independent prosecutorial office with a mandate to investigate charges of corruption.

While this argument flies in the face of the popular perception that the greatest need in post-conflict societies is the implementation and protection of civil and political rights, and while it lacks the high-flying and symbolic traits of the present rule of law menu, it is quite logically constructed. What is more, it is all about rule of law and human rights promotion.⁷ The alternative perspective views conflict as a development problem, and that without getting the economy back on track and without providing the basic means necessary for people to sustain themselves financially, conflict is never far away. In situations where the government misuses public resources, where the executive power curtails the judiciary, and where embezzlement and corruption is high, where water rights and land rights are hotly contested, rule of law has an important role to play.⁸

is wider in scope. The World Bank talks of 'Low Income Countries Under Stress', and the Organisation for Economic Co-operation and Development uses the term 'difficult partnerships', focusing on crisis as a development problem. [Is there a need for a reference here]

⁴ For an overview of United Nations missions with rule of law components, see S. N. Carlson, 'Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons Learned Study', *UN Peacekeeping Best Practice Unit*, March 2006.

⁵ J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006).

⁶ A number of scholars refer to the present effort of promoting the rule of law as a template, menu, or orthodoxy. See T. Carothers, 'The Problem of Knowledge', in T. Carothers, (ed.) *Promoting the Rule of Law: In Search of Knowledge* (2006) and J. Stromseth *et al.*, *op. cit.*, fn. 5.

⁷ See the discussion in S. C. Agbakwa, 'A Path Least Taken: Economic and Social rights and the Prospects of Conflict Prevention and Peacebuilding in Africa', (2003) 47 *Journal of African Law*, 38–64.

⁸ Sudan is an evocative case in point. The *Comprehensive Peace Agreement* (CPA) signed in 2005 is severely undermined by the executive power, despite several safeguards built into the agreement. The President has issued decrees undermining the legislative power of the National assembly, including decrees proposing to give the police and armed forces greater powers but with limited accountability. See International Crisis Group,

A counter-argument to this 'rule of law and development perspective' is that in the immediate situation after conflict, the rule of law menu represents urgent measures needed in order to guarantee peace, order and stability. This is correct, but directing legal and judicial assistance to governance and economic management should not follow long after.

This article will argue that there is a need to pay greater attention to rule of law in relation to issues such as governance and economic management, and that failure to do so may severely undermine the sustainability of other statebuilding reforms.

In order to set the stage for this article's central argument, Part 2 will provide an overview of the cause of crisis states while Part 3 will examine some of the implications of conflict for the legal and administrative sector. Part 4 will analyse the rule of law template in statebuilding, focusing on how the concept of rule of law is used by international actors. In Part 5, three critical capacities of the rule of law template will be analysed: law reform, judicial reform and human rights and police. This is followed by a discussion of a governance and economic management programme in Liberia in Part 6, as an alternative to the 'one-size-fits-all' approach currently dominating the agenda of rule of law and statebuilding entrepreneurs.

The primary focus in this article centres on volatile and crisis state situations. The defeatist question posed by Martin Doornbos, 'when starting from scratch, where does one begin'⁹ to the case of statebuilding in Somalia, can serve as a geographical and conceptual denominator, and the same can be said of Robert Jackson's unconventional suggestion that certain states should be advertised by public notice on large signboards at all border entrances bearing the words: 'Warning: this country can be dangerous to your health.'¹⁰

2. A Crisis Anatomy

Understanding the anatomy of crisis situations is far from an academic interest; it holds great bearing on the quality of the response of the international community. As shown by Cater, how conflicts are understood greatly influences the strategies of the UN and other donors.¹¹

Finding root causes to conflict was a much debated issue throughout the 1990s between proponents of a perspective which placed economic incentives as the main cause, and those who claimed that various forms of deprivations of justice and violations of human rights, authoritarian regimes, etc. were to blame.

'Sudan's Comprehensive Peace Agreement: The Long Road Ahead', *Africa Report No. 106*, 31 March 2006, 6.

⁹ M. Doornbos, 'Somalia: Alternative Scenarios for Political Reconstruction' (2002) *African Affairs* 101 at 102.

¹⁰ R. Jackson, *The Global Covenant: Human Conduct in a World of States* (2003) 295.

¹¹ C. Cater, 'The Political Economy of Armed Conflict and UN Intervention: Rethinking the Critical Cases of Africa' in K. Ballentine and J. Sherman, *The Political Economy of Armed Conflict: Beyond Greed and Grievances* (2003) 40 et. seq.

The international community has tended to depart from the perception that conflict is primarily caused by a deprivation of justice, meaning a lack or abuse of civil and political rights and the existence of an autocratic regime where political participation is non-existent.¹²

According to the 'justice-seeking' perspective, conflicts and crisis situations occur because people pursue certain grievances against the state, and when there are no adequate mechanisms and institutions in place for seeking redress, crisis looms nearby.

This 'justice seeking' approach is clearly illustrated in the report of the UN Secretary-General, *Rule of law and Transitional Justice in Conflict and Post-conflict Societies*, where it is said that past experience has demonstrated that the consolidation of peace as well as the maintenance of peace in the long term, cannot be achieved unless 'the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice'.¹³

The report also holds that '... the heightened vulnerability of minorities, women, children, prisoners and detainees, displaced persons, refugees and others, which is evident in all conflict and post-conflict situations, brings an element of urgency to the imperative of the rule of law'.¹⁴ Rule of law is seen as a remedy for widespread insecurity.

While this perspective rightly posits human rights abuses at the centre of conflict and at the centre of the international response, it is intrinsically narrow in scope and generally excludes deprivation of social and economic rights. The justice-seeking approach tends to equate insecurity with violation of physical integrity rights. But, insecurity is much more than violations of civil and political rights. In a report from the World Bank called *Voices of the Poor: Crying Out for Change*, based on extensive world-wide interviews, eight factors of insecurity were listed: insecurities of work and livelihood; natural and human-made disasters; crime and violence; persecution by the police and lack of justice; civil conflict and war; macropolicy shocks and stresses; social vulnerability; health, illness and death.¹⁵

A broader perception of insecurity is also given by the Truth and Reconciliation Commission in Sierra Leone, which concludes that a number of factors are at play in a crisis situation. The Commission noted that it was years of bad governance, endemic corruption and the denial of basic human rights that created the conditions that made conflict inevitable. The Commission also observed that

¹² R. Rotberg, 'Failed States in a World of Terror', (2002) *Foreign Affairs* 81at 130 'in the last phase of failure, the state's legitimacy crumbles. Lacking meaningful or realistic democratic means of redress, protesters take to the streets or mobilise along ethnic, religious, or linguistic lines'.

¹³ *Op. cit.*, fn. 2, para. 2.

¹⁴ *Ibid.*

¹⁵ D. Narayan, R. Chambers, M. K. Shah and P. Petesch, *Voices of the Poor: Crying Out for Change* (2000) 151.

many of these causes are still not adequately addressed 'they are potential causes of conflict, if they remain unaddressed.'¹⁶

There are scholars who argue that objective grievances, such as human rights violations, have nothing, or very little to do with conflict and crisis.¹⁷ Instead, they suggest that economic factors such as a high concentration of natural resources provide incentives for looting and predatory economic behaviour and, that rebel groups seek not to redress grievances, but enrichment, and that this causes conflict to erupt. The economic perspective is a very one-sided take-on conflict that pays little attention to the state as an actor, and it is difficult to explain the conflicts in Rwanda and Somalia as a struggle over coffee rentals and cows.¹⁸ Nevertheless, the economic perspective does manage to bring attention to the fact that weak economic governance and widespread poverty, typical development problems, are central features among the root causes of conflict.

Objective grievances should not be disregarded as part of the explanatory power of conflicts but they should be viewed from a more comprehensive perspective. A number of objective grievances in post-conflict societies relate to physical integrity rights, however, a large part also concerns the right to water, land and adequate housing. Therefore, the role of economic, social and cultural rights, or rather the deprivation of these rights, should be more clearly acknowledged in the international rule of law response.¹⁹ This entails recognition that 'resource misallocation, economic mismanagement, corruption, poor fiscal policies, and structural adjustment policies' can have negative effects on a society, and if left unaddressed, can cause the eruption of violent conflict.²⁰ As noted in the Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, 'corruption, illicit trade and money-laundering contribute to state weakness, impede economic growth and undermine democracy. These activities thus create a permissive environment for civil conflict'.²¹

¹⁶ Report of the Sierra Leone Truth and Reconciliation Commission, *'Witness to the Truth'*, Vol. 2, para. 37.

¹⁷ See P. Collier and A. Hoeffler who analyse economic factors and link the existence of natural resources (such as oil, timber and diamonds) and a high level of commodity export to the probability of civil war based on a utility argument where a high concentration of natural resources provides an incentive for looting and predatory economic behaviour. P. Collier and A. Hoeffler, 'On Economic Causes of Civil War', *Oxford Economic Papers* (1998) 50; 'Justice Seeking and Loot-Seeking in Civil War' (1999); and 'Greed and Grievances in Civil War' (2001).

¹⁸ For a critique of the 'loot-seeking' perspective, see K. Ballentine and J. Sherman (eds.), *The Political Economy of Armed Conflict: Beyond Greed and Grievances* (2003).

¹⁹ See, e.g. *Task Force Report on State Failure 'Phase III'* 20 September 2000, p. vii 'as is true for other types of state failure, lower levels of material well-being are associated with a greater risk of ethnic war. We found that countries with worse-than-average infant mortality faced roughly double the odds of an outbreak of ethnic war.'

²⁰ *Op. cit.*, fn. 7, p. 43.

²¹ *Report of the High-level Panel on Threats, Challenges and Change: A More Secure World: Our Shared Responsibility* UN Doc. A/59/565, 2 December 2004, para. 23.

While this perspective – claiming that root causes to a conflict may consist in equal part of a lack of employment, education, widespread poverty and human insecurity as well as a lack of the right to vote – have not been ignored in the broader realm of statebuilding, it has been ignored by the ‘rule of law menu’. Issues concerning the protection of social and economic rights and control of the executive power are generally left out of the statebuilding and rule of law equation.²²

The UN High Commissioner for Human Rights observed in a report from early 2005 on Sierra Leone that progress in the area of human rights had been lopsided in favour of civil and political rights. Few improvements were registered in the area of economic, social and cultural rights, and from all indications, Sierra Leone was unlikely to meet the Millennium Development Goals in any of the areas.²³ The Secretary-General made a similar observation and noted that increasing respect for civil and political rights in Sierra Leone continued, but progress in the area of social and economic rights remained slow and cumbersome.²⁴

For the planning and preparation of post-conflict statebuilding interventions with a substantial rule of law component, the multifaceted anatomy of crisis situations – the mixing of justice, economic and social conflicts – requires a holistic approach.

3. The Impact of Conflict on the Legal and Administrative Systems

The legal and administrative system is often the part of the state which is most vulnerable to conflict.²⁵ One striking feature is the high level of destruction of official buildings, particularly court houses, police stations, correctional centres and prisons; a level of destruction which seems endemic in crisis situations.²⁶ William G. O’Neill paints a tragic picture from Kosovo in 1999 following the withdrawal of the Serbian armed forces, and describes the situation as if ‘. . .

²² This is in contradiction to the problems on the ground. If one looks to the annual reports of the Ombudspersons in Kosovo and Bosnia and Herzegovina, a large part of the complaints received concerns social and economic rights. See, e.g. ‘*Fourth Annual Report*’ of the Ombudsperson in Kosovo.

²³ *Situation of Human Rights in Sierra Leone* UN Doc. E/CN.4 2005/113, 2 February 2005, para. 33.

²⁴ *Twenty-fifth Report of the Secretary-General on the United Nations Mission in Sierra Leone* UN Doc. S/2005/273, 26 April 2005, paras. 44–45.

²⁵ As concerns implications of crisis, a distinction can be made between international and national legal implications. Here, the national implications will be discussed, but it is worth noting that on the international level crisis situations entail a host of difficulties relating to a loss of *de facto* legal capacity to enter into new international agreements and treaties. For further discussion of international legal implications, see R. Koskenmäki, ‘Legal Implications Resulting from State Failure in Light of the Case of Somalia’, (2004) 73 *Nordic Journal of International Law*, 1–36.

²⁶ See H. Strohmeier, ‘Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor’, (2001) 95 *The American Journal of International Law*, 46–63.

a plague of heavily armed locusts had swept through, scouring the grounds for anything valuable and leaving broken windows and ripped-out electrical sockets in their wake.²⁷

This is not unique for Kosovo. A World Bank Joint Assessment Mission to East Timor, following the post-election violence, reported that over 70% of all administrative buildings were either fully or partially destroyed, and almost all office equipment and movable property was completely destroyed.²⁸ The fact that official records and court files are destroyed means, for example, that land, housing and property rights may be hard to legally identify. This, in turn, creates insecurity and prohibits local productivity and economic growth, further complicated by the return of refugees and internally displaced persons.²⁹ Widespread destruction makes the legal and administrative system of a war-torn society 'ahistorical'.³⁰

In many cases, the legal and administrative system also suffers from a lack of independence due to an entrenched tradition of executive interference. This was recorded by the group of UN experts assessing the legal sector in Liberia in 2003 in relation to the establishment of a UN peace operation

. . . public confidence in the judiciary is extremely low. Salaries and benefits . . . have not been paid for 17 months, providing an easy justification for acceptance of bribes and favours . . . Courts were extremely reluctant to rule against the government and 'telephone justice' was said to be common. By all accounts, Taylor's domination of the judiciary was far-reaching and extreme.³¹

Weakness in the administrative system is often a salient feature of post-war societies. The administrative legal framework tends to be unclear with overlapping jurisdictions between various agencies, leaving room for discretion or creating administrative inertia. This also means that the regulation of property rights, social services and the issuing of licences and permits for commercial activity

²⁷ W. G. O'Neil, *Kosovo: An Unfinished Peace* (2002) 75.

²⁸ World Bank, 'Joint Assessment Mission Report' (1999) para. 15. See also *Report of the Secretary-General on the Situation in East Timor*, UN Doc. S/1999/1024, October 4, 1999, paras. 11–13.

²⁹ See A. Hurwitz, K. Studdard and R. Williams, 'Housing, Land and Conflict Management: Identifying Policy Options for Rule of Law Programming', *International Peace Academy, Policy Report*, October 2005.

³⁰ This is illustrated in the European Commission financial audits of state-owned enterprises and other revenue generating agencies in Liberia. In relation to, for example, Liberia Petroleum Refining Company, the financial audit observed that most of the records and official documents had been destroyed which made it difficult to determine the revenue generating potential, sort out concessions and contracts, as well as installing measures to curtail corruption in the company. 'Liberia Petroleum Refining Company' (2004) Volume 1 *Executive Report*.

³¹ UN DPKO *Liberia: Legal and Judicial Planning Assessment and Concept of Operations*, 19 September 2003 (on file with author).

takes a hard toll, creating legal and administrative barriers for people struggling to return to some sort of normality.

In post-war societies, the previous law in force is often challenged and fiercely contested, as evident in Somalia and Kosovo. When the Special Representative of the Secretary-General in Somalia declared the criminal laws in force prior to the establishment of the UN mission to be applicable it provoked vigorous protests from the legal community in northern Somalia who perceived the penal code to be tainted by the former regime of Siad Barre.³² Similarly, when the UN transitional administrator for Kosovo declared that the laws in force prior to the establishment of the UN mission should continue to apply, *mutatis mutandis*, several Kosovo-albanian judges refused to apply the law.³³

In this regard, the current effort of developing model criminal codes for potential use in peace operations should be noted as a positive improvement of rule of law promotion practice. While the effort originally followed the recommendation in the Report of the Panel on United Nations Peace Operations, where a form of 'justice package' was suggested in order to more effectively address the issue of applicable law, the project has evolved and has the potential for more long-term use in criminal law reform.³⁴ The model codes encompass a Model Criminal Code, Model Code of Criminal Procedure, Model Detention Act and a Model Police Act. The drafting process has followed an inclusive and comprehensive approach involving consultations with legal practitioners and scholars across the globe.³⁵

Related to this phenomenon is the emergence of parallel justice systems, as a response to a perceived bias in the formal justice system, or because of the weak function of formal law. Following the crisis in Somalia, customary law and Islamic law, Sharia, emerged and has since become a consolidated normative system in rural areas while the formal justice system applies only to the urban sector, at best.³⁶ A similar development has taken place in Sierra Leone. As noted in a recent assessment by the World Bank, the justice sector only serves the urban elite, the resources available to the sector are abysmal, and the general perception of the justice system is in general negative. In the countryside, people increasingly

³² M. Ganzglass, 'The Restoration of the Somali Justice System', in W. Clarke and J. Herbst (eds.), *Learning from Somalia: The Lessons of Armed Humanitarian Intervention* (1997) at 28.

³³ SC Res. 1244 UN SCOR, 4011th mtg., UN Doc. S/RES/1244, 10 June 1999 and UNMIK Regulation 1999/1. See also Strohmeyer, *op. cit.*, fn. 26.

³⁴ *Report of the Panel on United Nations Peace Operations*, *op. cit.*, fn. 1, para. 83.

³⁵ See, V. O'Connor, 'Traversing the Rocky Road of Law Reform in Conflict and Post Conflict States: Model Codes for Post Conflict Criminal Justice as a Tool of Assistance', (2005) 16 *Criminal Law Forum*, 231–255.

³⁶ Somalia has three parallel legal systems: the Islamic law (SHARIA) customary law (XEER) and the formal state law. R. Haglund and R. Sannerholm, 'Comparative Law and Legal Development: Report of a Workshop Held in Garrowe, Puntland' (Örebro University, 2003) on file with the author.

resort to customary and informal extra-judicial mechanisms for settling disputes and arranging their affairs.³⁷

Finally, crisis states share, together with the rest of the community of developing countries, the general problems of severely constrained human and material resources, politicisation of the justice system; several laws that are not applied, lack of educated and adequately trained legal professionals, and a low level of access to justice. In times of conflict and prolonged insecurity, these characteristics become more acute problems. A low access to justice becomes no access to justice, several laws not applied turn into laws not applied at all, and a politicisation of the justice system, rule *by* law and not rule *of* law, eventually becomes rule by the gun.

Considering the fact that conflict is caused by a number of intertwined factors (from human rights abuses to widespread corruption) and considering that conflict creates a rule of law deficit in both the legal and administrative sectors, it is rather surprising that the majority of rule of law programmes and projects implemented in post-war societies has a tendency to focus almost exclusively on criminal justice, while neglecting the broader role played by law in a reconstruction process.

4. The Model Rule of Law in Statebuilding

Do we really need to discuss the rule of law? Is it not enough to act on the basis of 'I know it when I see it?' There are two compelling reasons for why a discussion and examination of the concept of rule of law in post-conflict statebuilding is warranted, indeed one could even say, urgently needed.

The first one is simply that if the international community is to continue to promote the rule of law as part of a reconstruction strategy, there should be some clear indications as to what, more precisely, is meant by the rule of law, beyond references to general goods such as human rights and democracy. Scholars and practitioners alike frequently criticise 'rule of law promoters' for lacking a precise definition of what, exactly, they are promoting.³⁸ Not knowing what to promote, yet still doing it, leads to confusion, contradictory results and a conflict of values, the argument goes.³⁹

³⁷ Legal Vice Presidency, World Bank, '*Sierra Leone: Legal and Judicial Sector Assessment*', May 2004, 4.

³⁸ M. Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *S. Cal. L. Rev.* at 1308 arguing that while there is no consensus of what the rule of law stand for there is reasonable consensus for what it stands against; G. P. Fletcher, *Basic Concepts of Legal Thought* (1996) 12 '*we are never quite sure what we mean by 'rule of law'*'; and J. Shklar, 'Political Theory and the Rule of Law' in A. C. Hutchinson and P. Monahan, (eds.) *The Rule of Law: Ideal or Ideology* (1987) at 1 saying that rule of law may very well have become meaningless because of '*ideological abuse and over-use*'.

³⁹ R. Kleinfeld, 'Competing Definitions of the Rule of Law' in Carothers, *op. cit.*, fn. 6. p. 32 '*read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant – a trunk to one person, a tail to another.*'

Secondly, it is not only that discussing the rule of law will enhance the quality of communication between donor agencies involved in promoting the concept, and between the donor community and recipient states, which makes an examination of the concept warranted, it is also the fact that the rule of law sometimes has legal consequences. The EU in its external relations under the Cotonou agreement has included the rule of law as one criterion which the partner countries need to fulfil. Actions in violation of the rule of law can thus result in certain measures such as withholding funds and freezing assets. In order for these measures to be implemented in the event of a breach of agreement there must be a rather specific understanding of what the rule of law is.

But it is not at all clear what the rule of law means, what the concept includes, or in this context, what the rule of law does for socio-political and socio-economic development.⁴⁰ Instead, the axiom frequently referred to – that rule of law is necessary for economic development and democracy – is not, when held up to close light ‘as axiomatic as it may first appear’.⁴¹ Furthermore, the assumed causal link between enhanced rule of law and increased human rights protection is shaky, at best.⁴² Instead it seems as if the rule of law is promoted on the basis of rather general assumptions and loose theoretical grounds.⁴³

One way of approaching rule of law is to see it as a way of organising the state, how the state’s relationship to its citizens should best be regulated, and how the relationship between the citizens should be regulated.⁴⁴ The rule of law, writes Susan Rose-Ackerman, has two fundamentally different aspects; ‘the first sets legal limits, both civil and criminal, on private interactions. The second imposes limits on the political regime’.⁴⁵ In a somewhat scaled-down version, the rule of law could be presented as constituted by a set of principles: legality, legal certainty,

⁴⁰ First, it should be noted that rule of law has originated in two different legal ‘families’. We have the Continental-European concept of ‘Rechtsstaat’ and the Common-law concept of ‘rule of law’. Furthermore, rule of law is often within the academic discourse separated into a material and a formal connotation, where the former emphasises the formal procedures of the legal system without giving much attention to the substance, contrary to the latter where not merely the formal requirements should be fulfilled but also some form of political morality in terms of ‘just’, ‘equitable’ and ‘fair’ laws. For further reading, to name but a few, see, F. A. Hayek, *The Road to Serfdom* (1986); J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press: New York, 1979); I. Shapiro (ed.), *The Rule of Law* (1994); B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004); J. M. Maravall and A. Przeworski, *Democracy and the Rule of Law* (2003).

⁴¹ Carothers, *op. cit.*, fn. 6, p. 17.

⁴² See R. Peerenboom, ‘Rule of Law and Human Rights: What’s the Relationship?’ (2005) 36 *Georgetown Journal of International Law*, 36:1.

⁴³ Rule of law assistance is not a field, according to Carothers, ‘if one considers a requirement for such a designation to include a well-grounded rationale, a clear understanding of the essential problem, a proven analytical method and an understanding of results achieved’. *Op. cit.*, fn. 6, p. 28.

⁴⁴ S. Rose-Ackerman, ‘Establishing the Rule of Law’, in Rotberg (ed.), *When States Fail: Causes and Consequences* (2004) 183.

⁴⁵ *Ibid.*, p. 182.

separation of powers and equality before the law with the primary purposes of protecting against arbitrary rule and guiding human conduct.⁴⁶ But this minimal or modest conception has scant support among international agencies, where emphasis tends to be placed on the rule of law as a concept intertwined with human rights, justice and democracy.⁴⁷

The Secretary-General has attempted to establish a common rule of law definition, which will guide the work of the UN's various agencies, programmes and departments. Rule of law, it is said:

... 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.⁴⁸

This definition integrates both procedural (formal) and substantive (material) principles.⁴⁹ In addition, the definition also advocates for rule of law as an essential part of good governance through the reference to accountability, transparency and participation in decision making.⁵⁰ This definition will, without doubt, gain support and approval among many of the various actors involved in rule of law promotion, in the sense that it represents the general idea of rule of law as

⁴⁶ See, e.g. J. Raz, *The Authority of Law: Essays on Law and Morality* (1979); O. Kirchheimer, 'The Rechtsstaat as Magic Wall' in F. S. Burin and K. L. Shell (eds.), *Politics, Law, and Social Change: Selected Essays of Otto Kirchheimer* (1969); and R. H. Fallon 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Colum. L. Rev.* 97:1.

⁴⁷ See, e.g. the Organisation for Cooperation and Security in Europe (OSCE) stating more than a decade ago in the seminal document Conference on Security and Cooperation in Europe that rule of law 'does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.' *Copenhagen Meeting of the Conference of the Human Dimension of the OCSE*, (1990) 1 (2).

⁴⁸ *Op. cit.*, fn. 2, para. 6.

⁴⁹ As a contrast, see the World Bank's definition saying that the rule of law prevails where: 'the government is itself bound by the law; every person is treated equally under the law; the human dignity of each individual is recognised and protected by law; and justice is accessible to all'. The Legal Vice Presidency, World Bank, '*Legal and Judicial Reform: Strategic Directions*' (2004) 1.

⁵⁰ See the Human Rights Commission's definition of good governance in Resolution 2000/64, 66th meeting, 26 April, 2000.

something good, something linked to democracy, something linked to human rights, and something linked to good governance.

But all good things do not go together, and it is evident that rule of law, following this definition, will be painstakingly difficult to operationalise and implement in post-conflict societies. High ambitions and soaring expectations are at the heart of the problem with the rule of law menu – too many ‘goods’ have been associated with rule of law that it is difficult to define, in concrete terms, what it will take to realise them.

What rule of law reformers have done to a large extent is modelled the rule of law menu based on their own national experiences and tried to mimic the conditions in their own legal contexts. Rwanda is a case in point. Following the post-genocide intervention the international community focused on a number of training programmes for the few remaining legal professionals in the fledgling justice sector. Most of the international experts, however, came from common law backgrounds with little or no understanding of Rwanda’s legal tradition, which is a mix of French and Belgian civil law which effectively hindered much of the rule of law reforms carried out.⁵¹

The rule of law menu tends to look like a checklist of what institutions it is assumed that rule of law needs in order to exist instead of asking the most basic question of why the rule of law is needed in the first place.⁵² Moreover, the international promotion of rule of law has a strong tilt towards the function of regulating the relationship *between* citizens; rule of law has come to be equated with law and order, security, and low levels of crime, and the concept of security sector reform is sometimes used interchangeably with rule of law reform.⁵³ There is also a strong moral and political imperative to focus on human rights in relation

⁵¹ C. Mburu, ‘Challenges Facing Legal and Judicial Reform in Post-Conflict Environments: Case Study from Rwanda and Sierra Leone’ *World Bank Conference on Empowerment, Security and Opportunity Through Law and Justice*, July 8–12, 2001, 29

⁵² See generally, Kleinfeld, *op. cit.*, fn. 39.

⁵³ See *Making Standards Work: Fifty Years of Standard-setting in Crime Prevention and Criminal Justice*, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, UN Doc. A/CONF.203/8, 1 April 2005, ‘... policing interventions in post-conflict societies should be viewed as an integral part of the rule-of-law continuum, coupled with parallel interventions in other components of the criminal justice system such as the judiciary and penal systems’, para. 42. See also *A More Secure World*, *op. cit.*, fn. 21, paras. 229–230. The writing in this field has expanded rapidly. Presented here are some of the contributions that describe the present rule of law paradigm. M. Plunkett, ‘Rebuilding the Rule of Law’, in W. Maley, C. Sampford, and R. Thakur, *From Civil Strife to Civil Society: Civil and Military Responsibility in Disrupted States* (2003) 207–228; F. M. Lorenz, ‘Civil-Military Cooperation in restoring the Rule of Law: Case Studies from Mogadishu to Mitrovica’, in M. C. Bassiouni, *Post-Conflict Justice*, (2002) 829–849; R. Huang, ‘Securing the Rule of Law: Assessing International Strategies for Post-Conflict Criminal Justice’, *International Peace Academy*, Policy Paper, November 2005; and Center for Strategic and International Studies and the Association of the United States Army, ‘Post-Conflict Reconstruction: Task Framework’, May 2002; and Stromseth et. al., *op. cit.*, fn. 5.

to rule of law and, most actors identify rule of law as primarily a system for the protection of civil and political rights.

The rule of law template's preoccupation with criminal justice and human rights is a stark contrast to lessons learned from governance reforms and development aid in post-conflict reconstruction, where emphasis is placed on supporting war-torn societies' ability to perform certain limited functions such as protecting people from harm and to provide an economic framework in which people are capable to support themselves.⁵⁴ The more modest, but also more practically attuned policy of governance reforms in post-conflict societies is most clearly expressed by the UK's Department for International Development (DfID) and its 'good enough governance' strategy.⁵⁵ This strategy focuses on the main causes of instability, the main capacities of the state, and the accountability and legitimacy of the state, while avoiding reforms that are too ambitious for the implementation capacity of the post-conflict society.⁵⁶

An illustrative example of how rule of law is equated primarily with law and order and human rights is the United Nations Development Programme (UNDP) project in Somalia, 'Role of Law and Security Programme' (ROLS), established in 1997.⁵⁷ The 'rule of law component' has three focal areas, the judiciary, law enforcement and human rights. These three elements, it is said, constitute a holistic and integrated approach to strengthening the emergence of rule of law in Somalia 'working by supporting the development of a transparent and independent judicial system that respects human rights and serves the people in a just and equitable manner'.⁵⁸ While lack of access to justice is a real problem in Somalia, in particular for vulnerable groups, land rights and grazing rights are other major problems from a subsistence perspective, while obstruction of justice by war-lords turned self-appointed local 'administrators' is an even greater problem. The case of Somalia highlights the fact that not all work to reform the legal sector should be labelled as rule of law reform, irrespective of whatever epithet donor agencies use.⁵⁹

The dilemma with the discourse on rule of law in post-conflict societies is that while the present paradigm makes a correct assessment of the needs in post-conflict societies, it is also off the mark. War-torn societies are in need of justice triad reconstruction featuring criminal law reform, judges educated in gender sensitivity and an adequately trained police, yet there is also a need to expand the rule of law focus and bridge security and development perspectives,

⁵⁴ See e.g. 'OECD-DAC Principles for Good International Engagement in Fragile States' *OECD-DAC Draft Paper*, DCD 8/Rev2 (2005).

⁵⁵ DfID 'Why we need to work more effectively in fragile states' (January 2005). <<http://www.dfid.gov.uk/pubs/files/fragilestates-paper.pdf>> accessed 2006-03-23

⁵⁶ *Ibid.*, p. 20.

⁵⁷ UNDP, 'Role of Law and Security (ROLS) Programme' (2003). (On file with the author.)

⁵⁸ *Ibid.*, p. 1.

⁵⁹ Kleinfeld, *op. cit.*, fn. 39, p. 50ff, discussing the problems of a purely institutional approach to rule of law reform.

and it is necessary to focus more clearly on rule of law as a way of imposing both legal limits on the state and for enhancing law's capacity to actually guide human conduct to create an enabling environment for recovery.

This means that rule of law could be seen as encompassing much more than the present focus. Besides reforming the judiciary, bar associations, constitutions and the criminal law system, in order to remedy violations of civil and political rights, it could also encompass administrative and commercial law reform and activities to fight corruption to redress economic and social rights and ensure the principle of legality. The predominant focus on criminal justice and the judiciary is, as one commentator has put it, analogous to what the public health field would look like if it mainly focused on urban hospitals and the doctors staffing them, and ignored health nurses and other health workers.⁶⁰ Focusing on only one sector of the legal and administrative system tends to create a 'dualistic development of the justice system'⁶¹ where investments in criminal justice and the judiciary gain momentum while corruption, administrative inertia and a low level of access become the norm in other sectors.

5. Three Critical Capacities: Reforming Laws, Enhancing Adjudicative Capacities and Supporting Law Enforcement and Human Rights Protection

The international community has identified institutional reform and law reform as the central components for a post-conflict statebuilding strategy. The institutions most often considered for reform, in a roughly descending order of importance, are the judiciary, police, national human rights commissions, correctional centres and prisons, and other agencies and departments of the state. In the following sections, three critical capacities of the present rule of law template – reforming laws, enhancing adjudication, and human rights protection and police reform – will be examined. These three broad categories exemplify the content of the current rule of law template, and some of the main methods of implementation.

The issue of both law reform and institutional building has frequently been approached as a technical or practical problem translated into refurbishing courthouses or importing 'good laws'. But the problem lies elsewhere. As noted by the Secretary-General in relation to Sierra Leone, courthouses and prison facilities have been built or renovated throughout the country, but 'progress has been slow in addressing such problems as undue delays in the trial and adjudication of cases and the lack of judicial personnel'.⁶² Any type of externally promoted rule of law reform is, above all, a matter of enhancing capacity and changing behaviour, and as such, is more political than legal-technical in nature.

⁶⁰ S. Golub, 'A House Without a Foundation' in Carothers, *op. cit.*, fn. 6, p. 106.

⁶¹ G. O'Donnell, 'Why the Rule of Law Matters', (2004) 15 *Journal of Democracy* 40.

⁶² *Op. cit.*, fn. 24, para. 21.

A. Reforming Laws

Law reform has been one of the top priorities in justice system reconstruction in post-war states.⁶³ Law reform means providing technical assistance and legal advisory services to governments, assisting them in ratifying or acceding to international conventions, and assisting legislatures in drafting new legislation. Predominately, the reform efforts relate to criminal law reform, criminal procedure law reform, the legal framework for the judiciary and constitution making. Laws relating to citizenship and elections are also frequently adopted in the initial stages of post-conflict reconstruction.

International human rights standards and instruments play a pivotal role in law reform from two perspectives. First of all, human rights treaties are often used as a model for a review and overall assessment of the legal framework and, secondly, the United Nations often push hard for the signing and accession to international human rights treaties.⁶⁴ As a result, there is an interaction and integration of international standards on human rights into the national legal system during a short period of time.

International human rights law, in addition to United Nations norms and standards⁶⁵ is perceived to be 'a solid basis for guidance' and offers both 'orientation and inspiration, as well as an appropriate framework for establishing and re-establishing and strengthening criminal justice systems'.⁶⁶ In the same vein,

⁶³ As noted by Strohmeier, *op. cit.*, fn. 26, p. 58, all other legal and judicial reform activities were surpassed by the need to establish a basic legal framework.

⁶⁴ Liberia is a good example. With the support of the United Nations, Liberia signed in 2004, the *Optional Protocol to the Covenant on Civil and Political Rights*; the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination*; and; the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. Liberia also acceded to the following international instruments, *inter alia*: *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*; the *Convention on the Reduction of Statelessness*; the *United Nations Convention Against Transnational Organised Crime*; the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, the *Protocol Against the Smuggling of Migrants by Land, Sea and Air*; the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*; the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*; and the *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*. See *Fifth Progress Report on the United Nations Mission in Liberia* UN Doc. S/2004/972, 17 December 2004.

⁶⁵ See, e.g. *United Nations Basic Principles on the Independence of the Judiciary* Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985. See also UN training and instructions manuals, *United Nations Criminal Justice Standards for Peace-keeping Police* (1994); *Manual on the Effective Prevention and investigation of Extralegal, Arbitrary and Summary Executions* (1991) and the *Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres* (1995).

⁶⁶ *Op. cit.*, fn. 53, para. 43.

the Secretary-General has argued that international norms and standards bring a legitimacy that cannot be said to attach to the export of national standards.⁶⁷ The UN has also assisted in drafting national plans of action for the protection of human rights in the Democratic Republic of the Congo,⁶⁸ Sierra Leone⁶⁹ and Liberia.⁷⁰

It is in this context, however, interesting to observe that ratification of human rights treaties and conventions does not seem to imply a stronger protection of human rights, and that it may even be perilous in the short-term period. Post-conflict societies are under an immense pressure to conform to international standards while they at the same time experience serious difficulties of providing basic services.⁷¹

In crisis states, the first priority is to determine the applicable legal framework. When the UN has assumed an administrative responsibility and exercised executive powers, as in Kosovo and East Timor, the laws in force at the time of the establishment of the respective UN missions were decided to apply, *mutatis mutandis*, insofar they did not conflict with human rights standards.⁷² A problem with this approach is that it is rarely supported with instructions of how to assess the compatibility of existing national laws with international human rights. In Kosovo, it was left to the judges to interpret, with the consequence that judges poorly trained in human rights had to interpret 'the penal code or the criminal procedure code through the lens of international human rights instruments . . .'.⁷³

Similarly, in Afghanistan, according to the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, it was decided that the constitution of 1964 and the existing laws and regulations should continue to apply as long as they did not conflict with the agreement or international treaties to which Afghanistan is a party.⁷⁴ Nothing is said, however, about how the interpretation of a conflict of laws should be made, or what the competent authority would be.

Several UN missions in Africa have seen major investment in law reform. While described as 'assistance' to national governments, compared to executive powers in Kosovo and East Timor, and while the issue of law reform has been approached

⁶⁷ *Op. cit.*, fn. 2, para. 5.

⁶⁸ *Report of the Secretary-General on the United Nations Preliminary Deployment in the Democratic Republic of the Congo*, UN Doc. S/1999/790, 15 July 1999, para. 33.

⁶⁹ *Op. cit.*, fn. 24, p. 16.

⁷⁰ *Seventh Progress Report of the Secretary-General on the United Nations Mission in Liberia*, UN Doc. S/2005/291, 16 June 2005, para 62.

⁷¹ See O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2001–2002) 111 *Yale L. J.* 1935 and C. Keith, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference?', (1999) 36 *J. Peace Research* 95–118.

⁷² See UNTAET Regulation 1999/1, Section 3.

⁷³ *Op. cit.*, fn. 26, p. 59.

⁷⁴ *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, Section II (1).

differently in the various missions, the result is that a substantial volume of new laws are drafted under the auspices of international actors.

This is a rarely recognised and discussed aspect of the international involvement in Africa. It reveals a built-in tension in the work of the international community and UN in particular, between policy decisions that reforms should be based on the local context and take local ownership seriously, while the reality for all practical reasons sometimes makes this an unworkable approach. The missions established in Sierra Leone or Liberia, for example, have not been given executive powers. However, the guise of 'assistance' should not steer away from the fact that laws are initiated, drafted and promoted by international experts, with continuing international aid as a levier.

As an example, in the DRC, the UN mission was charged with assisting in the re-establishment of a state based on the rule of law, which led to the establishment of a Joint-Commission with the Transitional Government on essential legislation, including post-transitional constitutional drafting.⁷⁵ Similarly in Liberia, the UN assisted the Ministry of Justice in reviewing and redrafting of laws relating to rape, human trafficking, juries and the financial autonomy of the judiciary.⁷⁶

The focus on law reform in post-conflict societies illustrates a tendency of the international community to invest in high-profile areas where tangible results are easily measured. While this is laudable, it should not overshadow the principal problem in all post-conflict and developing countries, namely that of implementation and enforcement and of making laws accessible to the general population.

B. Enhancing Adjudicative Capacity

Next to law reform, strengthening the judicial system is a core objective for peace- and statebuilders. The goal is often presented as one of increasing the professionalism and independence of the judiciary, and to train and capacity-build judges in international human rights law. While judicial reform primarily focuses on the judiciary, this sector of reform also includes assistance to bar associations, public defender programme and prosecutorial services. Judicial reform is said to be one of the most difficult reform areas in which to measure swift progress and change.⁷⁷

A first concern, however, is to address the general lack of qualified personnel. According to a recent assessment of the justice sector in Liberia, only three of the 130 magistrates are lawyers, and out of 300 justices of the peace, whose sole

⁷⁵ *Third Special Report of the Secretary-General on the United Nations Organisation Mission in the Democratic Republic of the Congo*, UN Doc S/2004/650, 16 August 2004, paras 25–26.

⁷⁶ *Op. cit.*, fn. 70, para. 49.

⁷⁷ T. Hammarberg and P. Gavian, 'Introduction', in A. H. Henkin (ed.), *Honouring Human Rights: From Peace to Justice* (1998) 11.

qualification is literacy, more than half are illiterate.⁷⁸ Burundi is another tragic case. Prior to the establishment of a UN mission, the Secretary-General reported that there were only 60 defence lawyers available in the country, most of them located in the capital.⁷⁹

The difficulty of finding legal professionals to serve on the bench has been a problem in all of the recent UN missions in Africa, and it inevitably involves trade-offs on formal requirements and practical experience in the appointment process in order to rectify the judicial deficit. The lack of judges and magistrates not only results in a backlog of cases and prolonged times of detention but also means a total lack of access to justice, particularly in rural areas. In some cases, this problem has been approached by establishing mobile courts as a quick-impact project to deal with the most pressing matters of justice⁸⁰ or as in Liberia where the UN established a Case Flow Management Committee to address the issue of pre-trial detainees held for long periods of time.⁸¹

In Somalia, the UNDP, under the ROLS programme, has engaged in rebuilding the judiciary for nearly 10 years. While several of the reform activities relate to the physical reconstruction including printers, registers, law books and the establishment of an official gazette, much of the judicial reform has also been based on extensive training and 'retraining' of judges through a series of workshops.⁸²

It is important to note that the problem with qualified personnel is not isolated to the courts. In a number of countries certain administrative agencies and quasi-judicial bodies are vested with adjudicative powers in commercial and administrative matters. Failure to include this aspect of state services when promoting rule of law can have negative long-term effects. In Sierra Leone, a deficit in regional administrators and other public officials in certain parts of the country resulted in UN personnel acting as *de facto* administrators in providing basic services, although it is not at all clear that this fell squarely within the mandate of the peace operation.⁸³

Another element of judicial reform is judicial monitoring by international legal experts, or simply giving advice to courts in particularly sensitive matters. In Côte d'Ivoire, the Rule of Law Unit within United Nations Operation in Côte d'Ivoire provided advice to the local judiciary on issues concerning death in custody,

⁷⁸ International Crisis Group, 'Liberia: Resurrecting the Justice System', *Africa Report No. 107*, 6 April 2006, 1

⁷⁹ *Report of the Secretary-General on Burundi* UN Doc. S/2004/210, 16 March 2004, para. 37.

⁸⁰ *Fourth progress report of the Secretary-General on the United Nations Operation in Cote d'Ivoire*, S/2005/186, 18 March 2005, para. 43. This was also done in Kosovo. See the early OSCE report 'Observations and Recommendations of the OSCE Legal System Monitoring Section' 7 November 1999.

⁸¹ *Sixth progress report of the Secretary-General on the United Nations Mission in Liberia*, UN Doc. S/2005/177, 17 March 2005, para. 36.

⁸² See, Judiciary Component in ROLS (2003), *op. cit.*, fn. 57.

⁸³ Peacekeeping Best Practice Unit, *Lessons Learned From United Nations Peacekeeping in Sierra Leone*, September 2003, 18.

torture or ill treatment, and arbitrary killings where the security forces had been involved. This measure is adopted as a way of strengthening the independence of the judiciary in a short-term build-up phase.⁸⁴

An interesting aspect of judicial reform is that it rarely includes a focus on legal education and support to law schools. In both Liberia and Somalia, the UN mentions briefly the need for supporting legal education; however, the primary focus is on continuing legal training. While quickly finding, training and appointing judges are necessary measures in the short-term period, it does not address a long-term deficit. Furthermore, judicial reform represents to some extent an overzealous belief in judges' inclination to change. In post-conflict situations, where the judiciary sometimes benefit from a lack of supervision and a legal 'chaos', they are not always part of the solution but part of the problem.⁸⁵

Past experiences caution against high expectations on speedy institutional change in the judiciary. Even when judicial reform has received support and commitment from the 'host' state and key actors, there is often a limited capacity to 'absorb' aid in any form due to weakness in the overall state administration. Furthermore, without effective public administration, tax collection and auditing of state funds, corruption flourishes, and even the best-designed institution-building programme within the rule of law template will have difficulties with sustainability.⁸⁶ This lack of 'absorptive capacity' fundamentally impedes the sustainability of reform – in any sector.

C. Law Enforcement and Human Rights Protection

Nearly all recently established missions include a police reform component.⁸⁷ Reforms in this area usually focus on increasing the number of police officers – as in the DRC where the UN mission, in co-operation with the Ministry of the Interior, has managed to train and deploy 6,000 police officers during 2004–2005 – or of training police officers in human rights and 'democratic policing', restructuring police forces, or reviewing the legal framework governing police work. Another aspect of police reform is 'training of trainers'. In Burundi the UN mission, United Nations Operation in Burundi, established police training centres and during 2004–2005 trained 160 police trainers, in addition to training in investigating and forensic techniques.⁸⁸

⁸⁴ *Fifth progress report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, UN doc. S/2005/398, 17 June 2005, para. 46.

⁸⁵ See, Kleinfeld, *op. cit.* fn. 39f discussing the built-in tensions in legal and judicial reform.

⁸⁶ *Op. cit.*, fn. 77, p. 9.

⁸⁷ For a brief review of post-conflict police reform, see Call, 'Challenges in Police Reform: Promoting Effectiveness and Accountability', *International Peace Academy, Policy Report* (2003) and T. H. Tor and E. B. Eide, *Peacebuilding and Police Reform* (2000). UN civilian police units under the Department of Peacekeeping Operations is the principal actor in police reform.

⁸⁸ *Fourth report of the Secretary-General on the United Nations Operation in Burundi*, UN doc S/2005/328, 19 May, 2005, para. 25–26.

The major challenge in any police reform is to facilitate a change of 'culture and ethos'.⁸⁹ Several police forces in post-conflict societies have been part of a repressive regime, and they often suffer from mistrust and lack of confidence from the society in which they operate. In this respect, ensuring that adequate accountability mechanisms are in place is a crucial reform component, along with an appropriate screening and vetting process for those seeking to enrol following disarmament, demobilisation and re-integration activities.⁹⁰

As concerns human rights, one frequently promoted and established institution is national human rights commissions.⁹¹ While their mandate varies in relation to the different context, they are generally set up to monitor the human rights situation, carry out investigation and at times receive complaints from citizens, acting as a sort of ombudsperson institution. This is illustrated in the mandate for the Commission established in Afghanistan under the Bonn Agreement, whose responsibilities include human rights monitoring, investigation of violations of human rights, and the development of domestic human rights institutions.⁹² Human rights commissions have also been established or planned for, with the assistance of the UN, in Liberia, DRC, and Burundi.

In Sierra Leone, a Human Rights Commission was established in 2004.⁹³ While it follows the general functions of other Commissions established, it has retained a rather wide set of powers, among others, the right to enforce the attendance of witnesses and examining them on oath, compel the production of documents, the power to issue orders to enforce its decisions, and to refer to the High Court for contempt an individual who refuses to comply with a decision.⁹⁴ Although an important step in creating a formalised national capacity to address human rights issues, the results have been modest in terms of effectively promoting and defending human rights.⁹⁵

A large part of the human rights promotion under rule of law takes the form of training. A good example is the workshop organised by the UN in the DRC where 130 lawyers and magistrates were 'informed' about the Convention on the Elimination of All Forms of Discrimination Against Women in order to 'help ensure that the rights of women are effectively promoted and protected by the Congolese courts'.⁹⁶ While an important aspect of institution-building, it is unclear what the effect of training programmes has in the long-term perspective, and it is

⁸⁹ O'Neill, 'Police Reform in Post-conflict Societies: What We Know and What We Still Need to Know', *International Peace Academy, Policy Paper*, April 2005, 2.

⁹⁰ Call, *op. cit.*, fn. 87, p. 5.

⁹¹ Generally following the *UN Principles Relating to the Status of National Institutions for the Promotion and Protection of Human Rights* (annex) Commission on Human Rights, 52nd meeting, March 3, 1992 Session, E/CN.4/1992/84. See also, *op. cit.*, fn. 2, para. 31.

⁹² *Agreement on Provisional Arrangements in Afghanistan*, Section III C (6).

⁹³ *The Human Rights Commission of Sierra Leone Act*, No. 9, 26 August 2004.

⁹⁴ *Ibid.*, 8 (1) a–c.

⁹⁵ *Op. cit.*, fn. 77, p. 13.

⁹⁶ *Twentieth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo*, UN Doc. S/2005(832), 28 December 2005, para. 45.

not altogether clear what it actually means in situations where judges continue to work unpaid, or where executive interference in the judiciary is still strong.

Finally, much of the human rights approach in statebuilding also includes efforts to build civil society institutions. This means supporting coalition building and enhancing the capacity of local human rights groups. An evocative case in point is from Côte d'Ivoire where the UN Mission, with funding from the Office of the High Commission for Human Rights, started a programme to strengthen national human rights groups and their capacity in raising the awareness of human rights among the population.⁹⁷ A similar approach was taken in Sierra Leone.⁹⁸ The UN agencies in co-operation with the Government of Sierra Leone also launched a nationwide consultation campaign in 2004 with the ambition to formulate national legislation for the implementation of the Convention on the Elimination of All forms of Discrimination Against Women, in addition to training of some 3,587 members of the civil society. The end-result of these activities is presented as a way to 'provide these groups with grounded knowledge of human rights principles as part of a gradual handover of the responsibility to monitor, promote and report on the human rights situation in Sierra Leone'.⁹⁹

The focus on 'bottom-up' approaches such as the enhancement of civil society is laudable. Besides the fact that it is necessary in order to 'plant' reforms in the society, it also provides incentives for national ownership and participation in decision-making. However, as with the training of legal professionals, it remains unclear what effect building human rights advocacy groups will have in the long-term.

6. Alternatives to the Rule of Law Template: Beyond Criminal Justice

Although not yet clearly formulated in policy, there is a tendency among the actors of the international community predominantly involved in rebuilding crisis states to move beyond the narrow rule of law template and also include governance and economic management issues.¹⁰⁰ International assistance to Liberia illustrates, in this regard, an interesting example of this emerging paradigmatic shift.¹⁰¹

⁹⁷ *Seventh Progress Report of the Secretary-General on the United Nations Operation in Côte d'Ivoire*, UN Doc.,S/2006/2, 3 January 2006, para 32.

⁹⁸ *Op. cit.*, fn. 83, p. 56.

⁹⁹ *Op. cit.*, fn. 23, para. 65.

¹⁰⁰ See, for example, the comprehensive reform of Iraq's commercial law undertaken by the Coalition Provisional Authority (CPA) in just over a year of administration. T. W. Kassinger and D. J. Williams, 'Commercial Law Reform Issues in the Reconstruction of Iraq', (2004–05) 33 *Ga. J. Int'l & Comp. L.* 217.

¹⁰¹ For two good descriptions of the crisis and conflict in Liberia see, F. Aboagye and A. M. S. Bah (eds.), *A Tortuous Road to Peace: The Dynamics of Regional, UN and International Humanitarian Interventions in Liberia* (2005) and A. Adebajo, *Liberia's Civil War: Nigeria, Economic and Regional Security in West Africa* (2002).

The present international involvement in Liberia is based on the resolution adopted by the Security Council in 2003,¹⁰² following the signing of *Accra Comprehensive Peace Agreement* (ACPA) which was facilitated by the Economic Community of West African States (ECOWAS).¹⁰³ Among other reform activities, ACPA called for a restructuring of the Liberian police force,¹⁰⁴ establishment of an independent national commission on human rights¹⁰⁵ and a *Truth and Reconciliation Commission*,¹⁰⁶ and the reorganisation of the *National Elections Commission*.¹⁰⁷ The agreement also called for the establishment of a *Governance Reform Commission*,¹⁰⁸ with the objective of securing good governance in Liberia and a *Contract and Monopolies Commission*¹⁰⁹ (neither with executive authority nor enforcement capacities) for supervising all budgetary and other financial handling of the transitional government.

For nearly 3 years the international community has invested heavily in rule of law reforms in Liberia. It stands to be argued that after the international assistance to legal and judicial reform activities in Kosovo and East Timor, Liberia is the one place where the rule of law menu has received the strongest attention.

Nevertheless, and notwithstanding the creation of a special rule of law component within United Nations Mission in Liberia (UNMIL) (comprising a *Legal and Judicial System Support Division*, *Corrections Unit*, *Civil Affairs Section*, *Civil Police Mission*, *Human Rights Protection Service* and a *Gender Office*), the most basic and essential component of rule of law – ensuring a law abiding state – has failed to take root. One explanation is simply that it has never really been the primary focus of international assistance to Liberia.¹¹⁰

¹⁰² SC Res. 1509, UNSCOR, 4830th mtg., S/RES/1509, (19 September 2003). The resolution stipulates that UNMIL should, in regard to rule of law, ‘assist the transitional government in conjunction with ECOWAS and other international partners in developing a strategy to consolidate governmental institutions, including a national legal framework and judicial and correctional institutions’ para. 3 (q).

¹⁰³ *Comprehensive Peace agreement Between the Government of Liberia and the Liberians United For Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties*, Accra, 18 August 2003, (hereinafter, ACPA). The Liberian Reconstruction Conference in 2003, which produced the *Results Focused Transitional Framework* also included a focus on governance and good economic management.

¹⁰⁴ ACPA, Article VIII.

¹⁰⁵ *Ibid.*, Article XII (2a).

¹⁰⁶ *Ibid.*, Article XIII.

¹⁰⁷ *Ibid.*, Article XVIII (2a).

¹⁰⁸ *Ibid.*, Article XVI.

¹⁰⁹ *Ibid.*, Article XVII.

¹¹⁰ This could be seen as a consequence of the absence of a broader strategy for post-conflict reconstruction on behalf of the UN peace operation in place in Liberia. See, R. Dwan & L. Bailey *Liberia’s Governance and Economic Management Assistance Programme (GEMAP): How it came into being, what it is and what we might learn from the process*, A Joint review by the Department of Peacekeeping Operations’ Peacekeeping Best Practices Section and the World Bank’s Fragile States

The rule of law reforms implemented are more focused on high-profile areas such as ensuring women's rights, training judges in human rights sensitivity, and ensuring the rights of juvenile offenders. They are generally not concerned with how the emerging state in Liberia should be organised, or how the relationship between the state and citizens should best be regulated, outside the realm of criminal justice and civil and political rights.

The lack of a strategy for legal, judicial and administrative reforms aimed at securing the principle of legality in the transitional government, and for ensuring transparency, good governance and accountability mechanisms has severely undermined the peace process.¹¹¹

In 2004, the European Commission and ECOWAS conducted financial audits and investigations into several state-owned enterprises and other revenue generating agencies. Based on the results of the audits the European Commission concluded that 'theft and fraud within the transitional government were so great that they were sabotaging any possibility for durable peacebuilding'.¹¹² The audits met resistance, in particular, the investigation by ECOWAS on allegations of corruption in state-owned enterprises, and several members of the Transitional National Government of Liberia attempted to obstruct the investigations.¹¹³ The Liberian Institute for Certified Accountants filed a writ of prohibition to the Supreme Court, in order to restrain public officials from co-operating with ECOWAS and the EC.¹¹⁴ The Supreme Court, however, refused the writ after civil society groups filed an *amicus* brief on behalf of the investigations.¹¹⁵ Previous pressure from the international donor community had resulted in the formation of a *Task Force on Corruption* and a *Cash Management Committee*.¹¹⁶ The Security Council had on several occasions, acting under Chapter VII of the UN Charter, adopted resolutions for the freezing of assets and supervision of the trade of diamonds, but with limited results.¹¹⁷ Similarly, the European Council

Group, April 2006, p. 9 <<http://siteresources.worldbank.org/INTLICUS/Resources/DPKOWBGEMAPFINAL.pdf>>

¹¹¹ See International Crisis Group, 'Liberia's Elections: Necessary but Not Sufficient', *Africa Report No. 98*, September 2005, 7 at 15, noting that 'petty corruption manifests itself at the most ordinary level in Liberia' and that reform is needed of all levels of the state bureaucracy.

¹¹² The audits involved the following revenue generating agencies: Liberia Petroleum Refining Company; Forestry Development Agency; National Port Authority; Roberts International Airport; Bureau of Maritime Affairs; and Central Bank of Liberia. See also the report of UNDP, *The Dimensions of Corruption in Post-War Liberia: Rebuilding the Pillars of Integrity and Strengthening Capacities* (2006).

¹¹³ *Report of the Secretary-General pursuant to Security Council resolution 1579' (2004) regarding Liberia*, UN doc S/2005/376, 7 June 2005, para. 36.

¹¹⁴ *Op. cit.*, fn. 70, para. 8.

¹¹⁵ *Op. cit.*, fn. 110, p. 5.

¹¹⁶ *Op. cit.*, fn. 81, para. 4.

¹¹⁷ See, SC Res.1521, UNSCOR, 4890th mtg., S/RES/1521 (22 December 2003); SC Res. 1532, UNSCOR, 4925th mtg., S/RES/1532 (12 March 2004); and SC Res. 1607, UNSCOR, 5208th mtg., S/RES/1607 (21 June 2005).

adopted certain measures against Liberia already in 2003 following reports that the government of Liberia failed to live up to the criteria of human rights protection, rule of law and good governance as stipulated in the *Cotonou Agreement*.¹¹⁸ None of these measures, however, were sufficient in tackling the rule of law deficit within the transitional government.

As a response, a congregation of donors known as the *International Contact Group for Liberia* (ICGL) proposed a *Governance and Economic Management Assistance Program* (GEMAP).¹¹⁹ This agreement, signed between the *Transitional National Government of Liberia* (TNGL) and the ICGL on 9 September 2005, represents an intrusive and radical form of international control and supervision over a number of economic and governance issues. It can be seen as a new form of statebuilding, where substantial focus is placed on rule of law within a broader context of public sector and economic management reform.

The main objective of the agreement is to improve governance and enhance transparency and accountability, by targeting revenue collection, expenditure controls and government procurement practices. These issues played a central role before and during the civil war. 'Bad' economic governance and lack of accountability eroded the capacity of the Liberian state and fuelled violent competition over lucrative natural resources.

GEMAP includes six components: financial management and accountability; improving budgeting and expenditure management; improving procurement practices and granting of concessions; establishing effective processes to control corruption; supporting key institutions; and capacity building.¹²⁰ The implementation of the agreement is the responsibility of the *Economic Governance Steering Committee* (EGSC) which consists of representatives from the Liberian government, civil society and international donors. The steering committee is chaired by the Head of State of Liberia.

In the following text, aspects of procurement practices, the fight against corruption, support to key institutions and progress and challenges under the first year of implementation will be discussed.

¹¹⁸ *Council Decision of 25 August 2003 adopting measures concerning Liberia under Article 96 of the ACP-EC Partnership Agreement* (2003/631/EC). The adoption of certain measures was lifted in 2006 through Council Decision (2006/450/EC).

¹¹⁹ Communiqué, Meeting of the International Partners on Economic Governance, *Follow-up to Liberia's Results Focused Transition Framework Annual Technical Meeting*, 11 May 2005. *Governance and Economic Management Assistance Program* done at Monrovia on 9 September [hereinafter, GEMAP]. In the preamble it is said the ICGL 'share serious concerns regarding Liberia's economic governance' and that 'after more than 18 months of intensive technical and policy advice and non budgetary financial support aimed at strengthening capacity, and following a strong initial start to address these areas, there is still widespread weak fiscal management . . .', 1. GEMAP will run for 36 months, unless the completion Point under the Enhanced Highly Indebted Poor Countries Initiative has not been reached.

¹²⁰ *GEMAP* pp. 1–4.

A. Improving Procurement Practices and Granting of Concessions

A striking feature of GEMAP is that several components call for the deployment of international experts with binding co-signature authority. No major transactions can take place without being examined by both a Liberian manager and an international counterpart.¹²¹ For example, under the financial management and accountability component, an international expert will have co-signing authority over matters relating to banking and for ensuring that internal controls and audits are carried out according to established rules.¹²² International experts will also have co-signing authority on financial management practices in various state owned enterprises. ECOWAS originally proposed that international judges would be brought in to sit on the Liberian bench. This was rejected by the TNGL as being too intrusive and sovereignty offensive, and the proposal was withdrawn.¹²³

The reform of the procurement practices and granting of concessions has to be viewed in light of the fact that Liberia is not a poor country; on the contrary it is rich in natural resources such as timber and diamonds. But, through endemic mismanagement and bad governance, substantial portions of Liberia's resources have been lost. Subsequently, this component of GEMAP calls for increasing the transparency in public procurement by making it mandatory to list bidding parties, install open and competitive bidding and to publish results of public tenders.¹²⁴ Concessions in the past have not been subject to external control, and have fallen short of both national laws and international standards on public procurement.¹²⁵

A procurement law has been passed and came into effect on 1 January 2006. Liberia will also join the *Kimberly Process Certification Scheme* and the *Extractive Industries Initiative* (EITI).¹²⁶ Reforming the procurement and concessions practices, and reviewing the legislation in this area, is a necessary strategy in order to guarantee that public assets are not used in political contests or for personal gains. A *Contract and Concession Review Committee* has also been established with a mandate to review contracts entered into by the TNGL between October 2003 and January 2006. The objective is to see if contracts have been written in accordance with the economic interest of the people based on four

¹²¹ This has been put in place in the following institutions: Ministry of Finance; Central Bank of Liberia; Bureau of Budget; Ministry of Lands, Mines and Energy; National Port Authority; Robert's International Airport; Liberia Petroleum Refinery Cooperation; and the Forestry Development Agency.

¹²² GEMAP p. 3. It is stressed throughout the agreement that the use of international experts is an interim measure, and that sustainability in reforms can only be achieved through national ownership and capacity.

¹²³ *Op. cit.*, fn. 111, p. 14.

¹²⁴ GEMAP, p. 4.

¹²⁵ See e.g. *World Trade Organisation, Agreement on Public Procurement*, Annex 4 Plurilateral Trade Agreements, The Uruguay Round Agreements, Marrakech 1994.

¹²⁶ The Kimberly Process Certification Scheme was created in 2002 and consists of 45 states and organisations who have met the minimum standards of the certification scheme which includes internal controls and certification of all shipments of rough diamonds. See <www.kimberlyprocess.com>.

principles; the method of procurement; the appropriateness of the contracts; the performance of the contracts and; their economic value.¹²⁷

B. Establishing Effective Processes to Control Corruption

The Liberian justice system has been severely damaged by the long civil war. One fundamental implication resulting from Charles Taylor's rule is rampant corruption in the judiciary and frequent executive interference. Thus, the possibility of accountability mechanisms, judicial review and means of redress against government actions has been limited, at best.

GEMAP proposes in this regard, the establishment of an effective and independent *Anti-Corruption Commission* to assist in the investigation of fraud and corruption and other economic crimes.¹²⁸ The Commission, consisting of both Liberian and international experts, will have full prosecutorial powers. In addition, an independent prosecutor will be installed to work on corruption charges, and international technical assistance will be provided to enhance the investigative capacity of the prosecutorial office.¹²⁹

The Commission is mandated to investigate cases brought before it by any person or group, including donor organisations who suspect that their funds and assistance programmes have not been properly used by the government. This measure will require the passing of appropriate legislation on the *Anti-corruption Commission*, the independent prosecutor as well as a review of the existing legal framework on corruption and economic crimes in Liberia.¹³⁰

The international influence is notable in the anti-corruption strategy and 'international legal experts will support and advise the Liberian judiciary in the dispensation of justice, particularly in cases of corruption' in a form of 'co-location programme' where international judges sit with national judges.¹³¹ This falls short of the original proposal by ECOWAS to let international judges dispense justice, but nevertheless represents an intrusive initiative. It can also be discussed what level of *de facto* discretion and independence the Liberian judges will have in relation to international experts 'advising' on the adjudication of high-profile cases.

From a rule of law perspective, this component carries significant weight and importance. Past experience has shown that disregard for the law, and a personalisation of power, is a major impediment on the quality of governance in Liberia, and a constant source of conflict. If holding public office is equated with

¹²⁷ Economic Governance Steering Committee 'Status Report Year 1', December 2006, 8.

¹²⁸ GEMAP, p. 4.

¹²⁹ *Ibid.*, p. 13. This is a stark contrast to the previous Anti-Corruption Agency established under ACPA, Executive Order No. 6 in June 2005, where no prosecutorial powers were included.

¹³⁰ See e.g. the *United Nations Convention Against Corruption*, General Assembly, UN Doc. Resolution A/58/422 (31 October 2003).

¹³¹ GEMAP, p. 14.

massive personal enrichment, with few judicial checks and balances, or few taken seriously, violent competition for political power is never far away. Strengthening the general oversight system including substantial law reform is a considerable move forward in the direction of securing rule of law.

In September 2006, Liberia ratified the UN *Convention against Corruption* and the *African Union Convention on the Prevention and Combating of Corruption*. The conventions provide valuable strategies and instruments which could assist in the anti-corruption strategies under GEMAP. Furthermore, a *Memorandum of Understanding* has been signed between state-owned enterprises and commercial banks in Liberia on measures for the allocation of revenues in openly monitored and specified accounts.

C. Supporting Key Institutions

When it comes to supporting key institutions, the central focus is the *Central Bank*, the *General Auditing Office* and the *Governance Reform Commission*, the latter established under ACPA.

Regarding the *Central Bank*, GEMAP strives to secure the independence provided the Bank in the *New Financial Institutions Act* of 1999 and the *Central Bank of Liberia Act* of 1999. GEMAP also calls for a submission to the Legislative Assembly of a revised act establishing and securing the independence of the *General Auditing Office* independence.

The *Governance Reform Commission*, according to the agreement, will be strengthened along the lines of the ACPA, so that it may function as an Ombudsman, receiving complaints from citizens. The mandate also includes a review of the existing programme of good governance and the development of public sector reform.¹³² This measure is important from a rule of law perspective, allowing for citizens to file complaints and address grievances in relation to administrative agencies, and can function as a complement to the *Anti-Corruption Commission*.¹³³

The support to key institutions is interlocked with the capacity-building measures provided for by the agreement. Among the primary institutions to receive support under the GEMAP is the judiciary, but capacity building also extends to the civil service, with the need for training of civil servants and development of codes of conduct to strengthen the integrity system in Liberia.

¹³² ACPA, Article XVI.

¹³³ A management study by the European Commission undertaken in 2006 proposed the creation of a new body (Good Governance Commission) as a continuation of the Governance Reform Commission. The new body would have the overall responsibility of overseeing the implementation of governance reforms in Liberia. See 'Management Study to Design a Secretariat, Commission or Body Responsible for Leading Good Governance Initiatives and Monitoring Recommended Reform Measures in Liberia' Short Term Consultancy funded by the European Union (ACP LBR 03) *Final Report*, May 2006.

D. Progress under GEMAP and Challenges Ahead

While the implementation of the agreement has gained momentum and seen some tangible progress, particularly in relation to improved fiscal discipline and increased revenues during 2006, several challenges remain.¹³⁴ One overarching challenge is to more closely link GEMAP with other rule of law programmes and projects carried out, principally with the reforms undertaken by UNMIL. As it stands now, UNMIL continues to co-ordinate overall rule of law programmes, and GEMAP has not been incorporated in a more comprehensive rule of law strategy of the UN.

Another challenge relates to the central dilemma of all internationally supported reform programmes: how to ensure sustainability once external support withdraws. The ICGL must balance the need for international supervision and control with local ownership and influence in the programme. The real test for GEMAP is for the Liberian state to continue with reforms, practices and standards after the completion of the agreement.

Finally, the agreement is only nineteen pages long. Considering the extensive scope which GEMAP now covers, much of the details are left to on-going negotiations as the implementation is carried out. With several important measures pending, such as drafting new laws to support the integrity system and the adaptation of the legal framework to the UN and AU conventions against corruption, GEMAP faces an important challenge of communication in order to reach the standards of good governance intrinsic in the agreement. Making the implementation process transparent, inclusive and open to criticism is important from the perspective of legitimacy and national ownership. In light of this, the agreement stands to gain from co-ordinating with UNMIL's overall rule of law reforms in reaching a broader audience considering UNMIL's public outreach activities and extensive training programmes of legal professionals.

7. Conclusion

The present rule of law template is not sufficiently broad to deal with post-conflict reconstruction. While the rule of law template shows progress in the creation of security and law and order, and in the protection of civil and political rights, it has fallen short in ensuring the principle of rule of law in relation to other sectors of the state. The result is widespread corruption and embezzlement of state assets, not just in Liberia but also in Sierra Leone, Burundi and other war-torn societies. This severely undermines states' capacity to implement pro-poor policies and address the deprivation of economic and social rights and is in the long run a threat to sustainable peace. In addition, a system of rule of law requires constant attention and is essentially very expensive to maintain. Failing to direct rule of law reforms to the issue of governance and economic management is therefore inherently

¹³⁴ EGSC Status Report: Year 1, December 2006, 11.

counter-productive. The legal sector cannot be sustained by international aid and assistance.

GEMAP can be seen as a reaction to the failure of the rule of law template to address root causes to conflict and issues, which continues to cause instability. The agreement manages to draw attention to the fact that rule of law promotion cannot follow a pre-fixed institutional template, but that any rule of law strategy must be context specific and holistic in its perception of problems and challenges.

There are, however, several difficulties with the agreement from the perspective of sovereignty that should be acknowledged, in particular, the intrusive measures of providing international experts with a co-signing authority.¹³⁵ The International Crisis Group has stressed that the agreement is *sui generis* and should not be seen as a template for other crisis states. The level of 'failure' and the fact that Liberia is resource-rich makes it a unique situation. This is a solid point to make. Nevertheless, it should not exclude the possibility of 'recycling' the general ideas and principles behind the programme. This seems to be the opinion held by the UN, and the Secretary-General has expressed the possibility of using a similar approach in Burundi.¹³⁶

GEMAP manages to bridge security and development perspectives, with rule of law as the nexus. While criminal law reform and human rights promotion should continue to play a central role in the rule of law menu, these efforts should be situated within a broader governance reform strategy.

¹³⁵ *Op. cit.*, fn. 111, p. 12ff.

¹³⁶ *Op. cit.*, fn. 89, para. 51.