



UNITED NATIONS PEACE-BUILDING

Establishing Rule of Law:
Recommendations from the Field



The United Nations Association of the United States of America and
the Project on Justice in Times of Transition of Harvard University

UNITED NATIONS PEACE-BUILDING ESTABLISHING RULE OF LAW: RECOMMENDATIONS FROM THE FIELD

The U.N. Secretary General's July 2004 report on rule of law and transitional justice in post-conflict societies reiterates the U.N.'s commitment to strengthening rule of law institutions in the countries in which the U.N. is actively engaged. As the United Nations and its member states continue to develop mechanisms to improve its capacity in this sector, it is important that relevant U.N. policy makers consider the experiences of practitioners who have worked in this field in past missions.

This booklet presents a summary of the recommendations collected by the United Nations Association of the U.S.A. and the Project on Justice in Times of Transition's *Partnership Program on Peace-building and Rule of Law*. Through a series of meetings in Singapore, Turkey, Botswana and New York City, this initiative collected lessons learned from over 200 practitioners working with relevant local or international rule of law institutions in recent post-conflict zones such as Afghanistan, Angola, Bosnia, Cambodia, Democratic Republic of the Congo, East Timor, Haiti, Kosovo, Rwanda and Sierra Leone. Different aspects of the rule of law peace-building field were considered at each meeting and many important recommendations were formulated at these events. A more detailed list of the recommendations and reports from the meetings are available on the websites of the Project on Justice in Times of Transition of Harvard University (www.ksg.harvard.edu/justiceproject/) and the United Nations Association of the U.S.A. (www.unausa.org).

A number of key individuals at the United Nations Association of the U.S.A. and the Project on Justice in Times of Transition of Harvard University deserve recognition for their significant work toward making the *Partnership Program on Peace-building and Rule of Law* possible. They include: Ambassador William Luers, David Scheffer, Jeff Laurenti and Kimberly Dasher at the United Nations Association of the U.S.A. At Harvard, Professor Robert Rotberg, Wendy Luers, Ina Breuer, Sara Zucker and Stan Byers were intimately involved in the organization of the initiative.

The United Nations Association of the U.S.A. and the Project on Justice in Times of Transition of Harvard University would also like to thank our partner institutions – the National University of Singapore, Koç University in Istanbul, and the University of Botswana – for helping to make our regional meetings possible. The guidance and support of Under-Secretary-General Jean-Marie Guéhenno and Nina Lahoud from the Department of Peacekeeping Operations of the United Nations have empowered the *Partnership Program* from its inception. Finally, we would like to acknowledge with particular gratitude the financial support of the following: the Government of Germany; the Government of Singapore; the Government of Botswana; the Government of Finland; DynCorp International; the Rockefeller Foundation; USAID; Chemonics-Rapid; the American Embassy in Botswana; the Gilman Foundation; the Office of Transition Initiatives in Dili, East Timor; the Zentrum für Internationale Friedenseinsätze (Center for International Peace Operations) in Berlin, Germany; the Albert Kunstadter Family Foundation; East Asian Legal Studies Center at Harvard Law School; the Henry Luce Foundation, Inc.; the Compton Foundation; Rockefeller Family and Associates; Ken Miller; Singapore Airlines; the Grand Palm Hotel in Gaborone, Botswana; and the South East Asia Initiative of the Burma Project of the Open Society Institute.

PREFACE

by **Jean-Marie Guéhenno**

Under-Secretary-General

Department of Peacekeeping Operations, United Nations

The primary responsibility for developing a comprehensive rule of law strategy for a country emerging from conflict, as well as the responsibility for its long-term implementation, should ultimately rest with the men and women of the country concerned. It is they who need to craft and live with the system of rule of law that will regulate their citizens' behavior as well as safeguard their interest and freedoms. It is they who will have to determine what system of law is best suited to their local culture, traditions, and norms. It is they who have most at stake, because the role played by the rule of law in a society has a tremendously formative influence on shaping a national identity as a whole.

The Challenges Ahead

Promoting national ownership and capacity building is one of the most important aspects of international involvement in a post-conflict environment. But that may be easier said than done, especially in the case of peacekeeping.

First, internationally brokered, yet nationally signed peace agreements tend to provide the road map for the international community's involvement in a post-conflict environment, especially for United Nations peacekeeping operations. Political realities and difficult compromises often outweigh longer-term developmental considerations during the negotiations leading to the agreements. One is then faced with the prospect of an imperfect agreement, or none at all. One challenge is therefore to ensure that longer-term rule of law concerns feature more prominently during the early stages of negotiations.

Second, even if the agreement were to provide sufficient attention to rule of law issues, it takes time to work out a strategy and concept of operations for implementing such provisions. It takes more time to ensure that the relevant national actors are properly consulted by the United Nations in devising strategies and concerns of operations for approval by the Security Council, whose mandate is required for United Nations peacekeeping operations.

Third, the United Nations system is only a part of the international community. Regional and sub-regional organizations, individual governments, and non-governmental organizations have specific expertise in the area of the rule of law. All partners, including the United Nations, as well as national actors, need to agree on a division of labor and mechanisms for real coordination, to secure the agreement of the Security Council on the mandate for a United Nations peacekeeping operation, and to then prepare a needs assessment, a budget, and mobilize the funds.

Fourth, the scarcity of time itself is a major and perennial challenge. As time marches on, valuable opportunities can be lost on the ground, and confidence in the peace process can start to erode. This argues in favor of forging partnerships and devising some generic strategies, ahead of time.

But, this also argues in favor of recognizing the importance of sequencing and prioritizing efforts. Certain challenges cannot be anticipated ahead of time, in a vacuum. The signing of a peace agreement itself creates a new set of dynamics and brings new national actors to the fore. They must be dealt with in terms of the new realities, on the ground.

Not everything can be done on time, nor can everything be done immediately, at the same time, in the initial days of an operation. The challenge is to identify what needs to be addressed urgently, in what order, and by whom.

Sometimes the United Nations will carry a huge share of the burden, where the organization has transitional administrative responsibilities, as in the case of Kosovo or East Timor. But, those cases have been the exception and not the norm. In most cases, sovereignty is vested in a national authority, even if that is an interim national administration, as in the case of Afghanistan. In most cases, the U.N. does not have executive law enforcement authority. And, in most cases, the U.N. is not the only major international actor on the ground. In all cases, however, there must be a recognition that the promotion of the rule of law must feature prominently in the peace process, and that U.N. peacekeeping will have to do its part, to varying degrees.

I have laid out a few of the many challenges that lie ahead of us. As we confront them, we need to recognize that rule of law issues have not been given the attention that they deserve in the peacekeeping context and that rule of law is a much broader issue than we have hitherto realized. The Department of Peacekeeping Operations must cast its net much wider, and forge stronger partnerships with both those within and outside the United Nations system. Whatever we do in the rule of law area must ultimately maximize national ownership and develop local capacity, in the interests of promoting a durable and self-sustaining peace.

– May 5, 2003

SUMMARY OF RECOMMENDATIONS ON THE ESTABLISHMENT OF RULE OF LAW FROM PRACTITIONERS IN THE FIELD

I. RULE OF LAW OVERVIEW

Centrality of Rule of Law in Peace Operations

1. Establishing rule of law, including legal and security institutions, is essential to help ensure sustainable and responsible governance in post-conflict societies. It is also often essential for a viable “exit strategy” for a peace operation and for the viability of the peace settlement afterward. Rule of law needs to be regarded as a **core function** of post conflict peace operations, and appropriate resources need to be allocated both to ongoing preparedness for such roles, and their implementation in a crisis, by any international authority undertaking such peace operations.

Rule of Law Defined

2. “Rule of law” – focused in this context on legal and judicial systems, policing, and correctional institutions – includes creating an effective and fair criminal justice system that enforces the law free of political manipulation or favoritism; addressing crimes committed during war through a tribunal, strong national courts, and/or reconciliation; protecting human rights, including recognized property rights; ensuring a functioning correctional system for criminal offenders; and establishing a legitimate political system. For the long term, the democratic development of the law and a permanent independent judiciary are essential.

Financing the Rule of Law Dimension

3. As a core function of peace operations, the rule of law dimension needs the assured financing that often only assessed budgets can reliably provide. The international personnel engaged in such rule of law activities in U.N. missions have normally been financed through assessed budgets, but even local rule of law institution-building activities, at least in the first year of an operation, are so important as to warrant support from assessed funding. The experience with trust funds suggests their funding

stream is often unreliable and the gathering and payment of donor pledges unpredictable; indeed, even the provision of international personnel may be uncertain when the operation is delegated to individual nations without a commonly agreed budget. Having these assured resources to support rule of law capacities at the start can provide a firm foundation for their sustainability; not having them heightens the risk of failure in the long run.



II. INCORPORATING THE RULE OF LAW INTO PEACE SETTLEMENTS AND U.N. MANDATES

Rule of Law in Peace Negotiations

1. When law and justice questions may be issues in contention in peace negotiations among parties to a conflict, international actors mediating, facilitating, or trying constructively to influence the negotiations should keep before the parties the need to make provision for rule of law dimensions in the settlement—and provide a “reality check” that the agreed provisions can muster the international support that may be needed to implement them.



2. To the extent that the post-conflict treatment of belligerents’ war-time crimes arises as an issue in negotiations, international actors should seek, to the extent compatible with their role, to ensure that parties understand the options for national and international mechanisms to handle such issues, including the limitations on possible amnesties when cases involve crimes within the jurisdiction of the International Criminal Court.

The Pre-Mandate Assessment

3. Before a detailed mandate is adopted, an assessment team should examine the national legal system already in place to determine its sufficiency: Is it a functioning and equitable legal system consistent with international principles of justice and human rights, due process of law, and the independence of the judiciary? The assessment should incorporate pre-existing and customary law as a base-line, insofar as it does not deprive women or minorities of their rights recognized under international law. The aim of international efforts should be to build or re-build the law from the bottom up, not impose an alien legal system top-down in a manner easily resented as colonial.

4. In considering whether to initiate any international judicial role, including a pre-mandate or pre-deployment, as well as to dispatch any subsequent U.N. assessment team, the United Nations and the international community should regard as a critical factor whether the host local authorities have requested such a role.

5. The pre-mandate assessment team should be comprised of a wide range of experts (and translators!), drawing if necessary or desirable upon the stand-by arrangements

of any external support process. The team should meet local actors, review extant research, and develop a plan of action for the legal system that takes into account existing law and its compatibility with international norms, accessible legal, penal, and judicial institutions, existing legal education, political factors that may influence legal institutions, and the views of civil society.

6. The assessment team should be alert for significant imbalances of legal and judicial capacities between regions or between populations, where physical infrastructure, a legal tradition, and perhaps functioning courts may be fairly developed in one region while essentially absent in others. Legal skills and capacities may exist in one sector of civil society – one that may live in relative security within a turbulent society – and not fully represent the diverse character of civil society throughout the territory.

7. Pre-mandate assessment teams need to consult with civil society as well as interested governments to gather and make available, to the United Nations and others as soon as possible, any reports and assessments available about relevant domestic legal systems, including those in place prior to any direct U.N. engagement in the post-conflict society. Those civil society and governmental experts that have been involved in preparing such existing reports and assessments should make themselves available, to the extent possible, for consultations with the assessment team and the international personnel engaged with a peace operation or other international legal role in the post-conflict society.

Security Council Mandates

8. The U.N. Security Council resolution establishing the mandate for an international mission should, as appropriate, describe and authorize development of specific elements of the judicial and law enforcement system in the post-conflict society.

9. In crafting the Security Council mandate, among the first questions the drafters address should be:

- (a) Does a durable solution of this conflict require international attention to the development of the rule of law in the affected societies?
- (b) How can the U.N. (or other international lead actors) help empower the people to sustain a rule of law?
- (c) How can the U.N. help the society make its judicial and law enforcement systems work?
- (d) To what extent is the U.N. or other international actor needed and able to fill the gaps in local capacities?
- (e) If war-time crimes are an issue in the settlement, what are the mechanisms available to address them in terms of justice, truth, and reconciliation?

Interim Legal Frameworks

10. In exceptional circumstances the situation on the ground may require that the U.N. or international mission rapidly prepare and implement an interim legal framework,

legal code, or regulations, pursuant to its mandate. Even where speed in establishing an interim legal framework is an urgent requirement, the international authority should from the start solicit local actor participation to the maximum degree possible. Then the mission should take the time required to facilitate modernization of the interim legal system through democratically inclusive processes. This facilitative process should take into account existing capabilities, including human resources and physical infrastructure that may impact on the capacity of the legal and judicial system for reform.

III. COLLABORATION WITH LOCAL ACTORS: PREREQUISITES TO SUSTAINABLE RULE OF LAW SOCIETY

Local Inclusion and Selectivity

1. International mediators or “friends” supporting a peace process should seek to engage inhabitants of the affected territory in the development of a political settlement prior to the establishment of any peace-building mission. In particular, international actors should facilitate avenues for the participation of non-combatant sectors of society (e.g. nongovernmental organizations, business leaders, churches, etc.– the whole of civil society) to contribute to and, even if only indirectly, participate in the negotiating process.

2. International authorities will, of course, have to distinguish with care among the groups and individuals purporting to represent segments of civil society. Professional societies, trade unions, civil and human rights groups, academic centers, and the like will often be viable channels for expanding participation within the society at large.

3. Local actors and civil society members (including national and international nongovernmental organizations, women’s and minority groups, and other relevant groupings) should be engaged from the earliest stages of the peace operation. As frequent victims of major abuses during conflicts, women should play a strong role in establishing justice in their society. International staff need to involve women and other marginalized groups directly in the peace-building processes, in particular when local influentials would exclude them as irrelevant.

4. International personnel must be sensitive to local culture, exercise common sense, be subject to continual review, be above reproach regarding corruption, reach out to the local citizenry, and be very conscious never to patronize them.



Local Participation and Longevity of Post-conflict Structures

5. International participants in a peace-building operation need frequent reminders that long after the international personnel have left it is local people who must sustain and build upon whatever the peace operations start and that local people are the most important clients and the most important implementers of U.N. objectives. Peace-building missions should reinforce, not replace, credible local structures and local actors.

6. Each step in the societal rebuilding process should be organized with the help of the local people even when an international mission has been mandated to run the interim administration. The explicit goal for international staff must always be to “work themselves out of a job,” requiring them to work collaboratively with local counterparts, including civil society, until responsibility is completely transferred.

Local Consultations and Training

7. Senior representatives of U.N. missions should convene regular consultations with civil society representatives and include in those consultations all U.N. agency representatives in the theater. An NGO/civil society coordinator should be designated as part of the structure of the mission, who will continue to liaise with recognized representatives from civil society (local, international, diaspora) throughout the mission.

8. Training of international staff and local actors should be a core element of any peace operation from the start. Beyond substantive expertise, international staff may need skills in capacity building, management, and negotiation to coordinate interaction between agencies on the ground, and mentoring and delegation skills to facilitate the transfer of knowledge to local actors. Local actors may need training in a range of skills, including how to form and finance local organizations and how to manage staff and develop strategic plans.

IV.

INTERNATIONAL AND LOCAL POLICE RECRUITMENT, TRAINING, AND ACCOUNTABILITY



Pre-Deployment Police Strategies

1. Prior to deployment of an international presence to support domestic security and maintenance of law and order, international authorities should lay out a strategic plan on policing for the mission that is designed to establish a coherent and continuous police strategy from the outset. The strategic plan should be informed by a domestic security

needs assessment drawn up after consultation with a broad range of local actors, in-depth opinion surveys of public attitudes toward their experience and expectations of policing, and guidance from international and, as appropriate, regional police advisors

2. Better pre-mission logistical planning and training can help international police—whether present as monitors, trainers, or interim law enforcers—to cultivate and sustain credibility with local actors. Their training remains a national responsibility, but an international program to “train the trainers” can improve (a) how they adhere to international standards, (b) how they manage meetings, negotiate, communicate with other staff, and listen, (c) how they interact with prosecutors and courts, and (d) how to be flexible, creative, efficient, and understanding of local customs and character.

3. The recruitment and screening process should be improved to ensure that personnel arriving on the ground are actually qualified in terms of the standards required for the mission (e.g., knowing how to drive). Missions have limited authority to hold international police officers accountable for performance and for conduct that itself violates the law, and in many cases the sending country cannot claim jurisdiction to try its civilian nationals (in contrast to military personnel) for their alleged criminal conduct abroad. The legal accountability for crimes committed by international police personnel needs to be clarified.

Bridging the Gap between Civilians and Police

4. When an international police presence must deploy in an environment of popular division and deep mistrust of authority, confidence building to gain the trust of the population and at least a minimal level of public cooperativeness should be an explicit goal from the start and assigned to a designated team.

5. An individual or unit in each peace operation should be made responsible for working to bridge the professional and cultural gap between an international police force, on the one hand, and international NGOs and civil society on the other.

6. Civilian review boards should be established at the local level to oversee and review the performance of the re-formed police. Where international authorities have interim responsibilities for local governance, they should establish a process for selection of civilian review boards that insulates them from pressures from local political influentials and helps ensure the accountability of the police to the broader citizenry.

Creating a New Police Force

7. In ethnically fragmented societies where the ethnic character of the police itself was a factor in the conflict, missions should help create a new police force representative of the society’s different ethnic groups. These should be recruited, trained, hired, and deployed together. If international actors recruit and train personnel, and local authorities separately decide whether to hire and where to deploy them, agreements between the U.N. or other international authority and the local authorities need to be in place ensuring that those recruited and trained are indeed given appropriate assignments.

8. The selection process for new local police must identify adequately qualified personnel and be coordinated with demobilization of former combatants so that only individuals meeting high standards, in the context of the society, and untainted by corruption will be selected. Police recruitment efforts need specifically to include a component for recruitment of women. Moreover, police training programs for all recruits need to include gender sensitivity training – for international police personnel as well as local recruits.

9. A major goal of an international police presence in promoting police professionalization should be to sever police dependency on political patrons, and to insulate the administration of the police from manipulation by the political class. The local police force must be groomed to see themselves as part of the overall justice and penal system, and accountable to civil authority and the public at large.

V.

CONSIDERATIONS FOR ADDRESSING WAR-TIME ATROCITY CRIMES

Amnesty and Accountability

1. While ending a war or conflict is admittedly the priority in most situations, representatives of the international community attempting to facilitate the parties' agreement on a political settlement should not encourage or endorse inclusion of provisions granting blanket amnesty for atrocity crimes. When amnesty for such crimes is considered, international representatives should urge that the amnesty be conditional and limited, in accordance with international law.

2. Where outside actors are indirectly responsible for atrocity crimes, having provided resources and/or arms to the belligerents who committed them, the international community should look for ways and means to hold these outside actors accountable.

Preparing for an International Legal Role

3. In those circumstances where an international judicial role is seen as necessary to ensure justice for war-time atrocity crimes, the strategic planning for that role should nonetheless point toward the development of a sustainable national legal system, and

not simply focus on what will suffice for near-term justice. A “sustainable national legal system” would be a domestic judicial and law enforcement structure that can render justice and enforce the law long after the departure of international institutions and personnel. The international personnel brought in to deal with the atrocity crimes that the local system is presumably unable to handle should seek to help create a



sustainable structure that includes well-trained local personnel and workable domestic enforcement mechanisms.

4. In assessing and shaping proposals for international mechanisms, the following important local circumstances should be taken into consideration: the extent of development of the domestic legal system; the number and qualifications of available judicial personnel; the national government's political will to strengthen rule of law; the ability of local authorities to offer witness protection; training of legal defense counsel; the understanding of the local population with respect to seeking justice for crimes that typically have been committed against them; and the magnitude of the problem.

5. In preparing for an international judicial role, every reasonable effort should be made to respect domestic law and practice to the extent they do not violate international standards of justice, which should be critical standards to achieve in strengthening the domestic legal system.

6. Negotiations and deliberations regarding establishment of an international judicial mechanism should seek to ensure that it respects international standards of due process by requiring compliance with the International Covenant for Civil and Political Rights and the statute of the International Criminal Court, to the extent possible.

International Judicial Mechanisms

7. The options for international judicial mechanisms that should be available for evaluation include, but are not limited to:

- (a) international criminal tribunals established under Chapter VII authority by the Security Council;
- (b) a hybrid international court established by the United Nations in agreement with a sovereign government and including national law within its jurisdiction;
- (c) a mixed court established under domestic law as part of the domestic legal system but with significant international participation and international standards of due process, perhaps involving a formal agreement with the United Nations; and
- (d) the permanent International Criminal Court.

8. Prior to the deployment of an assessment team (and thereafter), international representatives and those of domestic civil society should take responsibility to educate the general public in the country about the reasons for an international judicial role (including the role of the International Criminal Court) and the impact it will have on society and legal traditions. This requires a uniquely tailored educational and media strategy that reaches the broadest possible audience, in order to invest the population in the process and inform them of its significance for their future.

Financing International Mechanisms for Justice

9. International mechanisms for justice should be financed in a manner that encourages the local population to feel a stake in the process, even as it establishes the commitment of both the international community and the national government to that process.

10. The United Nations should now have the capability to quickly estimate the costs associated with an international judicial mechanism based upon prior experience. In order to facilitate the best decisions on the application of an international judicial mechanism, it is essential to compile a depository of precedents and the domestic and international costs associated with each such precedent.

11. The host government should ensure that it is aware of the effect of any disparity in the financial remuneration between international and local judicial personnel and consider, in consultation with the international contributors of personnel, how to address the problem.

VI. ESTABLISHMENT OF COMPLEMENTARY MECHANISMS: ADDRESSING THE LEGACY OF CONFLICT

1. The introduction of an international judicial mechanism should take into account such mechanism's relationship with any truth and reconciliation commission (or body of similar intent) that may be established, and the international and national parties should endeavor to separate the operations of the judicial and non-judicial bodies so that individuals subject to the jurisdiction of the judicial body are distinguished from those who should only be involved with the non-judicial body.

2. Inclusive complementary mechanisms (including truth commissions, NGO truth-seeking procedures, traditional truth-telling, investigatory mechanisms, reparations, lustration, vetting, compensation, and reconstruction) can be useful in post-conflict reconstruction by helping to promote accountability and address victims' concerns and needs. No single mechanism or combination of mechanisms is appropriate for all situations; each individual situation requires an evaluation of the most effective mix of mechanisms for the particular cultural and political context.

3. The international community can play important roles in helping complementary mechanisms to succeed, but ownership and decision-making must take place on the national level. Appropriate roles for the international community include providing technical assistance, guidance on international legal standards, information, training, qualified personnel and neutral investigators where appropriate.



VII. RULE OF LAW-RELATED COMPETENCIES OF EXTERNAL ENTITIES

Stand-by Arrangements

1. The United Nations should consider the merits of an external stand-by arrangement of non-U.N. experts and resources on rule of law issues to supplement the U.N.'s internal stand-by rosters of experts and local “connectors” (people who are familiar with the local situation, belong to the diaspora, and/or have a good network with local actors) for rapid deployment to assessment teams and to missions in peace operations. The external stand-by arrangement would include, in addition to individually designated experts and “connectors,” inter-governmental and non-governmental entities and national institutions that have specialized competencies in judicial and penal and administration of justice areas and that could provide candidates and substantive assistance as required.

2. An external stand-by arrangement could facilitate agreements (such as a Memorandum of Understanding) or informal contacts between the United Nations and external entities in order to improve rapid deployment capabilities from external entities. The system also could help the United Nations better coordinate among competing external entities seeking U.N. officials’ attention and demonstrating different competencies.

Regional Organizations

3. The U.N. should support regional and sub-regional organizations in building their own capacity to address issues related to the rule of law in peace settlements.

Rule of Law Trust Funds

4. In order to strengthen the national role in rule of law development, particularly in light of the financial constraints that usually apply to an international role, the United Nations should be encouraged to activate partnership arrangements and trust funds, as the Task Force Report of the Secretariat’s Executive Committee on Peace and Security has recommended.



PARTICIPANTS

Over 200 practitioners participated in the *Partnership Program on Peace-building and Rule of Law* meetings in Singapore, Turkey, Botswana and New York. Most of these individuals are affiliated either with international organizations actively engaged in assisting the establishment of rule of law in post-conflict societies or with local institutions (courts, police force, government) that work closely with the international community. Because the *Partnership Program* sought to collect recommendations based on the peace-building experiences of recent larger U.N. peace operations, invited participants tended to have direct experience with missions in one or more of the following locations: Afghanistan, Angola, Bosnia, Cambodia, Croatia, Democratic Republic of the Congo, East Timor, El Salvador, Guatemala, Haiti, Kosovo, Rwanda and Sierra Leone.

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Publication Date: September 2004



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