Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development

Per Bergling, Lars Bejstam, Jenny Ederlöv,
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OUR MISSION

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Foreword

THE INTERNATIONAL COMMUNITY has recognized that the rule of law is a vital foundation on wich to build peace and recovery in post-conflict states. A number of international, regional and bilateral agencies are currently engaged in various aspects of promoting the rule of law. Their efforts often focus on the criminal justice side of the legal system, where many initiatives deal with transitional justice issues, criminal procedure reform, reforming the police, and a variety of related issues.

This report confirms that the rule of law is also of great relevance outside the justice sector, particularly in the public administration, and that the international community needs to expend more effort on integrating rule of law dimensions and perspectives into Public Administration Reform. In short, the goal of Public Administration Reform needs to be broadened to encompass not just efficiency and effectiveness, but also qualitative rule of law concepts and dimensions such as human rights, fairness, and objectivity. This is particularly important for vulnerable individuals and groups, such as women and children. To this end, the report discusses and proposes a range of strategies and actions.

For the Folke Bernadotte Academy (FBA), which develops and organizes training for rule of law experts for peace operations, this report and the recommendations in it constitute a very important contribution to policy and practice. The FBA will also seek ways of cooperating with other international actors to transform the conclusions and recommendations into reality.

The FBA would like to thank the research team, headed by Professor Per Bergling and Dr. Erik Wennerström, for suggesting the project to the Academy and for bringing it to a successful conclusion. In addition, thanks are due to the Swedish Ministry of Foreign Affairs for the funding that made this project possible. The Academy is also grateful to all the international organizations, missions, and their staff who met

the project team and shared their views and insights with the team. It is hoped that this study will inspire further studies, discussions and actions in the areas of Rule of Law and Public Administration Reform.

This report is an expression of the Folke Bernadotte Academy's mandate to contribute to the improvement of the prevention and management of conflicts in practice. The Academy is in this respect tasked with carrying out research, studies and evaluations on its own and in cooperation with both the Swedish and the international research community. It is also tasked with encouraging and inspiring the research community to carry out relevant research; striving to translate findings from research, studies and evaluations into practical applications; and disseminating findings to interested groups. The Academy's publications, workshops and conferences are important tools in this endeavor. The Academy is mandated also to promote national and international cooperation within its field between government agencies, practitioners and the research community, and within the research community.

Henrik Landerholm
Director General
Folke Bernadotte Academy

THIS REPORT ANALYSES the effects of rule of law deficits in the public administration in state-building and development environments, how such deficits impact on individuals and communities (particularly weak and vulnerable individual and groups), and proposes possible ways to more closely integrate rule of law dimensions in future efforts to reform public administrations.

In many peace-building environments, Public Administration Reform and Justice Sector Reform are promoted as separate projects, underpinned by different paradigms: Public Administration Reform is geared to making the administration more effective and efficient, while Justice Sector Reform focuses on introducing and strengthening rule of law and human rights principles. The reasons for this division include lack of knowledge among international and national policy-makers concerning the relevance of the rule of law for Public Administration Reform, vague and conflicting peace-building mandates and objectives involved and differences in topical orientation and 'culture' among the international actors concerned.

As a result, there is a rule of law deficit in the public administration and in the international efforts being made to reform it. This deficit has adverse effects on both states and individuals. Public administration agencies are the principal interfaces between the state and the individual and deal with matters of relevance for fundamental human rights, such as civil registration and health services. Problems concerning quality in these functions impact on basic rights and entitlements. In addition, post-crisis states are in a delicate situation and may relapse into conflict. Dissensions increase when the administration fails to meet legitimate demands, or when it enforces discriminatory policies. Finally, the fledgling state and public administration cannot play a constructive role in the coordination and implementation of international assistance and humanitarian relief if it acts arbitrarily, is corrupt, or systematically violates human rights standards.

Closer integration of rule of law dimensions in Public Administration Reform would thus serve three main objectives:

1. **Protecting the rights of the individual:** By situating the public administration within a rule of law framework, the 'users' of the system become rights-holders, able of legally claiming services of a certain quality and holding the agents of the state accountable.

2. **Facilitating reconstruction, stabilization and transition:** The rule of law is an indispensable element of a legitimate system of governance, and thus serves vital security and peace-building interests. When public administrative agencies act in accordance with the rule of law, they build popular confidence in the state, and thus create favourable conditions for peaceful co-existence and recovery.

3. **Increasing the effectiveness of international aid and assistance:** Public administrative structures can only play a constructive role in the coordination and implementation of international assistance and humanitarian relief if they adhere to rule of law and human rights standards.

To these ends, the report presents an inventory of possible approaches, and relates these to current and future challenges and needs. The diversity in initial conditions, needs and available resources, makes it impossible (or at least pointless) to suggest one specific set of measures that could be applied in a certain order of priority in any environment, but among the most feasible and realistic measures are the following:

Concepts of rule of law in public administration: The widespread confusion about what constitutes the rule of law in public administration, and the urgent need to ensure that the administration works in the interest of the individual, make the development and elucidation of principles of rule of law in public administration an important international task. Since public administration comprises a range of widely varying organizations and functions, it is not possible to promote one single definition or concept. However, a compilation of international and regional principles, enshrining commonly accepted rule of law concepts, could serve as a 'yardstick' against which to measure the quality of local procedures and services. As a long term goal, the promotion of a specific UN instrument, for example a General Assembly recommendation or a supplementary human rights covenant, should also be considered.

Transformation to national law: Peace-builders and other international actors should continue to promote the transformation of international rule of law principles into national frameworks of substantive and procedural rules. Such frameworks will offer legal protection of individual rights, enhance the legitimacy of the administration and state, and help to build confidence in the value of the rule of law generally. Such approaches do not necessarily mean creating new laws or radically changing the substance of the law, but the consolidation of scattered laws into comprehensive codes that are easier to understand and apply.

Institutional reforms: Normative reforms need to be followed by support for institutional reforms to ensure the presence of institutions willing and able to adhere to the rule of law. Such institutions comprise administrative courts, ombudsmen and 'independent agencies' such as anti-corruption commissions. In particular it should be noted that international law guarantees everyone a fair and public hearing by an independent

and impartial tribunal, even in appeals against the decisions of administrative bodies. The international community must also be prepared to engage in creating institutions which can ensure that final decisions are duly implemented, both by the administration and private parties. Whilst the establishment and operation of such agencies should be a domestic responsibility, the peace-building community can assist in the effort, *inter alia*, by providing best practice studies, supporting reorganization and training, and seconding key expertise.

Manuals, handbooks and other 'aids': The implementation and application of rule of law principles in Public Administration Reform would be helped by checklists, handbooks and best practice studies. Such instruments may also highlight resource and capacity issues to be considered when legislation and agencies are created or reformed.

Assessment and monitoring tools: Effective rule of law strategies need to be knowledge-based. Yet the area of rule of law in public administration is characterised by several serious knowledge lacunae. It should therefore be an international priority to develop tools for assessing and monitoring the 'qualitative' dimensions of public administration, such as checklists, indexes and indicators. Such instruments would also help to build pressure for accountability. 'User' or 'consumer' perspectives need to be given special attention when such instruments are developed and applied.

Transparency enhancement: Transparency has an intrinsic democratic value but it is also instrumental in promoting the rule of law in at least three important ways. First, transparency enables individuals to enforce their rights. Second, it promotes accountability. Third, it helps to fight organised crime, corruption and discrimination. There are strong reasons for continuing the work, already under way in the Council of Europe and other organizations, to create international standards for transparency and to promote their integration into national legal frameworks.

Improving inter-agency/sector co-operation: The existence of distinct justice sector and public administration mandates and paradigms suggests that further work is needed to promote coordination mechanisms and integrated approaches. In particular, there needs to be a strategy for the early and progressive integration of rule of law dimensions in governance reform and Public Administration Reform. While a far-reaching overhaul of general and agency-specific organizational structures is a long-term and enormously complex endeavour, small changes in the everyday operation of peace-building and development agencies in the field may be implemented with little difficulty, *e.g.* joint regular staff meetings between rule of law and public administration departments and units; joint needs assessments; and the 'borrowing' or sharing of concepts and resources.

Support for training: It is an integral part of any sustainable administrative reform policy to ensure that administrators have the necessary knowledge and technical skills to do their jobs properly. Current rule of law training activities for police officers, judges, defence lawyers, prison officers, etc. should be broadened to encompass various categories of civil servants and the rule of law dimensions of their work. Training curricula should also be coordinated throughout the justice and administrative sectors, as these sectors frequently interact and problems and remedies tend to be identical or similar.

Cross-cutting recommendations: Any rule of law strategy should be evidence-based, realistic ('doable'), anchored in universal concepts of law and human rights, and locally owned where conditions allow. Further, rule of law strategies should centre on the individual, and pay particular attention to the needs of weak and vulnerable individuals and groups, such as women, children and refugees.

Introduction

1 THE LAST FEW DECADES have witnessed a number of international efforts to stabilize and rebuild states and territories suffering from war, perpetuated rebellions, gross violations of human rights, and other eruptions of systematic violence. Among recent examples can be mentioned the United Nations-led efforts at peace-building in Kosovo, East Timor, Liberia and Afghanistan.

2 The peace-building community has noted that in these environments, the public administration is often in need of particular attention; office buildings may have been burnt, records and archives destroyed, administrators killed or forced to flee, etc. There may also be attempts by rival groups to turn the administration into a weapon under their control. Such conditions not only make the reconstruction effort difficult, but also deprive individuals of their human rights. The international community has, consequently, deemed it to be a global concern to ensure the presence of a functioning public administration.[1] Seizing on this recognition, the United Nations Security Council has mandated a number of executive and assistance missions to take the lead in reconstructing the national or local public

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1 In Côte d'Ivoire, problems in issuing birth certificates, identification documents and citizenship were root causes of the conflict. The 2007 *Ouagadougou Peace Agreement* requires that administrative agencies refrain from discriminatory practices and act according to the rule of law in a fair, transparent and accountable way.

administration.[2] Parallel to the work of the UN missions, a number of multilateral and bilateral agencies and civil society actors also seek to reform and empower administrative agencies and processes using conventional development assistance tools.

3   However, unlike the parallel peace-building project of Justice Sector Reform, which is underpinned by a rule of law paradigm concerned with the *qualitative* issue of how people are treated by the justice system, the project of Public Administration Reform is underpinned by a management paradigm concerned with the *quantitative* issue of how to build an effective administration quickly.[3] This study confirms that, although many problems and potential remedies tend to be identical or similar in Public Administration Reform and Justice Sector Reform, these projects are often like two ships in the night, sailing parallel to each other but unaware of the objectives, challenges and methods of the other.

4   That there is a rule of law deficit in Public Administration Reform is troubling because administrative authorities, whether local government or special statutory bodies, are the principal interfaces between the individual and the state, and as such effectively determine the conditions for a peaceful life and economic recovery. For example, it is in the processes of civil registration (issuing of birth, death, marriage, citizenship certificates, etc.) that it is determined whether people are to be regarded citizens, and thus should have the right to education, healthcare, vote, etc. Members of weak and vulnerable groups such as refugees, women and children, tend to be particularly dependent on quality services provided by the administration, and are most seriously affected by problems in this respect.

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2   The United Nations Transitional Authority in Cambodia (UNTAC) may be regarded as the first in the series of 'modern' executive UN missions. Subsequent examples include the United Nations Mission in Kosovo (UNMIK), the United Nations Mission of Support in East Timor (UNMISET), the United Nations Mission in Sierra Leone (UNAMSIL), and the United Nations Mission in Liberia (UNMIL).

3   For an overview of UN efforts at reconstructing civil administration structures in post-war societies, see Dobbins *et al.* 2005. As an example of the current Public Administration Reform paradigm could be mentioned the USAID report *Reforming Public Administration in Post Conflict Societies*, pp. 13–14, arguing that 'Improving the effectiveness of the civil service in postconflict environments is urgent because of serious weaknesses in the capacity of public administration either to carry out government policies or to deliver public services efficiently and effectively. The weaknesses in public administration are similar across postconflict countries in different regions of the world. […] Essential features that need to be in place include: Professional administrative and managerial capacities and competencies; efficiency and effectiveness of organization and procedures, professional recruitment and career management, etc.'

> **BOX 1   Good governance, human rights and the rule of law in UN missions**
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> In El Salvador, the UN regarded the projects of Public Administration Reform and Justice Sector Reform as 'related', but there were few or no common elements or initiatives. In Cambodia, the UN Human Rights component formally targeted both the judiciary and the public administration, but the concrete efforts were directed at different sectors and target groups (essentially education and awareness initiatives). In Kosovo, the section of the Public Administration Strategy on the Provisional Institutions of Self-Governance includes *inter alia* the existence of codes of conduct for civil servants, procedures for transparent and accountable government and regular and independent audits, while the standards in the rule of law section relate almost exclusively to the criminal justice system. In East Timor, there was early recognition that many problems were common, and on the formal level there was complete formal integration (all UN civil and administrative powers were in the hands of the Special Representative of the Secretary General), but while the SRSG engaged in a hands-on effort to build administrative capacity, he quickly devolved exclusive judicial power to national courts and considered their decision-making entirely outside his sphere of power.[4]

5   The reasons for the rule of law deficit include lack of knowledge among international and national policy-makers of the role and relevance of the rule of law for Public Administration Reform, vague and conflicting peace-building mandates and reform objectives (there is often both a peacekeeping mission under the UN Department of Peacekeeping Operations (DPKO) promoting Justice Sector Reform/rule of law and a development mission under the United Nations Development Programme promoting Public Administration Reform),[5] differences in topical orientation and 'culture' among the international actors concerned, and sequencing issues (rule of law in the justice sector is often prioritized in the immediate post conflict period, not least to facilitate 'transitional justice', while rule of law in the public administration is regarded as a secondary issue and is placed later in the action plan). International and local capacities also play a role; most assistance providers remain ill-equipped to accurately assess and effectively address rule of law problems in public administration.

6   There is a growing awareness in the international community that the current situation is unsatisfactory and that the traditional concept of Public Administration Reform needs to be broadened to include dimensions above and beyond efficiency and effectiveness. As early as in 1995, the UN General Assembly report *The Legal*

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4   Dobbins *et al.* 2005, p. 169.

5   On the links between UN development assistance and conflict management, see Griffin 2003.

and Regulatory Framework of Public Administration pointed out that efficiency in the administration is pointless and potentially dangerous without an appropriate policy/legal framework, and that law should be seen as the framework, object and tool in Public Administration Reform.[6] Recent statements by the UN Secretary General and others underline the centrality of the rule of law in UN peace operations and peace-building.[7] With regard to the specific scope of Rule of Law Reform, guiding UN documents emphasise that

> 'Early on rule of law reform must promote greater transparency and accountability in overall public administration (e.g. vehicle registration, building permits, rubbish removal, public health inspection, banking regulations, tax collection), since even more people have contact with these agencies (and their history of discriminatory practices and corruption) than they do with the formal judiciary. Any continuing bad practices by government agencies can quickly deepen lawlessness and reinforce the reality/perception that the situation is out of control or has not changed.' [8]

7   The UN-sponsored Commission on Legal Empowerment of the Poor, a group co-chaired by former U.S. Secretary of State Madeleine Albright and Peruvian economist Hernando de Soto, presented its report *Making the Law Work for Everyone* in June 2008. The overarching conclusion presented in the report is that the majority of the world's people are excluded from the rule of law, and thus deprived of many economic opportunities.

8   The report identifies four pillars that are central in the legal empowerment of the poor: access to justice and rule of law, property rights, labour rights, and business rights. The report also suggests ways forward for governments seeking to establish policies for their legal empowerment, and for 'the poor' to take action through community associations and civil society as a whole.

9   Outside the realms of UN peacekeeping, there is even greater recognition that the rule of law must generally be forcefully promoted in Public Administration

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6   ST/SG/AC.6/1995/L.4.

7   For example, Kofi Annan's address to the General Assembly, 21 Sept. 2004: 'it is by reintroducing the rule of law and confidence in its impartial application that we can hope to resuscitate societies shattered by conflict'. Of the 60 UN peace operations established to date, over two thirds have encompassed some rule of law activities, ranging from executive tasks such as creating and enforcing law to assistance tasks such providing training for judicial staff and reforming court management. O'Connor 2006, p. 521.

8   *Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector*, 2006, p. 14.

Reform in order to ensure fair and predictable use of power by state agencies. The Organization for Economic Co-operation and Development joint initiative Support for Improvement in Governance and Management (SIGMA) gives equal status to '*effective administration*' and '*the respect for the rights and interests of citizens*' in its programmes to support transition. The concept 'effective administration' is understood to mean that each department, agency, local authority, or other public body exercises its powers in accordance with the purposes and standards defined by law in an economical and efficient manner. The 'rights and interests of citizens' means that people who are affected by the actions and decisions of administrative institutions should be treated properly and fairly, *i.e.* benefit from the protection normally associated with the rule of law.[9]

10   Among academics and independent commentators, too, there is growing agreement that individual-centred and rights-based perspectives need to be given more attention as both means and ends. For example, it is a core element of the doctrine of Human Security that whether or not countries and societies recover from conflict largely hinges on the degree to which individuals enjoy personal, economic and health security. The degree of security, in turn, is partly determined by how well the administration manages the provision of identity documents, healthcare, welfare and business licenses, etc. So-called Human Rights-based approaches similarly rest on the idea that 'justice' (understood to comprise the rule of law), is a right of the individual founded on international law and human rights law, not a form of charity. Recent UN documents, among them the 2005 UNSG Report *In Larger Freedom: Towards Development, Security and Human Rights for All*, reaffirm the importance of human rights, development and security as three principal goals of the UN and thus help to transform these doctrines into policy.

11   Despite this political prioritization of the rule of law, little is still known about what constitutes rule of law in public administration, the specific relationship between Public Administration Reform and Justice Sector Reform in peace-building environments, the effects of the rule of law deficit (particularly on weak and vulnerable groups), or how to raise and better integrate rule of law dimensions in future efforts at Public Administration Reform.

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9   OECD/GD(97)167.

1.1 Purpose and output

12   Having noted the probable existence of a rule of law deficit in efforts at Public Administration Reform, and being concerned about the possible adverse effects of this on states and their citizens, the Folke Bernadotte Academy sought funding from the Swedish Ministry of Foreign Affairs to commission a study with the objective of analysing specific problems the rule of law deficit gives rise to for peace-builders, recovering states, and their citizens, and to provide an inventory of possible focus areas and methods for international engagement to more closely integrate rule of law perspectives and methods in future Public Administration Reform policies and projects.

13   This report, which focuses on the archetypical second and third phases of state-building (*i.e.* the creation and strengthening of local institutions for governance),[10] is mainly intended as an aid to help international policy-makers identify ways to more closely integrate rule of law dimensions in Public Administration Reform. However, the approaches and best practices presented in the report may also be of use to national stakeholders with similar ambitions. The ultimate, although indirect, beneficiaries of the conclusions stated in the report should be the individual citizens who are denied the protection and opportunities offered by the rule of law. The legal empowerment of individuals, particularly weak and challenged groups, is a cross-cutting theme in the analysis and recommendations.

14   It should be noted that no clear delineation could or should be made between international and national issues and reform projects. Although the international (UN) influence on policy and methods tends to be strong, at least in the initial phase of a mission, it is the engagement and capacity of national stakeholders that ultimately determine the success or failure of specific reform initiatives.[11]

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10   The challenges and needs of the first phase, *i.e.* the initial stabilization of a war-torn society, essentially fall outside the scope of this study. On phases of state and nation-building, see for example Fukuyama 2004. Experience over the past 15 years suggests that the UN and wider international community have achieved a fair mastery of the techniques needed to successfully complete the first phase, but success with the strengthening of local institutions has largely eluded both the UN and the international community. Dobbins *et al.* 2005, p. XXXVII.

11   Hansen and Wiharta 2007.

1.2 Method

15 The aim of the report called for a combination of literature study, traditional legal-dogmatic analysis and field research. The first step consisted of collecting and analysing relevant literature, policy documents and reports on Public Administration and Rule of Law Reform in order to gain a picture of experiences so far, current polices and best practice, and visions on future challenges and needs. Parallel to this, a traditional legal analysis was made of international law (and to some extent national law), case law and doctrine as to what constitutes rule of law in public administration and what issues remain to be regulated.

16 The next step consisted of visits to the principal international and regional organizations concerned with public administration and rule of law in peace-building environments, among them the UN (Secretariat, DPKO, UNDP, OHCHR), EU, CoE, OSCE/ODIHR, WB, and USIP, at their respective headquarters. The purpose of these visits was both to collect information about their current policies, lessons learnt and strategies for the future, and to inform them of this study and to seek their input on its objectives, methodologies and outputs.

17 The third step consisted of field visits to Kosovo, Liberia and Timor-Leste to relate doctrine and policy to real world problems, and to seek input for the articulation of more effective strategies for the future. Interviews were held with international as well as local actors concerned with Public Administration Reform and Rule of Law Reform, among them the UN missions and agencies in the respective countries, other international organizations, local policy-makers and executive agencies, and international and local NGOs. Meetings were also held with representatives of local free media in order to gain an independent 'outsiders' perspective on problems and potential remedies in the respective countries and communities.

18 The fourth step consisted of analysis and writing. Although there has been a division of labour among the authors (each author has been in charge of one or more chapters or topics) all conclusions and recommendations have been carefully discussed in the team and delivered with full agreement.

19 The fifth step was the presentation of preliminary conclusions and recommendations in a workshop with representatives for the major actors in public administration and Rule of Law Reform, (the UN, OSCE and the CoE *et.al*), the incorporation of the comments received, and publication of the report.

1.3 Key concepts and definitions

20   Many concepts and principles discussed in this report, for example 'the rule of law' and 'public administration', are insufficiently theorized, little understood, controversial, or otherwise difficult to define and present in a straightforward manner. While it is not among the objectives of this study to provide such definitions, some sort of simplified working definitions need to be provided to broadly establish in what sense, and for what purpose, the various terms and concepts are used.

21   For the purpose of this report, the term *public administration* is used to describe the laws, norms, agencies and actions of the executive branch of the state, for example municipalities and tax authorities. Public Administration Reform is consequently understood as the search for administrative (public service) structures and processes that are more responsive to the needs of citizens and otherwise deliver better public goods and services.

22   The term *justice sector* is used to refer to all national agencies and processes established to administer criminal and civil justice, such as courts, prosecution agencies and the structure of penitentiaries. Informal or traditional justice mechanisms (tribal and village adjudication mechanisms, chiefs, elders, etc.) are not included in the definition of the justice sector. The term Justice Sector Reform thus refers to internationally promoted efforts to reform or strengthen this sector or certain elements of it.

23   While peace-building doctrine sometimes uses the terms *Justice Sector Reform* and *Rule of Law Reform* interchangeably, Rule of Law Reform is better understood as the promotion of certain principles and values, for example legality, proportionality, procedural transparency, predictability, and equal application of the law. For 'peace-building' purposes specifically, the UN document. *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* argues that the rule of law is

> '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.'[12]

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12   The 1994 UNDP *Human Development Report* is considered a milestone publication in the field of human security. It argues that ensuring 'freedom from want' and 'freedom from fear' for all is the best way to tackle the problem of global insecurity.

In this sense, the rule of law may be understood as a cross-cutting perspective with relevance for a number of sector-specific reform projects.

24 Sometimes Rule of Law and Public Administration Reform projects are grouped under the heading of *governance*.[13] For example, the 'Post-Washington Consensus' definition of governance prescribes that there should be support for establishing or consolidating judicial autonomy and the rule of law. In recent years, some substantive or qualitative dimensions have been added to the definition of the rule of law, such as the core of human rights and protection of vulnerable groups. Governance has thus evolved into good governance. Yet, good governance is usually divided into 'clusters', where the promotion and protection of rule of law and human rights are separate from Public Administration Reform.[14]

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13   See for example the *Cotonou Partnership Agreement*, Art. 9.3.

14   *Handbook on Promoting Good Governance in EC Development and Co-operation*, pp. 8 and 30–31.

Rule of Law Problems in Practice

25   This chapter serves to illustrate the consequences or impact of rule of law deficits in the public administration, as well as the potential gains for individuals and societies from establishing the rule of law as a cross-cutting dimension of Public Administration Reform.

26   An important initial observation when discussing crisis and post-conflict situations is that no two situations are the same, and that the role played by law and public administration might differ substantially between, and sometimes even within, societies. The field visits nevertheless reinforced the general picture that war and conflict have a profound impact on the public administration, and that a damaged and weakened public administration is a major hindrance to the return to normality, particularly for members of weak and vulnerable groups (ethnic and religious minorities, women, children, refugees and Internally Displaced Persons) who depend upon the state for protection and the delivery of basic services.

2.1 Impact of conflict on public administration

27   A discussion on the rule of law in public administration can be accessed from different standpoints. The definitions and standards of public administration vary from country to country, as does what constitutes quality therein. For example, the Constitution of Liberia makes no direct reference to public administration (save for the right to judicial review) whereas the Constitution of Timor-Leste provides for standards, rights, and guarantees for citizens in relation to the public administration.

28 Despite these differences, there are many similar rule of law problems in the structures that are commonly regarded as public administration. A far from exhaustive list includes: absence of access to justice; politicisation of the administration; lack of accountability; discrimination by civil servants and other public officials; and low level of awareness of rights among the citizenry. These deficiencies cut across a wide range of central issues on the reconstruction agenda, such as land and property rights, protection of minorities, anti-corruption, and general service delivery.

2.1.1 *Physical destruction of public buildings and official records, and loss of human resources*

29 The most visible impact of conflict on the public administration is the destruction of its physical infrastructure, for example public buildings. In some countries the conflicts have almost completely destroyed the physical infrastructure. The official registries, archives, communication facilities, etc. may also have been destroyed.

30 Related to the physical destruction is the loss of human resources. Public officials are often targeted in times of conflict and may either be killed or forced to flee the country. In other situations, public officials may have taken part in the conflict and thus disqualified themselves from further service. This creates severe capacity problems in the post-crisis administration.

2.1.2 *Lack of constitutional authority*

31 A fundamental problem in many crisis and post-conflict societies is the erosion of the respect for the legitimate constitutional authority. This problem cuts through, and has implications for, all branches of the state—the security sector, the justice system, and the administrative system at large. In some cases, violations of the constitutional authority are inevitable or to be expected, for example where there are no provisions for power-sharing, excessive powers are given to the executive, or the oversight agency and accountability mechanisms are weak.

32 When there is no strong constitutional authority, the public administration may address itself to other objectives than transparent, accountable and rule-based decision-making and service delivery, for example rent seeking, maintaining privileges, or repressing political opponents. In Kosovo, municipal agencies are reported to frequently take actions in contradiction to their competences and legal responsibilities. It has also been documented in several cases, particularly in relation to property disputes, that municipal courts, offices and other administrative agencies have rejected decisions made by higher instances, even the Supreme

Court. For the individual, such lack of respect for the constitutional order has serious effects, most clearly felt through discriminatory and arbitrary practices.

BOX 2 Property and land rights in Afghanistan

The Afghan Constitution of 2004 provides a right to compensation for any individual that suffers harm through a government action. Moreover, laws on expropriation guarantee certain standards and property rights. Yet the Afghan Independent Human Rights Commission (AIHRC) repeatedly reports on problems of arbitrariness in relation to property and land rights, particularly the enforcement of land titles and records. In a typical case, a family was forced to leave their house despite proper legal documentation of their possession of their property. The property was later awarded to government officials. It was never shown by public officials, as demanded by law, that the eviction was in the public interest. Nor was any compensation offered to the family. The AIHRC has also reported violence towards and physical abuse of individuals refusing to evacuate their properties.

2.1.3 *Unclear competences and responsibilities*

33 In almost all crisis and post-conflict societies, there are widespread confusion and lack of knowledge about the legal and regulatory framework for the public administration. This is not surprising; crucial rules and processes are often missing or disputed. In the 2007 OSCE *Report on the Administrative Justice System in Kosovo*, the OSCE notes several flaws in the legal framework governing the administration. For example, despite a recent law on administrative procedure, there are problems relating to the right to a hearing, confusion regarding the applicable law, limited possibilities to appeal and a lack of interim measures. Furthermore, although both new and old laws concerning administrative procedure establish that no administrative authority in Kosovo should decide a matter outside of its competence, reports testify to several cases where agencies have done precisely that.

BOX 3 Actions *ultra vires* in Kosovo

A case study from Kosovo involving a host of different agencies (the Municipal Court, District Court, Supreme Court, the Ministry of Environment and Spatial Planning, Directorate of Urbanisation, the SRSG, the UNMIK Municipal Administration and the Directorate of Inspection of the Municipality (hereafter the Directorate)) illustrates the effects of problems in accessing justice in relationship to administrative decision-making. In 2001 a group of individuals complained to the Ombudsperson in Kosovo that the Directorate had issued a decision to demolish sixty businesses situated on the main road in Gllogovc/Glogovac. The businesses had been built with permissions dating back to 1992. The Ombudsperson sent an urgent request to the SRSG for interim measures to suspend the decision. Although the SRSG issued an executive decision to suspend the demolition, the Directorate proceeded in line with the first decision. The Supreme Court of Kosovo (final instance in administrative appeals) decided that the Directorate should review the appeal of the complaints in accordance with the Law on Administrative Disputes. The Municipal Court also issued a decision prohibiting the Directorate from demolishing the businesses. Despite this, the Directorate continued with the demolition and, in blatant violation of the law, all sixty businesses were destroyed. The intricate legal battle illustrates the breakdown of oversight mechanisms and how the lack of an effective remedy and real access to justice leads to devastating consequences for individuals.

2.1.4 Corruption in the public administration

34 Crisis and post-conflict countries are often fraught with serious problems of corruption. It seems that certain features of post-conflict recovery, for example weak constitutional authority, lack of clear definition of competences and responsibilities, and sometimes an *ad hoc* and experimental approach to Public Administration Reform (for example in Timor-Leste, the functions of the High Administration, Taxation and Audit Court were outsourced to private companies), exacerbate already existing problems of abuse of official power for private gain.

35 There are several reasons for taking this issue seriously. One is that a number of studies show a clear negative correlation between the level of corruption and both investment and economic growth in countries worldwide. Another is that there is little doubt that corruption undermines the general ability of the state to implement laws and policies, as it creates incentives to keep norms and practices complex, opaque and arbitrary. In addition, state and non-state actors have noted that human rights abuses, violence, general crime, and other infringements of the rights of the individual tend to be particularly serious and frequent in corrupt societies, and that members of weak and vulnerable groups are often the most

seriously affected. A financial audit carried out by the European Commission in Liberia in 2005 noted that theft and fraud within the government was so great that it threatened the entire peace-building process. Corruption thus distorts and taints constitutional and democratic norms and practices, and erodes public trust in the legitimate institutions of the state.[15] Eventually, people may prefer undemocratic alternatives. Non-democratic forces have proven adept at seizing the anti-corruption agenda and demanding a strong hand to bring about change by authoritarian means.[16]

36 In addition, international organizations have their own 'internal' reason for being concerned, notably that corrupt insiders in post-crisis countries siphon off large parts of loans and other forms of aid at its destination, and thus make assistance programmes less effective. International organizations are similarly aware of the political ill-will that surrounds corruption and corrupt countries, and afraid that perceived lenience in addressing such conditions will impact adversely on the organizations' reputation and fund-raising potential.

2.1.5   *Centralization, politicization and lack of accountability*

37 Public administration structures in post-conflict societies are often highly centralised. This centralization is frequently coupled with politicization of administrative functions and blurred boundaries between the political, the administrative and the private. In Kosovo, the politicization of the public administration, particularly on the local and municipal level, is apparent. Comprehensive reshuffling of public officials is not uncommon after municipal elections. In Liberia, the supposedly politically neutral Civil Service Agency handling recruitment, employment and general oversight of the civil service, is essentially an extension of the existing political powers.[17] Further, the lack of proper oversight mechanisms and processes for delegation of authority make badly needed decentralization and privatization initiatives difficult.

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15 Brietzke 2002, p. 115, Brunetti, Kisunko and Weder 1997a, 1997b, and 1997c, de Soto 1989, p. 13, Goodpaster 2002, pp. 96–97 and Karlström 2003, p. 23.

16 Karklins 2005, p. 7 and Rose, Mishler and Haerpfer 1998, p. 17.

17 Constitution of the Republic of Liberia, Art. 89.

2.2 Impact of rule of law problems on individuals and vulnerable groups

38 While a dysfunctional public administration affects the state's overall ability to initiate and manage transition and reconstruction processes, the most serious impact is on the lives of individuals, particularly members of weak and vulnerable groups. The field study underlines that problems of arbitrariness and unpredictability, discrimination and lack of access to justice often prevent citizens from seizing on the protection and opportunities the law provides.

39 Below follows a list of typical problems individuals may encounter when interacting with public administrative agencies in crisis and post-conflict states:

2.2.1 *Arbitrariness and unclear law*

40 Confusion regarding the applicable law is a serious problem in many post-crisis societies. The problem is often compounded by lack of established traditions, practices and principles. Timor-Leste and Liberia are cases in point. In want of clear laws and norms, individuals here may be subjected to arbitrary treatment and have few means of redress under an extremely weak oversight system. For weak and vulnerable groups, who depend on predictable service delivery, for example in relation to health and medicine, unclear rules or sudden changes in policy and practice can have particularly adverse effects. For other groups such as businessmen, arbitrariness and discretion discourage investment and provide incentives for short-sighted opportunistic behaviour.

2.2.2 *Discrimination*

41 In other cases, the public administration may deliberately violate the legal rights of individuals as part of a policy of discrimination. For example, it may misuse, manipulate or destroy documents concerning identity and citizenship, or refuse to issue such documents. Another form of discrimination is the imposition of high fees for certain categories of individuals.

42 There are several reports of discrimination within the administrative agencies responsible for registries and titles in Kosovo, Timor-Leste and Liberia. Such conditions pose serious problems for minority groups seeking access or return to their land. In some cases, the system may even invite discrimination. For example, according to customary law in Liberia 'strangers' (individuals in a territory of an ethnic group of which they are not a member) must seek permission from the Tribal Authority to till or otherwise use land.[18]

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18 Revised Rules and Regulations Governing the Hinterlands of Liberia, Art. 67.

BOX 4   Discriminatory practices in property and construction in Kosovo

In Kosovo, the Ombudsperson has repeatedly reported discriminatory practices by the local and municipal government with regard to vulnerable groups such as members of minority communities. The right to property is one area where discrimination is particularly common and serious.

> 'In circumstances where even municipalities frequently do not feel obliged to follow the laws on property and construction, illegal construction continues to run rampant. Complaints against inactivity or corruption on the side of the competent municipal organs are either ignored or dismissed, while the existing judicial system too frequently issues certain decisions on paper that in the end it is not strong enough to execute properly. … Those parts of the population that are most vulnerable as they have little backing or political or other connections, for instance poor people or members of certain minority communities, are the first to suffer in such a situation. While they are restricted by the applicable laws, these same laws practically do not afford them the protection they are entitled to on paper.'[19]

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43   Women are often discriminated against in crisis and post-conflict societies. They also tend to be more adversely affected by discrimination than men. There may also be certain social constraints that prevent women from complaining or seeking legal redress. Further, women are discriminated against by non-state actors. A report on Liberia underlines that womens' human rights are severely undermined by 'harmful traditional practices' found in the customary law, and that the Ministry of Internal Affairs fails to take action to bring these practices to an end.

2.2.3   Lack of access to justice

44   The problem of discrimination is compounded by problems in accessing administrative justice. In some places, such as Liberia, these problems are the result of unclear or missing statutory provisions concerning the right to appeal. In other cases, for example Kosovo, the access problems are the result of failure to comply with existing procedural rules. Other causes include lack of written decisions, lack of awareness of administrative rights and responsibilities, backlog of cases in the Supreme Court, and the ignominious resistance of lower agencies to comply with decisions and rulings made higher up in the appeals process. Here too the problems are particularly serious for members of weak and vulnerable groups. While access to justice is a central concept in Justice Sector Reform, scant attention has been paid to the matter in relationship to Public Administration Reform.[20]

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19   Ombudsperson Institution in Kosovo; *Fifth Annual Report 2004–2005*, p. 45.

20   See e.g. the 2004 UNDP *Access to Justice Practice Note*.

BOX 5   Commission on Legal Empowerment of the Poor

The Commission on Legal Empowerment of the Poor has noticed the lack of access to justice. The Commission argues in its latest report *Making Law Work for Everyone*, that the exclusion from rule of law hinders four billion people around the world from climbing out of poverty and robs them of their chances of a better life. Existing political, administrative, and judicial institutions are simply not geared to protecting the rights of the poor. The Commission emphasises that the effects of this unfairness are not only morally unacceptable; they also stunt economic development and can easily undermine stability and security. 'The outcomes of governance—that is, the cumulative effect of policies and institutions on peoples' lives—will only change if the processes of governance are fundamentally changed.'[21]

2.3   Customary systems and public administration

45   Many post-conflict societies have dual legal and administrative systems; a formal and a customary system existing in parallel. Often the so-called 'formal state law' has a very limited reach beyond the capital and major cities, where systems based on religion or custom take over.

BOX 6   Hinterland of Liberia

Liberia has a dual system of governance based on villages, chiefs, and paramount chiefs. The informal system is fragmentarily regulated in the 2000 Revised Rules and Regulations Governing the Hinterland of Liberia. It is estimated that the vast majority of so-called justice delivery cases are handled by the informal system. The Hinterland Regulations detail the rights and duties of district commissioners and other officials, and several provisions deal with the right to levy taxes and fines. It is unclear how many of these provisions that are adhered to. There is a procedure for lodging complaints and charges against officials of the province to the Provisional Commissioner (decisions taken by paramount chiefs are appealed to district commissioners and superintendents, and finally to the Office for Tribal Affairs at the Ministry of Internal Affairs), but this procedure is not applied. There is thus no functioning judicial review mechanism for decisions taken in the customary system.

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21   *Making Law Work for Everyone*, p. 2.

46   The need to recognise and utilise informal and customary structures is acknowledged among peacekeepers and assistance providers, but concrete efforts to this end are frequently stranded by lack of reliable data and lack of experience in co-operating with partners outside the formal system.

2.4 Rationale for international engagement

47   Based on the problems discussed, the study identifies four main reasons for a more active international engagement in promoting rule of law dimensions of Public Administration Reform.

1. **Protecting the rights of the individual:** Public administration agencies deal with every-day issues such as tax collection, licensing of businesses, managing official registries and land titles, education, health, etc. As such, they are the principal interfaces between the state and the individual, and the 'quality' of their services is critical for the protection of basic rights and liberties. By situating the public administration within a rule of law framework, the 'users' of the system become rights-holders, able to legally claim services of a certain quality. This is particularly important for members of weak and vulnerable groups, such as women, IDPs and children.

2. **Facilitating reconstruction and transition:** Post-crisis states are in a delicate situation and may relapse into conflict. Dissensions increase when the administration fails to deliver basic services and meet public expectations, or when it uses and enforces discriminatory policies, or serves as a vehicle for corrupt political elites. The international community has, therefore, a strong security interest in rebuilding, stabilizing and empowering the legitimate institutions of the state, among them the public administration.

3. **Bolstering the legitimacy of the state:** A legal and institutional framework based on human rights and the rule of law enables citizens to have a voice in governance and provides a channel for exerting accountability. When public administrative agencies act in accordance with the rule of law, they foster popular confidence in the state, and thus create favourable conditions for peaceful co-existence and recovery.

4. **Increasing the effectiveness of aid and assistance:** Public administrative structures can only play a constructive role in the coordination and implementation of international assistance and humanitarian relief if they adhere to rule of law and human rights standards. Furthermore, peacekeepers and assistance providers need to be able to demonstrate to parliaments and the general public that their local counterparts have sound political priorities and adhere to universally recognized human rights and rule of law principles.

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Inventory of Rule of Law Approaches

48 THE CONTOUR OF A PARADIGMATIC shift in the international community's approach to rule of law in post-crisis societies is discernable. A more holistic understanding of the rule of law includes the issue of public administration and governance in general. Moreover, developments towards Whole of Government Approaches (WGA) and Sector Wide Approaches (SWAP) speak of an emerging rule of law strategy which is more inclusive and attempts to tackle a number of problems simultaneously.

49 This forward-looking chapter provides an inventory of possible approaches to further raising and more closely integrating rule of law dimensions in Public Administration Reform efforts in peacebuilding environment and development work. The inventory is combined with an assessment of the effectiveness, efficiency and general feasibility of each approach. There are also 'boxes' providing examples of real-world initiatives and 'best practice' in the respective categories. The approaches are structured from the most 'normative' to the most 'consultative', but are not to be regarded as either mutually exclusive or sequenced. Rather, they may be applied in combination and overlapping each other. The presentation of the specific approaches is preceded by a discussion of cross-cutting selection and implementation considerations.

3.1 Cross-cutting considerations and recommendations

50 Based on best practice and lessons learnt in peace-building and development work, the following cross-cutting considerations should guide and limit any strategy for promoting the rule of law in public administration.

Realistic: Any rule of law strategy needs to be realistic, *i.e.* within international mandates, resources and other capacities.

Context sensitive: Reform of the public administration should not be seen as an isolated project, but rather as something that is inherently linked to wider governance reform, and dependent on a wider historical and political context.

Knowledge-based, carefully planned and strategic: Any intervention should be grounded in thorough assessment to confirm that the problems discussed really do exist and the proposed remedies will help to solve them, follow a disciplined programmatic approach, and be based on 'best practice'. Time and resource constraints should not lead to resorting to casual assumptions and clichés about problems and remedies.

Individual-centred and rights-based: Reform approaches should consider the problems and needs of individuals first. The rule of law should be regarded as a means of safeguarding the rights of the citizen. The problems and needs of weak and vulnerable groups, among them women, should receive particular attention.

International and universal: Any international norm for how the rule of law should be understood and applied should be derived from international law and universally accepted principles of human rights.

Legitimate and locally owned: Reform approaches should be based on the broadest possible constituency, ideally comprising the assistance provider, the domestic political leadership, other stakeholder groups, and the individual citizen. Local ownership both makes reform policies more effective and enhances their sustainability.

3.2   Defining rule of law in public administration

51   The UN, Council of Europe and other organizations have initiated or adopted several international law documents that integrate recognized rule of law values, with the expectation that these documents will guide and direct the creation and implementation of national laws. For example, the guarantees in the International Covenant on Civil and Political Rights for equality before the law and equal protection of the law should also be understood to apply in the area of public administration. The same is true for the duty of states, established in the International Covenant on Economic, Social and Cultural Rights, to provide the services or guarantees necessary to enforce the substantive rights in the respective covenants. It is reasonable to assume that this general obligation reaches beyond the specific rights enshrined in the covenants to comprise a range of general rule of law guarantees that follow international and regional instruments, case law, practice and doctrine.

52 Recognizing that it should be possible to derive from international law a universal definition of the rule of law for the public administration, the 1995 UN report *The Legal and Regulatory Framework of Public Administration* suggests the codification of certain fundamental principles of administrative law in a specific UN instrument, for example a recommendation from the General Assembly or a supplementary human rights covenant.[22] This rule of law framework for public administration proposed in the report emphasises five basic 'orientations':

1. *Constitutionality and legality in public administration:* The organization of the administration should be clearly regulated in law, and there should be concrete remedies (courts with appropriate jurisdiction) to combat illegal acts by administrative bodies, etc.

2. *Citizens and the public administration:* There should be clear administrative procedures, based on rule of law principles and guarantees (the right to be regarded as a party in the procedure, to be heard, to appeal, to access information, etc.).

3. *Staff management:* There should be laws regulating recruitment, career structure, discipline, etc. of public officials.

4. *Service or utilities delivery:* The relationship between the public and private sectors should be clearly defined in law; there should be rules governing fair competition, transparency and dispute resolution.

5. *Law and governance:* There should be agreement and decision on the appropriate governance pattern (law, soft law, contracts, etc.) for intergovernmental relations and relations with non-state entities.

In line with these orientations, the UN report suggests the following specific principles or rights for the individual, and corresponding duties for the administration, to be put forward:

A. The right to a fair hearing before any decision is taken affecting the rights of the person.

B. The right to participate in administrative procedure on the basis of widely defined locus standi.

C. The right to judicial review of administrative decisions.

D. The right to access official documents subject to conditions and exceptions rovided by the law.

E. The obligation on the administration to provide relevant information to citizens.

F. Liability of public administration in the case of harm caused by its activities.

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22 ST/SG/AC.6/1995/L.4.

53 Despite the optimism surrounding the 1995 report, the recommendations were not taken up and placed on the General Assembly agenda for further deliberation and action. The current UN stance on codification of rule of law principles remains ambivalent. While the rule of law is a prioritized topic generally, and particularly in the context of peacekeeping (as witnessed *inter alia* by the Secretary-General's Rule of Law Report and other Secretariat and DPKO documents), there is still some sensitivity within the organization and among member states surrounding normative definitions. There is a notion that a strongly normative ('intrusive') approach based on 'principles' or similar instruments may be difficult to promote within the UN system at present.

54 Yet, many UN representatives, particularly people within the UNDP, see the use of having some kind of instrument to explain the core meaning of the concept and its application in different circumstances and sectors. Such an instrument is believed to be particularly useful as a 'sensitizing tool', *i.e.* as something that could be used to make local and international policy-makers aware of the significance of rule of law in public administration, from a human rights and development perspective. The advocates of such an instrument think it is important that it is developed by, or at least with the blessing of, the UN, and that the standards therein are derived from UN human rights norms. There is a scepticism regarding regional initiatives to this end, on the grounds that they may undermine the role of the UN in developing and promoting international human rights norms.

55 The Council of Europe has long promoted various instruments to bring the rule of law into public administration in member and candidate countries throughout Europe, the Caucasus and Central Asia, and thus has much sympathy for a 'norms' or 'principles' approach.[23] Some of its instruments are normative, others are guides or intended as aids for policy-makers and administrators. The most recent initiative of the Council of Europe is the *Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration*. This instrument provides a model code for good administration, based in particular on the Committee of Ministers' *Recommendation No. R (80) 2* and *Resolution (77) 31* and the *European Code of Good Administrative Behaviour*. The recommendation proceeds from the consideration that public authorities are active in numerous spheres and play a key role in a democratic society; that their activities affect private persons' rights and interests and that national legislation offers these people certain rights with regard to the administration. The recommenda-

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23 At the Council of Europe's Vienna Summit in October 1993, the participating heads of state and government casted the CoE as the guardian of 'democratic security', founded on human rights, democracy and the rule of law.

tion also mentions that the member states of Council of Europe shall 'promote good administration within the framework of the principles of the rule of law and democracy'.

56 The recommendation provides 'principles' of good administration, for example that public authorities shall act in accordance with domestic and international law; exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred; act in accordance with the principles of equality impartiality, proportionality, legal certainty and transparency. The term 'public authorities' encompasses not only public law entities, including state, local and autonomous authorities, but also 'any private law entity exercising the prerogatives of a public authority responsible for providing a public service or acting in the public interest'. While it is increasingly common for public tasks to be performed by private subjects, it is important to ensure that this development does not take place at the expense of the rights and entitlements of individuals.

57 Public authorities shall also act and perform their duties 'within a reasonable time', but it is not stated how long a period would be acceptable in a specific case. It would probably be impossible to stipulate a time limit for all kinds of matters or activities, but some kind of mechanism allowing individuals to take the matter to higher levels in the event of administrative silence would have made the stipulation stronger. In addition public authorities shall provide private persons with the opportunity to participate in the preparation and implementation of administrative decisions which affect their rights or interests, and respect the right to privacy, particularly when processing personal data. The code also provides rules governing the forms, publication, entry into force and execution of administrative decisions.

58 On the issue of appeal, it is stated that persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests. There are also provisions that public authorities must provide a remedy for private persons who have suffered damages through unlawful administrative decisions or negligence on the part of the administration or its officials. The Council's ambition is to continue to promote codification, but it also welcomes parallel efforts by other international, regional and national actors to promote rule of law in public administration. The Council of Europe has always sought to ensure that its instruments and actions conform with UN norms and processes.

59 The European Union similarly sees a need to explain what the rule of law in public administration is and to build international and regional acceptance for certain

key principles. The EU has developed a range of instruments to guide member states and candidate countries in establishing rule of law standards in various sectors. The EU considers it important that the values enshrined in the instruments also benefit individuals and groups outside the Union, including post-crisis environments.

60 The Organization for Security and Co-operation in Europe argues that the confusion and uncertainty as to what constitutes rule of law for the public administration, and the lack of respect for fundamental rule of law principles in some environments, are strong cases for articulating and promoting various normative or at least guiding instruments in this area. Although the 1990 OSCE *Commitments relating to the Rule of Law* and the *Commitments relating to Judicial Systems and Human Rights* identifies the rule of law as an OSCE priority and provides an OSCE definition of the concept (encompassing *inter alia:* the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law; clear separation between the state and political parties; and equality before the law), the organization has neither the mandate nor the interest to take on this task at present. However, it welcomes efforts by other actors to do so. The OSCE also intends to continue to develop various 'aids' to policy-makers and administrators struggling to incorporate and apply rule of law principles in administrative law and processes, and stresses that these instruments always have their point of departure in international law and human rights principles, as enunciated by the UN, the Council of Europe and other key actors. It should be noted that no legal obligations arise from OSCE documents and deliberations, only political commitments.

61 All the consulted organizations thus see the use of some form of instrument that could serve to explain, *inter alia*, how the rule of law should be understood with regard to public administration, how it should be promoted in the context of peace and state-building, and what constitutes best practice in this area. At the same time, there is circumspection concerning a very strong, normative or intrusive approach, favouring instead arguments for ensuring the broadest possible constituency and 'buy-in' among international organizations, states, civil society and other actors. There is also a consistent view that firmly anchoring any principles in international (UN) norms is desirable as a means and end in the process, not least to ensure legitimacy for the initiative and the ensuing principles, and consistency in the international human rights system.

3.3 Transformation to national law

62   This approach refers to the promotion of a national framework of substantive and procedural rules that ensures the presence of rule of law guarantees throughout the public administration and particularly *vis-à-vis* the individual. This framework may consist of constitutional provisions binding on the authorities and organization of the administration, administrative law, administrative procedure law, and supporting legislation. If it works as it should, the framework will offer legal protection of individual rights, enhance the legitimacy of the administration and state, and help to build confidence in the value of the rule of law generally. Efforts at legalization do not necessarily mean creating new laws or radically changing the substance of the law, but can also mean the consolidation of scattered laws into comprehensive 'codes' or similar compilations that are easier to understand and apply (such codification usually follows a deductive logic of stating general principles first, then substantive provisions, then instructions for implementation, etc.).

3.3.1   *Constitutionalism and constitutional reform*

63   Constitutional reform, or restoring constitutionalism as the governing paradigm, may be the most fundamental example of legalization. Constitutionalism here is understood both as an outline of the offices of the state and their functions, and a stipulation of the normative limits of their power and a guarantee of the rights of individuals. In post-crisis environments particularly, where structural (constitutional) problems in the organization and operation of the state are frequently at the root of the conflict, constitutional reforms are often necessary. It may be argued that peace-building and other processes of radical change would be difficult to reconcile with constitutionalism as a principle for legitimizing and enforcing an enduring political order,[24] but constitutionalization should rather be understood as the establishment of a mechanism for continuous and controlled renewal.

64   There are many international and regional initiatives in the area of constitutionalism. In some instances, the international community has taken a hands-on approach in dictating or suggesting a certain constitutional order with a view to ensuring the best possible protection of human rights and the rule of law, as was

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24   Teitel (2000, p. 191) argues that constitutions and constitutionalism in such periods stand in a 'constructivist' relation to the prevailing order in the sense that they are both constituted by the prevailing political order (backward-looking) and constitutive of political change (forward-looking).

the case for example in Bosnia and Herzegovina, Kosovo and Afghanistan. In other countries, where there is a legitimate legislature and government, the approach is consultative and facilitating. For example, the Council of Europe, through the independent advisory body the European Commission for Democracy through Law (popularly the 'Venice Commission'), provides support for new and aspiring member countries in Europe and parts of Asia to harmonize their laws and legal practices with the European Convention on Human Rights and other Council of Europe instruments. The Venice Commission also provides guidance to post-crisis countries and territories such as Bosnia and Herzegovina and Kosovo on constitutional issues, particularly the consolidation of democratic institutions and related questions.

65   The role of constitutional courts in introducing and interpreting new paradigms of law, justice and administration should not be forgotten. In formerly authoritarian states, their mere establishment defines a break with unacceptable political and administrative practices. Allowing the general public access to constitutional courts also means putting in place a redress and accountability mechanism. In many transition states, this approach to democratization and accountability has been relatively expedient as the constitutional courts have not been paralysed by the kind of political battles that often plague new legislatures.

3.3.2   Universal values, legitimacy and local ownership

66   While the national laws thus created should preferably be as 'domestic' as possible, they also need to enshrine a range of political or otherwise value-based concepts imported from abroad. The most common and arguably most effective strategy for reconciling these paradigms is to argue that virtually all states have agreed to be bound by certain universal norms and principles, and that these norms and principles have implications for the relationship to the citizens.[25] On the issue of how international (UN) norms relate to local notions of law and justice, the UN Secretary General argues that

> 'United Nations norms and standards have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of member states, whether based in common law, civil law, Islamic law, or other legal traditions. As such, these norms and standards bring a legitimacy that cannot be said to attach to exported national models, which, all too often, reflect more the individual interests or experience of donors and assistance providers than they do the best interests or legal development needs of host countries.'[26]

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25   See e.g. Corell 2004, p. 341, Sikkink 2002, p. 38 and Teitel 2000, pp. 20–21.
26   S/2004/616, p. 5.

67   However, most major UN conventions provide little direct guidance as to how the respective norms should be made operative in the domestic sphere. This is problematic because it is in the details of domestic implementation that international rule of law principles are brought to life. To get to the level of detail required, one must often look to international or regional instruments that are not formally binding.

68   One cannot take for granted, moreover, that the import of laws and principles which appear to have 'worked' elsewhere will lead automatically to identical or similar results in a new setting. On the contrary, there is much evidence to suggest that 'transplanted', 'received' or 'borrowed' law only coincidentally induces the same behaviour in a new environment, because inevitably people and institutions choose how to behave not only in response to the law, but also to a surround of other social, economic, physical and subjective factors arising from history, custom, geography, technology, etc.[27] At the same time, development experience and comparative law suggest that unlike family law and other strongly religiously or historically anchored areas of law, administrative law and other 'instrumental' branches of the law often 'travel well'. [28]

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27   The doctrine on this issue is vast. Corne (1997); Gillespie (1996); Greenberg (1980); Waelde and Gunderson (1994) and Watson (1974) provide numerous examples from Brazil, Chile, China, the republics of the former Soviet Union, Ethiopia, Mexico, New Zealand, Scotland, Turkey and other countries.

28   See for example Levy 1950, p. 244. Cotterrell (2001, p. 82) argues that the prospects of success or failure are related to which form of law or 'community' the specific transplanted or borrowed concept has a bearing on. He derives from Max Weber's four pure types of social action (traditional, affective, purpose rational and value rational) four types of pure communities (instrumental, traditional, community of beliefs, and affective community) and argues that while the prospects of successfully introducing foreign or international concepts are often good with regard to matters that address instrumental communities, the prospects are much slimmer with regard to affective ditto. Other researchers have made different observations. For example, Andrew Harding (2001, p. 213) notes with regard to the retention and survival of transplanted laws in Southeast Asia (essentially laws imposed by colonial administrations) that 'the more public law is, the more it has diverged from Western law; but the more private or commercial law is, the less it has diverged'.

3.3.3 Administrative law and procedure

69 There are often reasons for promoting a general law providing common principles for decision-making in the public administration, for example, if all authorities carry out their responsibilities in accordance with the same procedural law, the possibility that both the civil servants and the citizens will be aware of their rights and duties will increase. The average standard of the procedure will also be higher if best practice and lessons learnt are shared among agencies, instead of every single branch applying its own regulations and benchmarks.

70 A general law on administrative procedure needs to meet many important expectations: It should be easy to apply for the administration, easy to understand and supervise for the individual, etc. The most important thing is that the citizens should be sure that all authorities and all civil servants perform their duties in accordance with the law and are not influenced by irrelevant or criminal considerations.

71 An initial matter that needs to be regulated is how an individual party can initiate a matter before an authority. How this should be done must be allowed to vary depending on the complexity of the case in question, but it is important that an incomplete application does not lead to a rejection or a refusal from the authority. Instead authorities and officials must be obliged to help the party in order to bring the matter under the authority's examination. This is particularly important in post-crisis environments, where many people may be displaced, unable to find and fill in forms, or otherwise unable to file a formally correct application. It is similarly important that it is easy to access and communicate with authorities, and that office hours are clearly stated and respected by the staff.

72 It is also important to ensure that decisions are taken objectively. Courts of law, administrative authorities, and others performing administrative tasks must treat people equally and observe impartiality. What constitutes objectivity needs to be spelled out in a policy and legal framework. First and foremost, an official must be regarded as disqualified to handle the matter if it concerns himself or his spouse, parents, children, brothers or sisters or some other close relation, or if he/she or some close relation may expect extraordinary advantage or detriment from the outcome of the matter. Another situation where an official should be disqualified is if he or she, or any close relative, is the legal representative of someone that the matter concerns or of someone who can expect extraordinary advantage or detriment from the outcome of the matter. The official should also be prohibited from participating in handling the matter if he/she has served as the applicant's legal representative or assisted the applicant in any way in return for payment. As it is virtually impossible to list all possible situations that might imply

disqualification, there is also need for some form of general clause stating that the official must refrain from dealing with the matter if there is some other special circumstance that is likely to undermine confidence in the officials' impartiality in the matter at hand, for example that the official cohabits with a party or they are good friends or enemies, or the fact that the official is committed to an interest represented in the matter. In order to maintain respect for the disqualification principles and provisions, it is vital that there should be no obligation on the private party to be observant and draw the authorities' attention to the fact that an official might be disqualified. Instead, any official who knows of any circumstance that could disqualify him must be obliged to disclose it on his own motion.

73   When the matter is investigated it is important that all relevant facts are gathered. In order to facilitate easy communication with the authority, the private party should be allowed to make oral statements if he or she wishes to do so. The authority should then record the information. When written applications and documentation are necessary, the authority should be obliged to guide the individual party and assist with information about documents or information that must be provided. Decisions should always be in writing to enable transparency and appeal, but the actual processing or procedure may contain oral elements when this helps the private party to make himself understood and access the agency and procedure.

74   The private party should be able to follow the progress of the matter. As long as the authority is still working with the matter, the private party should have access to all material that has been brought into it, on condition that the decision concerns him or her directly. This opportunity makes it possible both to correct incorrect statements and facts, and to argue against the provisional or tentative conclusions of the authority. However, the right to information may be restricted, as regards certain facts that need to be kept secret even from the party, for example on national security grounds, or when the decision is that which the party wants and expects, or if the matter is of such urgency that there is no time to articulate and communicate a preliminary decision.

75   The administration must have an obligation to ensure that the private party is informed about the content of any decision that directly concerns him. It is thus not sufficient to merely announce the decision in an official gazette or similar forum, but rather to ensure that the party actually receives this information in a form that can be understood and appealed. The authority may effect the notification orally, by ordinary letter, through a service or in some other way, but the notification must also always be communicated in writing in order to help the private party to understand it and to provide a possibility for lodging a formal appeal. Decisions should contain statements of all relevant facts, and the reasons

for arriving at a certain outcome. Decisions that affect a party adversely, should also include information about how to appeal.

76 Although the general rule ought to be that it should be possible to appeal all decisions, it is often reasonable to make the right to appeal conditional on some fundamental facts. For example, many general laws on administrative procedure require that the decision must directly concern the person filing the appeal, the appealed decision must affect him adversely, and that the decision is such that it can be appealed against.

3.4 Institutional reforms: judicial remedies and supervision

77 Legal and normative reforms need to be followed by institutional reforms, *i.e.* the establishment, reform or empowerment of administrative agencies, courts and other bodies, to ensure that the language of the law is transformed into reality, and that citizens have recourse to a judicial remedy. Institution-building is a complex task, demanding many resources, and must essentially be a domestic responsibility. However, a wealth of experience has been accumulated in the areas of development co-operation and transition support, on which peace-builders should be able to draw.

3.4.1 *Administrative courts*

78 If a decision by an administrative authority concerns a person, and affects him adversely, it is of great importance that he has the possibility to appeal against it. Whether the appeal should first be directed to an authority at a higher level or to a court is an open question, but as stated in article 10 of the UN Universal Declaration of Human Rights, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations. Article 6 of the European Convention on Human Rights similarly states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. This implies that a person must always have the right to have his case heard in a court, even when it concerns administrative matters. This procedure, in turn, should be guided by common and universally accepted rule of law principles.

79 Whether appeals against decisions made by administrative authorities should be examined in special administrative courts or in general (civil) courts is open to discussion. Specialized courts have certain advantages, for example a greater familiarity with the relevant law and the subject matter, but courts of general jurisdiction may be better equipped to safeguard general rule of law principles.

Capacity issues also matter: states with resource constraints may face difficulties in establishing and maintaining separate tiers of courts. In other instances, the general courts may be clogged by several identical or similar administrative cases. For example, the Kosovo Supreme Court is reported to have a back-log of over 2000 administrative cases, and only two judges to hear these cases. The most important thing is that the court, whether a specialised administrative court or a court of general jurisdiction, possesses a sufficient degree of independence, the necessary skills to decide the case objectively and the capacity to decide the matter within reasonable time.

80　The procedure needs to be structured to ensure easy access and a fair trial. People, including those belonging to weak and vulnerable groups, must feel that appeal is easy and may lead to a new decision. Thus, there should be no requirement for representation by a lawyer, stipulations that arguments have to be presented in writing, or that fees or deposits have to be paid, etc.

81　The actual decision may take different forms, ranging from an endorsement of the original decision of the administrative agency to a determination that the original decision is illegal and should therefore be declared void. There are strong reasons to suggest that the court should have competence or jurisdiction identical with that of the administrative agency, *i.e.* it should be able to alter the decision in accordance with what the court finds most appropriate in the specific case, not least because the decision of the court will then represent the final settlement of the case, and both the appellant and the administrative authority will know the outcome. If the court only has the power to declare the decision null and void, the process would often need to be resumed with the original administrative authority, thus keeping the applicant in limbo.

3.4.2　*Ombudsmen*

82　The original linguistic meaning of the Swedish word *'ombudsman'* is someone who represents an individual who for some reason is not able to take care of his or her own affairs or interests, for example in legal or financial matters. From that, the concept has spread throughout the world and has taken on a variety of forms. The most common definition of an ombudsman is currently a person or office formally appointed by the parliament or government to perform general and *in casu* supervision of executive or judicial authorities on behalf of the citizens. The ombudsman typically receives complaints from the public, and may then decide whether or not to initiate an investigation into the matter. The ombudsman may, alternatively, initiate an investigation *ex officio* if he discovers irregularities or malpractice within the administration. The most important role of the ombudsman is thus not to review every complaint *in casu*, but to supervise

the general legality and compliance with principles of good administration within public agencies.

83   In some systems the ombudsman has the right to alter decision he finds wrong or illegal, but this construction carries the risk of conflicts between the ombudsman and the regular appeals structure, typically the courts. In most systems, the principle is therefore that the ombudsman should point out mistakes and structural problems in the application of the law by the administration, and should have the option to take legal action against individual civil servants who have seriously violated the law or otherwise failed to do their duty.

84   If the ombudsman is to be effective as an extraordinary institution in addition to the regular political, administrative and judicial authorities, he must not be bogged down by too many cases, and he must also have the right to determine what cases should be investigated as being of principal or symbolical importance. It is also important for the authority of institution that the ombudsman is formally and *de facto* independent of all other branches of the state, and that his statements are respected and acted on. Resource and capacity issues are critical, particularly in post-crisis environments where even the most fundamental state agencies may lack sufficient resources to perform their functions properly.

BOX 7   Provedor of Timor-Leste

Timor-Leste has established the Office of the Ombudsman for Human Rights and Justice, or Timor-Leste Provedor de Direitos Humanos e Justica. The constitution provides that the Provedor shall be an 'independent organ in charge to examine and seek to settle citizens' complaints against public bodies, certify the conformity of the acts with the law, prevent and initiate the whole process to remedy injustice'. The specific areas of responsibility are human rights, good governance, and anti-corruption, and there are ombudsmen with specific responsibility for each subject area. The Provedor may carry out inspections and investigate any government or judicial authority, but has no authority to challenge the actions and decisions of the courts or the parliament. Apart from supervision, the Provedor is also tasked to provide education about human rights and justice, and to promote 'good practice' in government bodies. Although the Provedor is a recent institution (it started operating at the beginning of 2006), it is well-known in Timor-Leste and has received a large number of cases concerning good governance, violations of human rights, and corruption. The most difficult challenges to the functioning of the institution have been resource and capacity bottlenecks. The Provedor still struggles to find sufficiently trained staff, acquire and maintain buildings and IT, and otherwise mobilise the necessary means to function adequately.

3.4.3   Execution of judgements and decisions

85   There must be a procedure and mechanism to ensure that administrative decisions are respected and duly implemented, both by the administration and private parties. There is a range of means to this end. One of the most common is administrative fines, *i.e.* that a court or higher-level administrative authority (preferably not the administrative authority that took the original decision) decides that if the person concerned does not comply with the decision he will be subject to a fine as stipulated in the law. Another means is to call for the assistance of the police or a specific enforcement service. The authority can also decide to carry out the decision and then hold the individual liable for the costs incurred. There is the additional possibility of bringing matters of non-compliance before criminal courts and using sanctions such as fines and eventually sentencing of persons for refusing to comply. The most appealing alternative from a rule of law perspective and most realistic in post-crisis environments seems strategies based on fines and assisted enforcement.

86   Another question is how to ensure compliance with the decisions of public authorities on the part of other branches and agents of the state. Indeed, the rule of law requires that authorities follow both their own decisions and the decisions of higher agencies and courts. The possibility for ombudsmen and other supervisory bodies to press criminal charges against insubordinate or obstructive officials is a means to this end. Another way to achieve this is for the private party to turn to a (civil) court with a request for an order of performance, which the party can then present to the enforcement service and ask for coercive enforcement. Alternatively, the appeal body may directly formulate its decisions as a performance order, and thus eliminate the need for a court decision before coercive enforcement measures can be initiated.

3.4.4   Ad hoc bodies and mass claims mechanisms

87   While the establishment of administrative courts is an important step in promoting and safeguarding rule of law standards in administrative decision-making, various structural and institutional features of post crisis societies (weak and manipulated courts, long distances, etc.) may prevent or discourage people from accessing courts and other formal fora. In some instances, such problems can be overcome, or at least mitigated, by the establishing of international or local mass-claims mechanisms and proceedings dealing with important and strategic categories of similar cases, for example commissions for property restitution or small claims courts dealing with the delivery of utilities.[29] Such approaches attract the attention of the UN and other assistance providers.

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29   Von Carlowitz 2005, pp. 548, 554 and 556.

BOX 8   Commissions for Real Property Claims

The Commission on Real Property Claims of Refugees and Displaced Persons (CRPC) in Bosnia and Herzegovina and the Housing and Property Directorate and Claims Commission (HPD/CC) in Kosovo constitute examples of internationally backed attempts to facilitate swift, fair and effective processing of similar cases. Both institutions are characterized by a standardized mass claims procedure and serve as potential precedents for the settlement of refugee and displacement problems in many other conflict and post-conflict situations. The 1995 General Framework Agreement for Peace foresaw the establishment of the CRPC as an internationally supervised institution, mandated to receive and decide any claims for restitution or compensation of lost property that had not been voluntarily sold or otherwise transferred since the outbreak of the war in 1992. The CRPC consisted of 6 national members and 3 members appointed by the President of the European Court of Human Rights. The Commission applied both national and international legal norms, and the decision-making followed a standardized mass claims procedure. Enforcement was the responsibility of local authorities, which posed a major challenge to the authority and effectiveness of the Commission. In Kosovo, the HPD/CC was responsible for the enforcement of its own decisions, but needed the support of law enforcement authorities.

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88   In June 2004, the Special Rapporteur to the UN Commission on Human Rights on Housing and Property Restitution presented the Draft Principles on Housing and Property Restitution for Refugees and Displaced Persons. The Draft places primary responsibility for creating and maintaining a legal and institutional framework that facilitates property restitution on states, but also says that 'the international community has a responsibility to act in ways which promote and protect the right of housing and property restitution, as well as the right to safe, voluntary and dignified return'.

89   Support to the establishment and operation of *ad hoc* agencies and processes is a strategy fraught with problems. There are numerous examples of such initiatives being 'demand-driven' and thus difficult to implement and sustain. Often their establishment also presupposes the existence of certain legal and institutional features. For example, the establishment of mass claims mechanisms presupposes a knowledge of systemic problems, accurate claims registration, computerized processing, a written procedure, offices, staff, salaries, enforcement mechanisms, publicity, etc. Furthermore, such agencies and processes risk becoming detached and atypical branches of the administration, operating on the basis of different paradigms and sustained by other sources.

3.5 Anti-corruption

3.5.1 *Conventional responses*

90 Although anti-corruption efforts comprise a range of strategies and tools, affected governments tend to rely on a rather similar set of tools and to apply them in a certain order. The first step is to interpret the situation as a matter of correctable individual failure among a few, and consequently embrace a 'criminal' paradigm of harsher punishments. Such criminal strategies tend to be neither effective nor efficient. The main reason is that the corruption is not isolated to a few criminal individuals, but is rather a common phenomenon among both high and low. Investigating, prosecuting and punishing every incident of corruption also requires enormous resources, especially when the law enforcement and judicial structures are themselves corrupt. Another problem is that 'campaign-like' enforcement is often regarded with suspicion by the human rights-sensitive international community.

91 The next step is to concede that the growth in administrative corruption stems from temporary governance problems in conjunction with some kind of radical reform project, such as reconstruction and democratization in the wake of war of conflict. The corresponding 'quick fix' is accordingly to introduce policies aimed at speeding up the reform process and thus reducing the opportunities for officials to take bribes and indulge in other forms of undesirable behaviour.[30] Sometimes such strategies are combined with the introduction of 'anti-corruption laws' that provide for transparency, accountability, etc. Encouraged by peacebuilders and assistance providers, some post-crisis states go further and embrace a 'good governance' paradigm labelling corruption a result of erroneous policy, bad laws and dysfunctional institutions. The corresponding remedy is to reform the institutional incentives facing officials and citizens so that they develop new belief patterns and habits. This approach may also include the introduction of an authoritatively defined division of power and acceptance of the idea that the ruled and the rulers must all obey the same rules. The governance approach generally presupposes the existence of a government which feels accountable to the population at large and whose political survival is determined in free and fair elections.

92 There are various internationally developed tools to build domestic pressure for accountability and promote reform in societies struggling with corruption. For example, Transparency International publishes two indexes of the degree of corruption in the countries of the world: The Bribe Payers Index (BPI) measures the supply side of corruption, *i.e.* the probability that companies in a given country

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30   Goodpaster 2002, pp. 104–105.

pay bribes in connection with business. The Corruption Perception Index (CPI) draws up an annual ranking list of some 100 countries on the basis of how people representing trade and industry, academia, the media, etc. perceive the degree of corruption in their own country. By establishing 'the truth' about the level of corruption in different countries and sectors, these indexes influence the size and specific direction of assistance and loans, and thus also domestic policy. As corruption is generally regarded as a cross-sector or endemic feature of societies, it may be argued that such indexes also serve to highlight problems in the public administration and thus to build pressure among the population to reform that particular sector.

93 Some assistance providers and international organizations adhere to the idea that corruption is not a national or geographically limited problem, but rather a transnational concern that requires international solutions. The Council of Europe has accordingly developed a number of topical instruments dealing with matters such as the criminalization of corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of public officials and the financing of political parties. The most important among these are the 1999 *Criminal Law Convention on Corruption (ETS 173)*; the 1999 *Civil Law Convention on Corruption (ETS 174)*; the 2003 *Additional Protocol to the Criminal Law Convention on Corruption (ETS 191)*; the *Twenty Guiding Principles against Corruption (Res. 1997:24)*; the *Recommendation on Codes of Conduct for Public Officials (Rec. 2000:10)*; and the *Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Rec. 2003:4)*. The Council of Europe has also called for the adoption of national laws and recommendations pursuant to these instruments to criminalize corruption throughout Europe, enhanced cross-border co-operation in the prosecution of offences, and the establishing of a mechanism for monitoring observance of European and international anti-corruption instruments.

94 As demonstrated above, virtually all conventional approaches to anti-corruption involve the 'transplantation' or 'replication' of certain legal and judicial concepts and institutions from the outside. However, national policy-makers may not always be entirely clear on the purpose and proper organization of the concept, or willing to give the new institution the mandate and resources it needs. Conflicts over jurisdiction and resources with already existing courts and law enforcement agencies are also common. Anti-corruption concepts imported or promoted from the outside may therefore work best where they are needed least, *i.e.* in countries with high quality of overall governance structures.

> **BOX 9 Group of States against Corruption**
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> An European anti-corruption mechanism was created by 17 founding states in 1999 in the form of the 'Group of States against Corruption' (GRECO). GRECO's objective is to improve the capacity of its members to fight corruption by monitoring their compliance with Council of Europe's anti-corruption standards through a process of mutual evaluation and peer pressure. GRECO is expected to help identify deficiencies in national anti-corruption policies and prompt the necessary legislative, institutional and practical reforms. GRECO should also provide a platform for the sharing of best practice in the prevention and detection of corruption. Membership in the group is not limited to members of the Council of Europe, but is open to any state which took part in the elaboration of the enlarged partial agreement. Moreover, any state which becomes Party to the Criminal or Civil Law Conventions on Corruption automatically accedes to GRECO and its evaluation procedures. Currently, the group comprises 44 member states (43 European States and the United States of America). The functioning of GRECO is governed by its Statute and Rules of Procedure. Each member state appoints up to two representatives who participate in GRECO plenary meetings with a right to vote. GRECO elects its President, Vice-President and members of its Bureau, who play an important role in designing GRECO's work programme and supervising the evaluation procedures.

3.5.2 *Trust and governance*

95   Having realized the limitations of conventional anti-corruption strategies, peace-builders and assistance providers have begun to experiment with so-called 'trust and governance' prescriptions that address corruption both as a failure of institutions and as a problem of trust. In essence, these prescriptions add to the Post-Washington Consensus priority of making administrative and judicial institutions stronger regarding their core capacity, the idea is that an internalization of a higher degree of trust can help transform certain key bodies into 'clean zones', able to set an example for others.[31]

96   A primary issue in promoting trust-based approaches is the identification of a distinct target group (not the same as an institution or sector). This group may consist of a constellation of similarly trained or oriented people who are willing

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31   Braithwite 1998, p. 367. Braithwite argues that societies work better when two kinds of mutually constituting and reinforcing trust are maximized, namely trust as confidence (the expectation that someone will do what we want) and trust as obligation (people accepting that they have obligations, for example legal obligations, and acting in such a way as to honour them). In essence, the more people are trusted to behave in a trustworthy way, the more they are likely to do so.

and able to assume the role of the moral example and regulatory model. The legal profession has attracted particular attention in this respect, largely because of the important tasks it typically performs and its demonstrated ability in many societies to exercise self-regulation.[32] Specific categories of civil servants could potentially fulfil a similar role. However, very few post-crisis states have distinct administrative professions that meet these criteria and would be capable of fulfilling this function. Rather, the administration in post-crisis states often consists of fragmented and competing clusters of occupational groups with few common denominators.

97 Trust and governance approaches may thus have to be preceded by the creation of new forms of professional affiliations and associations. An informal approach to this end could be to explain to like-minded people in post-crisis societies the incentives to be derived from joining together in loose collegial affiliations similar to clubs or 'epistemic groups' that can function as platforms for dialogue, networking, etc., with the hope that these affiliations will eventually develop into all-embracing professional associations in a bottom-up process.

98 Another contrasting approach is formal and top-down, for example to promote reforms of the principles for entry into the administration. While competitive examinations are often suggested as a way of providing for a profession with the right formal and personal qualities, the feasibility of such mechanisms may be questioned on the grounds that in post-crisis societies there are often an insufficient number of properly educated people to choose from (Timor-Leste), or that the opportunities to manipulate such examinations are many. Further, in order to ensure lasting improvements, systems for regulating entry into the profession need to be combined with effective means to sustain performance and integrity after recruitment.

3.5.3 Addressing material conditions

99 Material conditions influence the conditions for creating new professional identities, value systems and control mechanisms. Apart from the basic need to be able to live on one's salary, it seems to be a significant, albeit not absolute, relationship between the 'prestige' of the profession, as determined by the salary level, and its inclination to act morally.[33] Another approach is thus to create a distinct financial

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32 Brietzke 2002, p. 119 and Taylor 2002, pp. 38 and 40.

33 It should also be mentioned that some studies of the relationship between wages and corruption in the civil service suggest that the relationship linkage may not be as strong as is often assumed. For example, van Rijckeghem and Weder (1997) suggest that where the wages are low in general, the level of wages may be of secondary importance, as potential bribes dwarf wage income.

'space', with sufficient resources and autonomy for the professional group to operate, for example by means of salary reforms. However, the administration constitutes a very large group of people, and even reforms targeting only certain categories of administrators may easily overstretch the budget of resource-weak states, or create inconsistencies in the general civil service salary structure (as has been the case in Bosnia and Herzegovina and other places).

3.5.4 Media and civil society

100   Another anti-corruption strategy focuses on reporting and monitoring by the media and civil society. The reason for this strategy is that public attitudes on matters of law and governance are not determined solely by hard facts and first-hand experiences, but also by the preferences, tendencies, and biases of those who report on the matter or otherwise disseminate information.[34] The field study underlines that, in many post-crisis environments, the media (particularly the press) may put corruption issues on the public agenda and help to create pressure for accountability. In some instances, the media may also take on the role of *de facto* enforcers of laws and policies that have no other effective enforcement mechanism, for example by allowing the 'court of public opinion' to penalize improprieties and limit the misuse of power: Crimewatch-style television programmes addressing conditions of abuse and corruption within the administration have proven effective in engaging the public in specific cases and in demanding structural changes.

101   It should be noted that the media in reform and transition states are often manipulated into colluding in corrupt activities such as promoting particular political or business interests, cover-ups or the blackening of economic or political competitors (Kosovo). Another problem is that too much, or too sensational, reporting can create or reinforce a culture of mistrust and cynicism.

BOX 10 Media initiatives

The *Justice Kid* television show in Kosovo is an initiative to build awareness among young people. Developed in a joint effort by the American Bar Association Rule of Law Initiative, the Kosovo Chamber of Advocates and the Kosovo Judges Association, it premiered on Kosovo TV screens for the first time in March 2007. Another example is from Côte d'Ivoire where the UN Mission, with funding from the Office of the High Commission for Human Rights, started a program to strengthen the capacity of national human rights groups to build rights awareness and press for accountability.

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34   Dakolias and Thachuk 2000, p. 380.

3.6 Aids for law-makers and institution-builders

102 Where laws and norms are lacking or little understood, there may be a need for handbooks, checklists, and other guiding and standard-setting instruments for law-makers and administrators. One of the most important observations in the field study is that many policy-makers and implementers are not aware of the rule of law dimensions of Public Administration Reform, and would like some kind of 'yardstick' or 'minimum standards' regarding what constitutes rule of law in public administration and how to implement it effectively.

BOX 11 Guidelines for Legal Empowerment

In its latest report *Making Law Work for Everyone*, the Commission on Legal Empowerment of the Poor provides guidelines for implementation, phases, policies, and tactics for national actions, followed by an agenda for the international community. The Commission has developed a comprehensive agenda for legal empowerment: including four pillars that reinforce and rely on each other. These are: Access to justice and the rule of law, property rights, labour rights, and 'business rights'. The Commission emphasizes that legal empowerment only can be realised through systemic change aimed at unlocking the civic and economic potential of the poor. It is therefore crucial that these four pillars are central in national and international efforts to give the poor protection and opportunities. Under the rule of law and access to justice pillar, there are measures aimed for example at: ensuring that everyone has the fundamental right to a legal identity, to be registered at birth, making the administration systems and relevant public institutions more accessible to the poor, fostering and institutionalising access to legal services, modifying or repealing biased laws, supporting concrete measures aimed at the legal empowerment of women, minorities, refugees and internally displaced persons, and indigenous peoples etc.

3.6.1 Interim and transitional legislation

103 In the wake of crises in Kosovo and East Timor, the UN started to reflect on its activities and priorities in peacekeeping and peace-building to date. In the forward-looking 2000 *Report of the Panel on United Nations Peace Operations* (Brahimi Report),[35] the UN discussed the specific proactive steps the organization might take in order to be better prepared for future post-conflict tasks. Noting the difficulties the UN had experienced both in identifying and applying the law in recent peace-building missions, the report called for the creation of 'justice packages' comprising, specifically, transitional codes that could be applied in future

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35 A/55/305, S/2000/809.

executive peace operations by international and national personnel engaged in the enforcement of criminal justice. This solution, it was hoped, would help to circumvent the lengthy process of designating and amending the applicable law. The Brahimi report assumed that such transitional legislation could be drafted in a way that could be compliant with international human rights norms and standards. The report also envisaged that the transitional legislation would apply until the domestic law-makers could take the lead in creating and maintaining more permanent legal and judicial structures.

104 A number of legal, practical and philosophical objections were soon raised by people inside and outside of the UN system against the idea of using interim or transitional legislation in executive operations and elsewhere. Changes in strategic outlook within the UN system, in particular arguments that in the future there would be less scope for Kosovo and East Timor-style executive missions with legislative and judicial authority, also led policy-makers to question the objective need for transitional legislation. As a consequence, much of the initial enthusiasm that surrounded the idea of temporarily replacing the domestic law of a post-conflict state with imposed UN law soon disappeared.

105 In the 2004 report *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, the Secretary–General argued that international personnel should merely 'assist' the law reform process, and that 'national assessments, national needs and aspirations' should be the guiding principles.[36] At the same time, the report reiterates the importance of quickly creating legislation that conforms with human rights law and responds to the country's current needs and realities, and sees an important role for international staff in identifying, supporting and empowering domestic reform constituencies in creating such legislation. In line with this thinking, the currently preferred UN policy is the creation of various rule of law 'tools', including codes, to assist national and international actors in assessing and reforming arbitrary, discriminatory or otherwise inappropriate legislation in post-crisis environments. Although the *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* report primarily discusses the potential contribution of such tools to criminal law and procedure reform, the underpinning logic seems equally valid for other areas of law, justice and administration.

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36   S/2004/616.

BOX 12 Model Codes for Post-conflict Criminal Justice

Much can be learnt about the possible contribution to peace-building of interim codes, and of the challenges involved in developing them, by studying the *Model Codes for Post-conflict Criminal Justice Project*. In 2001, inspired by the Brahimi Report and practitioners involved in post-conflict criminal law reform, the United States Institute for Peace and the Irish Centre for Human Rights, in co-operation with the Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime, launched a project to create a set of four model codes (the *Model Criminal Code, Model Code of Criminal Procedure, Model Detention Act* and *Model Police Powers Act*) that could be used as tools by both international and national actors engaged in criminal law reform processes in post-conflict states.

The model codes were drafted in consultation with leading experts from around the world and from a variety of backgrounds, including international and national judges, prosecutors, defense lawyers, police, corrections officials, human rights advocates, military lawyers and international, comparative and criminal law scholars. Drafts of the codes were also extensively vetted through a series of intensive individual and institutional consultations. In addition, a series of regional consultation meetings was conducted to assess both the potential compatibility of the model codes with legal systems in different regions of the world and to examine their potential utility as a law reform tool in diverse regional contexts. The substantive provisions of the codes were inspired by a variety of the world's legal systems, which were blended to create a coherent body of criminal laws that should meet the typical needs of a post-crisis society (disrupted, fragmented and under-resourced legal system, etc.) yet adhere to international human rights and rule of law standards. The introduction or use of the codes is made easier by annotations or commentaries explaining the choice of wording and approach of each provision, and highlighting other possible reforms or initiatives that may be necessary, for example institutional reforms.

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106 There is little doubt that there is a need in many situations for conceptual models or codes to guide the regulation of new matters. However, before investing in the development of such instruments, a number of international trends, as well as recent mission experiences, need to be considered. First, there is a risk that the development of such instruments is driven more by international 'supply' than local 'demand', *i.e.* that governments and international organizations invest in something they expect to be of use in the future and that they have the capacity to provide, without really knowing what that future will be like or what local decision-makers will actually ask for. Second, there may be significant geographical variations in problems and remedies rendering a single model code too blunt an instrumen. Third, the building of (universal/UN) political consensus for a model code, and for legitimizing it on the local level, require considerable investments in diplomacy and lobbying. Fourth, there is the political question of who should own and lead the development of such instruments to ensure the greatest

possible degree of inclusiveness, ownership and universal authority. Fifth, the kind of resources (structural, institutional, etc.) required to develop a code and make it operative in the field, need to be assessed.

3.6.2 Checklists for law-makers

107 Less normative and resource-demanding than the promotion of transitional legislation is the development of drafting manuals and checklists highlighting for law-makers important aspects of human rights and rule of law. Such instruments may also highlight resource and capacity issues that need to be considered when new legislation is created and implemented.

BOX 13 Governance and public administration checklists

The 1999 OECD SIGMA *European Principles for Public Administration* document identifies the administrative standards to which EU candidate countries are expected to conform in order to become members of the EU and part of the 'European Administrative Space'. The document suggests that it is possible to provide a condensation or summary of a 'general consensus on key components of good governance emerging among democratic states' that should apply to all member states regardless of legal tradition and system of governance. The suggested standards are inspired by the jurisprudence of the European Court of Justice and include the rule of law principles of reliability, predictability, accountability and transparency, but also technical and managerial competence, as well as organizational capacity and citizens' participation.

The OECD SIGMA *Checklist for a General Law on Administrative Procedures* is intended for use as a tool for national law-makers in countries seeking to introduce a general law on administrative procedures. The principles ('questions') listed are meant to be understood as 'some essential administrative law principles rooted in democratic constitutional systems', and include *inter alia* legality, impartiality, procedural fairness, reliability, predictability, openness, transparency, and appeal. In order to help law-makers preparing laws on administrative procedures, the checklist presents the principles in successive steps. The first is to assess the constitutional framework in order to determine the extent to which it already protects key rule of law principles. The next step is to define the scope of the law and the mandates and responsibilities of the interested agencies and parties. Thereafter follows the establishment of principles of legality, procedural fairness, etc.

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108 Checklists and manuals could also be developed to guide the elaboration of local by-laws, guidelines, codes of conduct, citizens' charters, and other normative instruments. The Council of Europe has developed a recommendation to guide member and candidate countries and bodies in creating codes of conduct for civil servants, which highlights the importance of the rule of law.[37] The recommendation

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37 CoE Recommendation Rec(2000)10.

is based on the logic that public officials are the key element in a public adminis-tration and therefore need to have specific duties, obligations and qualifications. The recommendation consequently suggests a range of principles to be introdu-ced into local codes of conduct to ensure that public officials carry out their duties in accordance with the law, act in a politically neutral manner, serve loyal-ly the lawfully constituted authority, not allow private interests to conflict with public position, etc.

109 Although checklists and manuals are less intrusive than model codes, their pro-spects and limitations are in many ways similar to those of codes: they are often demand-driven, based on casual assumptions about problems and remedies, and may fail to consider important differences in initial conditions, goals and capacities.

3.6.3 Best practice studies

110 International and domestic actors promoting Public Administration and Rule of Law Reforms can be helped by consulting best practice reports and similar docu-ments describing similar and successful projects in other countries and environ-ments. At present, there is no best practice study that specifically addresses the issue of rule of law in public administration, but guidance for developing such an instrument, and ideas about how it could be used, may be found in reports and analyses developed for other sectors.

BOX 14 UNDP Civil Administration Best Practice Reports

The UNDP *Civil Administration Best Practice Reports* cover a range of countries, among them Mali, Jordan, Jamaica and Singapore, and analyses their respective strate-gies for Public Administration Reform. Under the heading of *Human Resources and Customer Oriented*, the reports discuss ways to identify real-world problems in public administration, for example service delivery surveys. The reports also discuss the proc-esses of establishing training institutes for public administration and their contribution to nurturing an attitude of service excellence (high standards of quality, courtesy and responsiveness) and a more welcoming, effective and innovative environment. The reports emphasize the rights-based and individual-centred nature of the reform process. As a means to this end, the reports discuss, among other things, the articulation of citi-zen's charters to emphasize the obligation of public entities to improve the quality of the services they provide. The reports also note that Public Administration Reform may encounter resistance from within the system, and outline strategies for overcoming such resistance, including among other things an effective communication policy explaining the change objectives and the individual and collective incentives they entail. Under the head-ing *Technical and Organizational Oriented*, the more technical aspects of efficiency enhancement and public participation are discussed and analyzed. The reports provide examples of successful institutional reforms and monitoring initiatives.

111 Best practice studies have an inspirational and pedagogical value, but are often difficult to apply. The identification of certain examples as successful and others as unsuccessful, without considering differences in original conditions, capacities and other contextual factors, is over-simplification and sometimes patronizing. As with the transfer of laws and institutions, it may also be asked to what extent a best practice example is transferable.

3.6.4 Handbooks

112 Many assistance providers have invested in developing handbooks and similar instruments to guide their own staff in promoting various values and principles, for example the EC *Handbook on Promoting Good Governance in EC Development and Co-operation* and the United States Agency for International Development (USAID) handbook *Administrative Law Tools and Concepts to Strengthen USAID Programming: A Guide for USAID Democracy and Governance Officers.*

113 Local administrators could also be helped by handbooks and similar instruments explaining what the rule of law in public administration is and how to deal with various administrative issues that impact on the rights and duties of individuals. Public relations, openness and citizen participation, and the specific needs of weak and vulnerable groups are other issues that may be addressed, not least to underline the performance-legitimacy-trust nexus.

BOX 15 Handbook for Mayors and Municipalities

The OSCE-promoted *Handbook for Mayors and Municipal Council Members of the Republic of Macedonia* focuses on the needs of local decision-makers, primarily mayors and councillors, and is intended to help them better manage their responsibilities. The handbook was developed jointly by international and local academics and consultants, and current and former Macedonian mayors. It begins with a basic introduction to the legal framework of local self-government, in order to ensure that the fundamental rules and regulations are correctly understood. References are made to the 1985 *European Charter on Local Self-Government* and the principles enumerated therein. The handbook then proceeds to explain the mechanism for supervision of the constitutionality and legality of the local administration. Much attention is given to defining and explaining competencies with the purpose of preventing the local administration from acting *ultra vires*. The handbook also discusses the issue of independence under law.

114 Handbooks are common in various areas of governance and management. Where the framework of rules is opaque or difficult to understand, they may provide valuable guidance to administrators confronted with new problems. On the other hand, the normative status of handbooks is often unclear; they are supposed to provide normative guidance, but do not have the status of law. Further, where there is little tradition of consulting the actual law, people may have little inclination to consult other written sources. Another issue is that handbooks are usually referring to one specific agency or country. Developing and maintaining handbooks that cover the entire administrative sector, or even certain aspects of it, also require considerable resources.

3.6.5 Governance modules and quick-start packages

115 Where the public administration has collapsed, is profoundly manipulated or otherwise essentially dysfunctional, peace-builders may consider developing and implementing governance modules, quick-start packages and other key-ready administrative structures as substitute for the inoperative or dysfunctional system in place.

116 Key-ready governance structures currently attract little attention in the assistance community. It should be noted that none of the HQ and field respondents expressed interest in similar constructions. Rather, there is a fairly consistent view that the development of such tools requires enormous investment in cross-country and interdisciplinary research, dissemination, advocacy, and not least in disarming the local political sensitivity they seem to provoke. There is also a notion (shared by the developers of the concept discussed in the box below), that in order to be successful, the promoters of such tools would also have to overcome probable resistance in the international community.

BOX 16   Government out of a box

The Crisis Management Initiative, addressing the needs of future peace-building missions, has suggested the development of a 'Government out of a Box' concept consisting of modules governing, among other things, civil registration, local security, basic education, health services, and the provision of utilities. The idea is that these tasks would be carried out by local administrators, but that their organisations and work processes should be regulated in specific pre-made box modules, providing for common standards, quality guarantees, transparency rules, etc.[38]

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38   Crisis Management Initiative Workshop 2004, p. 4.

117 There is scepticism regarding the conditions for implementation of key-ready structures as well. It may be doubted whether local communities can in fact govern themselves on the basis of completely new rules and procedures. Peace-builders and others also fear that without their eyes and hands, assistance may not reach the target population, particularly weak and vulnerable groups, or may be misused or evaporate into corruption. Further, the introduction of a completely new administration and management system in the immediate wake of a conflict represents a strong interference with national sovereignty. The development and introduction of key-ready structures concepts therefore has a political edge to it and requires legitimacy that only the UN seems able to provide.

3.7 Assessment of problems and remedies

3.7.1 *Rationale*

118 There is a consistent view in the peace-building and development community that any effort to address rule of law problems in public administration should be preceded by careful assessment that the problems discussed really do exist and that the contemplated remedies will in fact be effective. For example, the UN Secretary-General's report *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* stresses that no one remedy suits all, and makes a strong case for fact-finding and evidence-based approaches. However, there are few tested tools for assessing rule of law conditions in public administration. The tools developed for rule of law assessment normally cover the criminal justice system or, in the best case, those parts of the public administration that are directly associated with the criminal justice system. Furthermore, a distinction needs to be made between measuring in the technical sense and measuring in the political sense. The models of assessment discussed below focus on the technical dimension, while the measuring that takes place in the UN and the Council of Europe under the heading 'compliance' is not analyzed here.

3.7.2 *Models of assessment*

119 **European Union models of rule of law assessment:** The rule of law is a pre-requisite for membership of the EU and a *founding principle* for the Union itself. When assessing the rule of law in candidate states, the EU is primarily concerned with four aspects of the concept: supremacy of law, separation of powers, judicial independence, and fundamental rights, as well as one value that is unique in this context—corruption. In the area of administrative law, it is, paradoxically, efficiency which is held to guarantee independence (together with certain formal elements, such as the establishment of proper civil services and codes to guide their activities in general). In order for a candidate state to assure the European Com-

mission that the rule of law criterion is met, the most important factor is the demonstrated willingness to move in the right direction. Few candidates have had difficulties meeting the requirements of the Copenhagen political criteria with regard to the organisation and functioning of the executive, although many have lacked the necessary legislation concerning their civil service at the moment of application.[39]

120 **International network to promote the rule of law (INPROL):** INPROL is a recently established network that has not so far generated assessment tools of its own, but acts rather as a conduit for tools developed elsewhere. Among the tools INPROL offers its members, there is a category entitled 'Assessments, Evaluations, Indicators, Metrics'. This category comprises a range instruments more or less relevant to assessing rule of law conditions in the public administration, including:

1) *Performance Monitoring and Evaluation: Conducting a Participatory Evaluation*, U.S. Agency for International Development, USAID (1996)

2) *Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems*, OHCHR (2006)

3) *Rule-of-Law Tools for Post Conflict State: Mapping the Justice Sector*, OHCHR (2006)

4) *Rule of Law Toolkit: A Model 'State of the Judiciary' Report*, IFES (2003)

5) *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector*, Vera Institute of Justice (2003)

6) *Rule of Law Reform in Post-Conflict Countries*, WB (2006)

7) *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, David Marshall and Shelley Inglis (2003)

8) *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, United Nations Security Council (2004)

9) *Metrics Framework for Assessing Conflict Transformation and Stabilization*, USIP (2007)

10) *Diagnosing Judicial Performance: Toward a Tool to Help Guide Judicial Reform Programs*, WB (2002)

11) *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, OHCHR (2003)

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39 Wennerström 2007, pp. 216–223.

121 These models would each have to be analyzed before their methodology could be described, but even a superficial analysis reveals that the majority of them target the judiciary, i.e. the classical rule of law domain, without reaching out towards the rest of the administration.

122 **American Bar Association—Central European and Eurasian Law Initiative:** The Judicial Reform Index (JRI) is a tool developed by the ABA Central European and Eurasian Law Initiative (CEELI), known today as the Europe and Eurasia Program, to assess the state of reform and the degree of independence in core justice sector institutions. Among the fundamental parameters active in the JRI are the standards established through the *UN Basic Principles on the Independence of the Judiciary*, the *Council of Europe Recommendation on Independence of Judges*, the *European Charter on the Statute for Judges* and the *International Bar Association Minimum Standards for Judicial Independence*. These international standards allow the JRI to be used in any regional context (it has been used in Africa, Asia, the Middle East, in addition to Europe and Eurasia since 2001).

123 The JRI standards for judicial reform and judicial independence are divided into 30 indicators measuring progress in the following sub-sectors: quality, education and diversity of judges; judicial powers; financial resources; structural safeguards; transparency; and judicial efficiency.[40] These indicators are assessed using information from interviews and analysis of a particular country's laws regulating the judiciary. The results are standardized into a JRI country assessment report, where each factor is allocated a correlation value with a summary description, as well as a more detailed analysis of major shortcomings and trends in the specific system. Although the scope of the JRI is at present limited to the judiciary (with a strong emphasis on criminal procedure) it is a concept that may be adapted to measure progress and independence factors in the public administration as well.

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40 The factors are: 1) judicial qualification and preparation, 2) selection/appointment process, 3) continuing legal education, 4) minority and gender representation, 5) judicial review of legislation, 6) judicial oversight of administrative practice, 7) judicial jurisdiction over civil liberties, 8) system of appellate review, 9) contempt/subpoena/enforcement, 10) budgetary input, 11) adequacy of judicial salaries, 12) judicial buildings, 13) judicial security, 14) guaranteed tenure, 15) objective judicial advancement criteria, 16) judicial immunity for official actions, 17) removal and discipline of judges, 18) case assignment, 19) judicial associations, 20) judicial decisions and improper influence, 21) code of ethics, 22) judicial conduct complaint process, 23) public and media access to proceedings, 24) publication of judicial decisions, 25) maintenance of trial records, 26) court support staff, 27) judicial positions, 28) case filing and tracking systems, 29) computers and office equipment, and 30) distribution and indexing of current law.

124 **World Bank:** The World Bank probably has the most experience in assessing state performance. Unlike most other actors in the Justice and Public Administration Reform areas, the World Bank also has a generic definition of the rule of law, according to which the ambition is to supplant autocratic and state-centred systems with a rule of law system where the law: 1) operates in a way that is general and objective; 2) is administered based on knowledge of the law; 3) is accessible; 4) is reasonably efficient; 5) is transparent; 6) is predictable; 7) is enforceable; 8) protects private property rights; 9) protects individual and human rights; and 10) protects legitimate state interests.[41] This operational definition contains elements that can be found in both formal and substantive rule of law definitions.

125 The World Bank has developed several tools for measuring judicial capacity and rule of law propensity. *The Governance Research Indicator Country Snapshot* (GRICS) has been in use since 1996. The GRICS consists of six indicators of governance performance: 1) voice and accountability, 2) political stability, 3) government effectiveness, 4) regulatory quality, 5) rule of law, and 6) corruption. However, the rule of law qualities that are measured are limited to contract enforcement, police performance, court performance, and the likelihood of crime and violence.[42] The narrowness of this assessment may be a function of the subsuming of the rule of law under governance. When governance as a whole is measured, the World Bank relies on the Aggregate Governance Indicators which comprise essentially identical indicators.

126 **Transparency International:** Transparency International has developed the Corruption Perception Index, which measures the perception of corruption in individual countries. Like the World Bank indicators on governance, the Corruption Perception Index is a composite index based on surveys of business people and assessments by country specialists. Data from 14 separate sources at 12 different institutions on the frequency and size of bribes are used in calculating the Corruption Perception Index (see also 3.5.1).

127 **Freedom House:** The Freedom House Index (FHI) is a well-known index in political science that assigns degrees of freedom to countries through numerical ratings of political rights and civil liberties. The average of the ratings determines whether a state is 'Free', 'Partially Free', or 'Not Free'. The sources include news reports, academic analyses, reports from non-governmental organizations, think tanks, individual professional contacts, and *in situ* observations. Part of the measuring process is based on a checklist consisting of 10 political rights questions and 15 civil liberties questions.

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41   Dietrich 2000, pp. 4–5; Bergling 2006, p. 41 *et seq*.

42   Kaufmann *et al*. 2005, and: http://www.worldbank.org/wbi/governance/govdata/.

3.7.3   *Assessing weak and vulnerable groups*

128   There is a particular need for the gathering of baseline date from vulnerable and marginalized groups such as women and refugees so that problems and risks can be properly identified. An interesting example in this regard is the assessment conducted by the *Justice, Law and Order Program* in Uganda. In a wide-ranging assessment, vulnerable groups were consulted on issues such as lack of safety, security and access to justice. The assessment report highlighted insecure land rights, corruption, low levels of access to justice, and weak accountability mechanisms, as particularly serious problems for these groups.

3.8   Monitoring

129   Monitoring administrative structures is another way of promoting and ensuring respect for rule of law principles. Monitoring is typically aimed at mapping widespread patterns of trends in violation of international standards and identifying systemic issues that hinder compliance. The situation and needs of members of weak and vulnerable groups (children, women, minorities, immigrants, refugees, *et al.*) may be given special attention.

130   Monitoring is not just about supervision. Nor does the presence of monitoring have to be a manifestation of distrust or ideas about 'us' versus 'them'. Rather, such 'on-going assessment' of laws and daily practices can provide national and international decision-makers with the accurate and specific information they need to strategically target resources for reform. Particularly for a fledgling domestic administration wich struggles to comply with and integrate international standards into reform and action plans, monitoring is a tool both for highlighting where the specific compliance problems are and for indicating how to most effectively address them when resources are scarce. Monitoring may also be a means of creating pressure for accountability by exposing problem areas and reinforcing the proper role and response of the system.

131   There is no formal rule of law treaty or other formally binding instrument against which to monitor or measure rule of law compliance in public administration. Nor is there any UN organ exclusively concerned with rule of law monitoring However, there are several indirect sources of normative guidance, notably international human rights instruments. It should be noted that almost all countries, including the group of post-war countries, are members of various international and regional organisations (UN, CoE, AU, etc.) and have ratified the most important human rights treaties (the UN Charter, ICCPR, CEDAW, ECHR, ACHPR,

etc.).[43] Additional guidance may be found in the decisions of the courts and commissions created to interpret these instruments and provide judgements or opinions concerning their application.

132 In peace-building environments, there are often a number of parallel monitoring initiatives, targeting aspects of human rights, judicial performance, and other topical issues. This monitoring capacity may be located either within the UN mission (as a component of UNMIBH, UNMIK and UNMIL etc.), with another international or regional organization (for example the OSCE) or in a hybrid entity (as is the case in Timor-Leste).

133 There is continuous work in the UN and other organizations to refine the monitoring tools and approaches. The 2006 OHCHR Report *Rule-of-Law Tools for Post-conflict States: Monitoring Legal Systems* focuses specifically on the monitoring of human rights standards in the justice system in post-war environments, and its conclusions regarding principles and methodology also seem relevant to the monitoring of rule of law compliance in public administration. The Report emphasises that monitoring should be comprehensive. For the administrative sector, this would mean covering the whole array of issues involved in establishing and maintaining administrative institutions functioning in accordance with the rule of law, for example budgetary allocations, oversight and accountability mechanisms, appointment processes, human resources policies, and training. Another important lesson is that monitoring should examine whether parallel informal or traditional structures exist, how they function and interact with the formal system, and to what extent they comply with rule of law and human rights standards. Further, in line with the human rights approach to legal system monitoring, both domestic law and domestic practice need to be analyzed for compliance with international standards. Where it is determined that the domestic law meets international standards, the focus should be shifted to whether actual practice conforms to the domestic law.

134 Although comprehensive monitoring is to be preferred, it is rarely possible to monitor all aspects of administrative practice. A more realistic approach may be to try to identify representative practices, procedures, policies etc. in the system by monitoring groups of cases and identifying trends and patterns within them in order to draw overall conclusions concerning the functioning of the system and to formulate recommendations for reforms.

43　International and regional treaty, non-treaty and other standards provide the legitimate benchmarks by which to evaluate progress in safeguarding or incorporating rule of law in public administration. For the UN, the universally applicable standards adopted under its auspices must serve as the normative basis for activities in support of the rule of law. S/2004/161, para. 9.

BOX 17 Qualitative Governance Monitoring

The 2001 World Bank document *Monitoring Governance: Lessons from International Experience* provides a set of specific tools that, in various combinations, could be applied in any country or context. The WB expects the tools to be particularly useful in assessing the intangible 'qualitative' and 'process-focused' dimensions of governance, such as transparency, openness, accountability or justice. The WB argues that a deep knowledge of such dimensions and the expectations surrounding them is essential if a culture of accountability and transparency is to be promoted effectively. Based on the recognition that effective 'qualitative' monitoring requires the participation of governments or domestic constituencies whose interests are directly affected, the document also discusses the conditions for building local ownership of monitoring mechanisms and local capacity to effectively lead monitoring processes. It is a core idea of the WB approach that governance is improved by monitoring what people actually care about: 'If the issue is not of concern to a broad range of people, there is far less likelihood that the monitoring effort will be sustained over time or its findings fed back into the policymaking process.' For example, if the issue is regulatory reform, consumers and industry can offer valuable insights. If the issue is the functioning of the judiciary, court users as well as judges and court administrators bring vital perspectives. The WB stresses that the most successful efforts focus on the intersection between government agencies and outside groups affected by agency performance, and that monitoring efforts that reflect internal and external priorities will have a greater impact—both on governance and on public confidence in reform. On the issue of how monitoring organizations should identify these shared priorities, for example what makes a 'good' civil service or judiciary, the WB notes that diagnostic surveys and polling, as well as participation and consultation with key stakeholders, can be very helpful.[44]

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135 Mandate issues are crucial for monitoring. UN experiences from human rights and legal systems monitoring in Kosovo, East Timor, Liberia and other places demonstrate that there needs to be a monitoring mandate that addresses the objectives of the monitoring, the parameters of the monitoring in relation to other international and national functions, and not least the extent of access, *i.e.* the ability to collect accurate and extensive information from sources that are not open or unaccustomed to being monitored. For want of a Security Council mandate or peace agreement providing for monitoring in the specific country or situation, the international community may need to build domestic political opinion for voluntary arrangements ensuring the co-operation of all relevant stakeholders. Particularly with regard to lower-level administrative agencies, reaching agreement on and explaining the purpose of these principles and methods may require considerable investments in negotiation and advocacy.

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44 O'Donnell 2001, paras. 31–32 and 35–36.

136 Sequencing and timing are also critical factors. Monitoring programmes ought to be established, where circumstances allow, during the initial phases of the peace-building mission. If the system is barely functioning, the monitoring mission needs to be preceded by, or initially prioritize, an overall assessment or mapping of the system to identify key stakeholders and their capacity.

137 Resources pose another hurdle for serious and long-term monitoring efforts. Effective monitoring requires knowledge (of law, administration, politics, languages, information gathering and analysis), practical field experience (of judicial and administrative systems and reforms), resources to deploy and maintain a field organization, and the strength to make the results known and acted on.

3.9 Indicators

138 Assessment, monitoring and evaluation are much easier tasks, and generate more precise recommendations, if they are based on reliable indicators. The development of rule of law indicators for the public administration may therefore be an indirect way of promoting rule of law perspectives and principles. The field visits demonstrated that while indicators for monitoring various aspects of governance exist, they often focus on the 'quantitative' aspects of administration. This suggests that more attention should be paid to developing tools and indicators for measuring how 'good' (predictable, fair, objective, etc.) administrative decisions are. Such indicators should preferably be elaborated in a participatory manner (involving all relevant stakeholders, international and local) and cover all dimensions of public administration (structural, institutional and capacity) where the rights and duties of individuals are affected, for example policy design, service delivery outcomes, transparency, accountability, (gender) equity and human rights protection. At the same time each indicator must be specific enough to suggest an appropriate institutional solution.

BOX 18 Worldwide Governance Indicators Project

The World Bank Worldwide Governance Indicators Project provides individual governance indicators for 212 countries and territories. These indicators cover six dimensions of governance: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, control of corruption, and notably the rule of law.

139 The OECD has similarly concluded that analysis of public management reforms is hampered by the absence of comparative data of high quality. It is against this background that the decision of the OECD Public Governance and Territorial Development Directorate to develop key indicators for good government and efficient public services should be seen. The indicators are expected to help member countries and analysts to do structured benchmarking on the basis of common units of analysis.

3.10 Improving inter-agency/sector co-operation

140 It is beyond the scope of this report to suggest changes in international mandates and structures, but the existence of distinct justice sector and public administration mandates and paradigms within and among peace-building and development agencies is a factor that merits some reflection.

3.10.1 Mandates and paradigms

141 It has been a characteristic feature of UN policy to task the DPKO-led peacekeeping mission to promote transitional justice initiatives and Justice Sector Reform, and to expect the UNDP to promote a parallel but more comprehensive and long-term effort at Public Administration Reform.[45] Reforming the justice and administrative sectors have thus been conceived as separate 'projects' with different mandates, working methods, budgets and time-lines. It may be said that the DPKO has often had the stronger mandate, but lacked in funds and people, while the UNDP has had the resources but lacked the mandate.

142 The separation between the political/peacekeeping and development arms of the UN at country and mission level has political as well financial underpinnings. Development actors are constitutionally bound to negotiate their programming with the host government, and tend to prefer long time-frames. Peacekeepers and political negotiators, on the other hand, often seek to maintain a certain distance from a host government which may be seen as a party to, or even the cause of, the conflict that has necessitated the political presence. Peacekeepers also need to be prepared to act quickly and independently in response to fast-evolving situations.[46] As the UN is usually 'the highest authority in theatre' or otherwise formally or informally in charge of the entire peace-building presence, this division of labour tends to be reflected in the agenda and methodologies of other international agencies and local counterparts as well.

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45 On the link between UN development assistance and conflict management, see Griffin 2003.
46 Ibid, p. 209.

143 Among bilateral development agencies, there is a similar sector division of labour that creates, if not a watertight, then at least a passively obstructive barrier to interaction. Often these organizations have a rule of law section or division that focuses on issues within the justice sector, and another section that deals with public administration. Issues that are crosscutting tend to be 'owned' by either of the two. The reasons behind this structure are complex and derive in equal part from political, cognitive and financial factors. There is also the simple fact that people working in rule of law departments have a legal background, often as lawyers, judges and prosecutors, and people in the governance department have a background in the civil service.

144 Further, there is a conventional sequence of peace-building events that influences if, how and when rule of law problems in public administration are addressed. This sequence seems to be determined by international political imperatives and organisational priorities and habits. In the *emergency* phase, the most influential among these imperatives is to address quickly what are assumed to be 'urgent' justice and security needs, for example establishing law and order, halting arbitrary detention and sentencing, and providing tangible (quantitative) proof of success in these efforts. Only in the second and third *transition* and *stabilization* phases do stabilizing, reforming and institutionalizing the governance structure become priorities.[47] A lingering idea, also inherent in the sequence, is that the different elements of the Rule of Law Reform effort should be addressed one at the time, partly because constraints on resources and partly because of fear that parallel rule of law efforts would risk blurring the focus or undermining each other.

3.10.2 Lessons learnt and future needs

145 The strategic Brahimi Report and other analyses have created political pressure for a critical reassessment and innovative thinking regarding the organisation of UN peacekeeping and peace-building. The Brahimi Report, particularly, highlights the absence of 'integrated planning and support … in which those responsible for political analysis, military operations, civilian police, electoral assistance, human rights … are represented'. In order to overcome this problem, the report proposes the creation, where necessary, of a mission-specific Integrated Mission Task Force. The first situation where such a mechanism was tried was in Afghanistan.[48] Many thematic and country-specific coordination mechanisms have also been established at UN headquarters to facilitate cross-sector co-operation and help break the rigorous application of current sequences and methods, for example the Rule of Law Task Force and Rule of Law Unit. Recent experiences from

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47   Rondinelli 2006, p. 2.
48   Griffin 2003, p. 210.

Kosovo, East Timor and Afghanistan have further underlined the need to work closely together across departmental and agency boundaries. For example, Kosovo and East Timor made it clear that the limited international resource base in some key areas such as civil administration, taxation and justice administration necessitated joint efforts in recruitment and the subsequent sharing of expert staff.

146 Yet, discussions with mission and UNDP staff indicate that contacts and coordination in the field remain sporadic and *ad hoc*. Whether there is commitment to and success in bringing the agencies together around a shared vision and a common approach often seems to depend on the personnel at the helm. Of particular importance is the relationship between the Resident Coordinator (Head of the UNDP mission) and the SRSG (Head of the DPKO peacekeeping presence). It should be noted that in line with the recommendations of the Brahimi Report, the Resident Coordinator is occasionally appointed the Deputy SRSG as a way of bringing the peacekeeping and development presences closer together.[49] Within DPKO and UNDP, there is recognition that much more needs to be done to create truly integrated missions and approaches. The DPKO envisages that at the headquarters, integrated teams will need to be put in place as single backstop offices for field missions. These teams will incorporate, *inter alia*, political, military, police, justice, and public administration expertise, and be backed up by functional units covering substantive as well as support tasks, including Disarmament, Demobilization and Reintegration (DDR), rule of law, etc.

147 Within the field missions, there is also an awareness of the problems of the current structure and a desire for reform. The UNMIK Civil Administration Component wanted the UN to continue to promote clearer mandates and to designate a specific agency as 'lead' agency in Public Administration Reform. Similar views were echoed by other UN actors. Some were concerned that in certain instances, development agencies and branches may be moving in the opposite direction, as has been the case when responsibility for public administration has been devolved to local authorities, while 'rule of law issues' has been retained as a core mission objective. Other organizations have experimented more, and gone further, in bringing the Justice Sector and Public Administration Reform together under a shared rule of law paradigm.

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49 In Haiti and Tajikistan, this approach to promoting integration is widely regarded as having been successful. Griffin 2003, p. 209.

BOX 19 Examples of integrated approaches

The World Bank's (International Development Association) current strategy for supporting public administration, decentralization and rule of law reform is embedded in a general governance and anti-corruption strategy.[50] IDA has a multi-sector approach to Public Administration Reform, reaching beyond traditional government reforms such as public financial management and civil service reform to encompass notably Justice Sector/Rule of Law Reforms. This thinking is gradually being transformed into reality within projects. In Guatemala, the World Bank supports a Judicial Reform Project aimed at bringing justice closer to the people in peri-urban neighbourhoods and indigenous communities through the introduction of mobile courts providing free mediation services and a forum for resolving small claims and civil, family and labour disputes. In Nigeria, there is a program to support the media to increase transparency and promote accountability in governance. The program highlights media institutions, journalistic capacity, access to information, etc.

The recently developed USAID guide to administrative law reform addresses the issue of how administrative law on a more general level could be incorporated into other core projects such as rule of law and support for democratic governance. The guide emanates from the agency's experience of providing support to developing or transition societies. A narrative is presented of various mechanisms that can be employed in order to realise three inherent goals of administrative law: the limitation of discretion, the rights of the governed (due process), and information. Concerning the incorporation of administrative law into programming, the guide argues that greater integration of administrative law and procedure law can strengthen five different types of programs: 1) rule of law; 2) judicial reform; 3) strengthening of civil society; 4) anti-corruption; and 5) regulatory reform for small and medium size enterprises. For the rule of law in particular, the guide notes that inserting an administrative law dimension could make these programs more relevant for the public and a broader reform constituency. In relation to judicial reform the added value could be greater access to justice for more citizens and businesses and better resource allocation in judicial caseload management.

148 The examples provided suggest that further integration and holistic approaches are both necessary and possible. In particular, there needs to be a strategy for integrating rule of law dimensions early and progressively in the projects of Governance and Public Administration Reform.[51] A first, modest step could be to review overall and agency-specific organisational structures in order to better

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50 Outlined in *Strengthening Bank Group Engagement on Governance and Anticorruption*, endorsed by the Bank's governors at the 2007 Spring Meetings.

51 The imperative to start early with restoring administrative capacity of the state was already expressed in a report from United Nations Public Administration Network (UNPAN) in 1995, *Restoring and Restructuring Governmental Machinery in Post-Conflict Peace-building*, p. 13.

match problems on the ground. While a far-reaching overhaul is a long-term and enormously politically complex endeavour, small changes in the everyday operation of peace-building and development agencies in the field may be implemented with little difficulty, *i.e.* joint regular staff meetings between rule of law and public administration departments and units; joint needs assessments and fact-finding missions prior to and during missions; and 'borrowing' and sharing concepts and resources.

3.11 Support for training

149 A number of studies from post-crisis, developing and transition countries show that among the most important reasons why people hesitate to bring their grievances to courts and tribunals, or to engage the state and its agents generally, is that they are not certain that these agencies and the people within them will be able to understand and decide fairly on the matters at hand.[52] Part and parcel of any sustainable administrative reform policy is therefore to ensure that administrators have the necessary knowledge and technical skills to do their job properly. Knowledge in this sense means much more than knowing the norms. The adaptation to a new professional role in a more democratic and transparent society requires absorbing a range of new perspectives, values and techniques. Training is thus also a key component in sensitizing and institution-building processes.

150 The UN and other peace-building actors already devote considerable resources to facilitating and implementing general and specialized training for police, judges, defence lawyers, prison officers, legislators, journalists, border guards and custom officials on topics relevant to the rule of law.[53] Such training could be broadened to encompass various categories of civil servants, and to focus on the rule of law dimensions and implications of their work.

151 Training curricula could be coordinated throughout the justice and administrative sectors, as the sectors frequently interact and problems and remedies tend to be identical or similar. Joint training would also help the judiciary and civil service see more clearly the various roles that all have to play, and foster a sound sense of teamwork. Where new laws and standards have been introduced, for example concerning appeal against administrative decisions, the training for administrators and judges should be synchronized.

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52 Brunetti, Kisunko and Weder 1997a, p. 19.

53 OHCHR *Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector*, p. 35.

152   Best practice suggests that rule of law training for practitioners should be practical and use pedagogical tools that involve active learning, participation, problem-solving and exercises based on real in-country problems. Training should also be combined with active mentoring or on the job training in the field when conditions allow.[54] To ensure relevance and sustainability, training efforts should draw on local capacity to the greatest possible extent. If such capacity is lacking or underdeveloped, the first step may be the training of local trainers concerning rule of law dimensions and approaches of Public Administration Reform.

153   One category of professionals that may require special attention and targeted training is independent lawyers or 'the bar'. There is a relationship between the quality of their services and the effective protection of human rights. Lawyers also need to be trained to protect commercial and business interests *vis-à-vis* the state.

> **BOX 20 Best practices in civil service training**
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> Several best practices are presented in the UNDP report *Civil Service Training in the Context of Public Administration Reform: Lessons on Best Practice in the Approach to Effective Civil Service Training*. First, there must be a political commitment to the enhanced training and independence of the civil service. Second, there must be a clear strategic vision or pragmatic evolution in the training. Third, the most efficient training structures are described as those which have a national body responsible for defining training needs, guiding curricula development, contracting out training delivery, monitoring quality, and evaluating impact. Problems have been apparent where the national body has been hampered in this capacity, for example by *ad hoc* political interference.

154   As the limitations of *ad hoc* topical training become increasingly apparent, many assistance providers shift focus to helping countries establish and operate their own 'permanent' training structures, such as schools or academies of administration.[55] Besides providing training, these centres may also host conferences and seminars on topical issues, often in co-operation with various international institutions and with the framework of international projects.

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54   Ibid.

55   WB *Legal and Judicial Reform: Strategic Directions*, p. 28.

BOX 21 Kosovo Law Centre

The Kosovo Law Centre (KLC) is an example of a domestic institution with responsibility for training and education. KLC has a specific programme focusing on 'Continuing Legal Education for Civil Servants'. This programme provides legal education training to municipal civil servants and offers a forum for discussion and dialogue around issues of administrative law in Kosovo. The aim is to improve both theoretical knowledge and practical skills. There are modules in the programme on the organization of public administration and its functions, administrative acts and administrative procedures, the law applicable to the civil service in Kosovo, and UNMIK regulations on self-government of municipalities in Kosovo.

155 Training initiatives need to be carefully planned. In particular, promoters of training need to establish baseline indicators of public administrative performance before initiating actual training. In crisis and post-conflict societies, such baselines are often difficult to establish because of lack of relevant information, differences in local standards, and language barriers. In addition effective and sustainable training initiatives need to comprise a range of structural and institutional components. In the structural sphere, assistance providers need to be prepared to support initiatives to assess and adjust the rules that govern professional training and regulate the division of tasks and responsibilities among various training institutions; to promote staff management reforms (reviewing and reforming rules and principles for hiring, firing, promoting, discipline, etc.); and to improve information management. In the institutional sphere, assistance providers need to be prepared to support the elaboration of sector/agency-specific training plans and curricula; the development and introduction of new training methods; the creation of teaching materials; and the improvement of foreign language (essentially English) skills to facilitate cross-border communication and comparative research. Many formerly post-crisis countries would also benefit from training activities designed to facilitate membership of international bodies and participation in the international political and legal dialogue. Such activities may focus on how to incorporate international norms when administrative structures are reformed, how to carry out supervisory functions, etc.

156 Although considerable resources are available for training various categories of officials in peace-building environments, it is virtually impossible to retrain the entire public administration. It may, therefore, be necessary to single out certain professions or categories of administrators. Selective strategies are fraught with a special set of problems, for example that the overall performance of the sector depends on effective and equal interaction between the different categories of administrators.

3.12 Promoting access to justice

157 Several problems exist in post-crises environments in accessing administrative justice, in the sustaining of impunity, perpetuating of discriminatory practices, and violation of the rights of individuals generally. The first priority in any strategy to address such problems is to gain sufficient insight and information about how the public administration is structured, how it operates, and how these factors condition access.

BOX 22 OSCE review of the administrative justice system in Kosovo

Having monitored access issues in the criminal and civil justice systems for several years, the OSCE started to monitor the administrative justice system in Kosovo in 2006. The reason for expanding the monitoring to include administrative justice is that this system covers the legality of government action and that it has a substantial impact on the lives of ordinary Kosovo inhabitants: 'without an effective administrative law system, Kosovo inhabitants can suffer from arbitrary and illegal government action without legal redress'. The first monitoring report includes a description of the administrative law applicable in Kosovo. Special attention is given to the general administrative framework (including the Law on Administrative Procedure, which regulates administrative proce-dure, and the Law on Administrative Disputes, which establishes judicial review). Several weaknesses in the administrative legal framework are highlighted in the report, including issues such as a conflict between the old and new laws, confusion with regard to legal redress, and problems of access. The OSCE has also analyzed the administrative procedure in several cases, and found that the authorities often fail to justify decisions in an appropriate manner, act *ultra vires*, or violate procedural rules.

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158 Once the basic facts about the system have been established, peace-builders may move on to reform processes and institutions to promote transparency and accountability in contacts between citizens and administrative agencies. There are various strategies and methods available to this end, including establishing admin-istrative appeal or judicial review, creating consultative or advisory councils, and improving access to information by passing freedom of information acts.

159 However, strengthening formal and semi-formal mechanisms is a futile endeav-our unless the average citizen knows about them. It seems that the rule of law standards promoted in relation to the justice sector are better known than the corresponding standards for 'administrative rights'. Civic education and sensitizing initiatives regarding administrative rights are, therefore, motivated.

160 A key element of effective access promotion is the identification and activating of civil society actors working with rights advocacy. Experience of such strategies in Justice Sector Reform is encouraging and should be considered. Another lesson

from Justice Sector Reform is that 'mobile agencies' can make a difference where physical access is limited due to long distances and difficult geography. For example, matters of civil registration, land and property, and licensing, could be handled by travelling agencies visiting remote areas. Mobile teams could also act in regard to internal reviews and appeals of decisions taken by administrative agencies.

3.13 Strengthening legal aid mechanisms

3.13.1 State and civil society

161 As discussed in Chapter 2.1.2 and 2.1.3, administrative appeals mechanisms are often missing, insufficiently developed or little understood in post-crisis states. There may also be jurisdictional barriers preventing appeals against administrative decision or other serious problems in accessing a judicial remedy. Members of weak and vulnerable groups are often particularly challenged in accessing justice. The development of legal aid and assistance structures could be a means to overcome or mitigate some of these problems. The experience of developing legal aid and assistance mechanisms in criminal, civil and public interest litigation is an important source of inspiration and best practice in such efforts.

162 While ideally, legal aid should be provided by statutory bodies with adequate and reliable funding from the state budget, certain features of post-crisis governance often make this option impossible. Various actors above, beside and below states, for example NGOs, other civil society organizations, as well as 'communities', therefore play an important role in advising and representing those in need of assistance. Such actors can also empower individuals and their organisations to participate constructively in debate and decision-making.

3.13.2 Paralegal initiatives

163 Paralegals have a long history of helping individuals in dealing with the justice sector (as claimants, victims and suspects), but could also be of help in administrative matters such as civil registration, property (land) issues, employment, etc.

164 There are three broad roles for paralegals in relation to public administration. The first is as repositories of information. Considering the abysmal state of many post-crisis public administrations, the capacity deficit, and the lack of awareness among insiders and users of rules and functions, paralegals could contribute knowledge and guidance to citizens seeking advice on a particular course of action. Their second role is to assist in appeals and reviews of administrative decisions. Depending on whether the law provides for the use of legal counsel in administrative disputes, paralegals could either support directly in proceedings

and hearings, or help to prepare materials and arguments for hearings and reviews. Their third role is to act as a contact point between the state and the individual by facilitating and promoting communication, information and awareness, for example, by supporting community campaigns and civic education.

BOX 23 Paralegal initiatives in legal aid

The *Timap for Justice in Sierra Leone* started as a joint initiative between the Sierra Leonean National Forum for Human Rights and the Open Society Justice Initiative, to deliver justice on the local (chiefdom) level through the use of community paralegals. An initial needs assessment in several chiefdoms revealed that justice problems existed on two levels; between citizens (for example cases of domestic abuse) and between citizens and the authorities (for example corruption in government services and favouritism among customary officials). In individual cases, the paralegals provide information about rights and procedures, mediate conflicts, and assist in dealings with the authorities. In community cases, the paralegals engage in education and dialogue, and support community members in undertaking collective action. In order to ensure accountability on the part of the paralegals, Community Oversight Boards have been set up at local levels. An interesting feature of the program is that it straddles both the formal and informal or customary systems in Sierra Leone.[56]

The *Administrative Justice Initiative* in BiH is implemented by the local NGO Vaša Prava (VP). This initiative provides an interesting perspective on how legal aid and paralegal activities can be employed in relation to the public administration and administrative justice. VP officers assist or represent indigent citizens in procedures and disputes. VP has also developed a strategic plan to assess the most common administrative problems faced by their clients, and a country-wide media and public education plan. VP lawyers has made a total of 16 radio and television appearances. Written and electronic public education materials, and a radio and television 'jingle' on administrative rights, have also been produced.[57]

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165 Paralegal initiatives may provide temporary relief by helping individuals access systems that are essentially closed or dysfunctional. However, paralegals are not very effective in addressing the underlying structural and institutional problems that prevent access in the first place. Further, paralegals often represent or promote one specific interest at a time (women's rights, migrant workers, etc.), rather than the rights of individuals in general. They may also prioritize 'high profile' issues over more mundane grievances against the administration.

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56 Maru 2006.

57 *IRIS Center Administrative Law and Procedural System (ALPS) Reform Project in Bosnia and Herzegovina: 3rd Annual Report*, 2006.

3.14 Developing traditional and customary concepts

166 The main rationale for including informal or customary systems of governance in rule of law strategies is their predominance and apparent relevance in many post-conflict societies, their perceived legitimacy among large sections of the population, and that sometimes there are no formal alternatives. However, the engagement of informal and customary structures is a strategy hedged by a number of serious concerns.

3.14.1 Mapping and understanding customary governance

167 First, there is a problem of knowledge. For example, while it is widely acknowledged that much of the *de facto* authority in Liberia is exercised in the customary system, it is not clear to domestic and international policy-makers how this system is actually organized or how it functions. There is thus need for in-depth studies of rules, actors and processes. Such studies should be combined with risk assessments. There is also a need for more long-term monitoring and evaluation of tendencies and trends. The tools developed by donor agencies for mapping and assessing the formal sector (see chapters 3.7 and 3.8) might need modification before they can be employed for this purpose.

BOX 24 Understanding customary systems

A project conducted by the United States Institute for Peace and the Fletcher School of Law and Diplomacy, in collaboration with the Centre for Humanitarian Dialogue in Geneva, seeks to provide guidance to international and national policymakers on the potential role of customary justice systems in post-conflict environments. The project examines issues such as the potential allocation of jurisdiction between formal and customary systems of justice, approaches to reforming customary practices that contravene international human rights standards, possible limits and problems in the use of customary justice mechanisms, ramifications for the distribution of political and economic power, and the facilitation of dialogue and information-sharing between formal and informal systems. The project also aims to develop policy options for expanding the rule of law in ways that account for the role of informal legal systems and local understandings of justice.

3.14.2 Human rights concerns

168 The second concern pertains to the respect for human rights. Frequent reports point to widespread and serious human rights violations in customary systems. It should be remembered that many customary systems are essentially tribal in nature, and thus reflect the power relationships and values of such communities. Colonial interference has sometimes exacerbated the problems. The Revised Rules

and Regulations Governing the Hinterland of Liberia still employs the terms 'natives' and 'civilized peoples' to distinguish indigenous Africans from Americo-Liberians. The Hinterland Regulations also allow for trial by ordeal (if the trial does not endanger the life of an individual), despite a ruling in the Liberian Supreme Court in 1940 that this practice is unconstitutional.[58] Weak and vulnerable groups tend to be particularly exposed. Gender discrimination is a well-documented feature of many customary systems. It should be noted that in Sierra Leone, the Truth and Reconciliation Commission has argued against a move to revive and continue to use the customary system for the above reasons.

3.14.3 Support strategies

169 Depending on the prevalence of the customary system, wich functions it performs, and how well those functions are performed, there are various strategies for states and peace-builders to pursue, including 1) incorporating the customary system into the formal public administration; 2) codifying or standardizing customary governance functions; 3) building capacity within the customary system to perform certain functions; and; 4) establishing oversight and accountability mechanism to safeguard human rights.[59]

170 Providing for some kind of regulation of the mandate and organization of the informal system is probably the most effective way to safeguard human rights and rule of law principles. The mandate and relationship to the formal system should ideally be regulated in constitutional provisions.[60] Other matters that have a significant impact on the rights and duties of individuals, such as the competence of the informal system in levying taxes and fees, or to decide in issues concerning land and property rights, and the rights of individuals in such processes, may be regulated in law or other statutory documents.

171 Transparency and rule of law in the customary system may also be promoted by introducing rules and procedures for basic record keeping. Systematized and reliable record keeping is particularly important when the system deals with civil registration and property rights on a large scale. Record keeping is also important

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58   Revised Rules and Regulations Governing the Hinterland of Liberia, Art. 73. 'Tenteah *et al.* v. Republic of Liberia', 1940. Reported in International Crisis Group *Liberia: Resurrecting the Justice System* Africa Report No. 197 (6 April 2006), p. 9.

59   See *e.g.* DfID *Non-state Justice and Security Systems Briefing* (May 2004) and Penal Reform International *Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems.*

60   One interesting example is quota rates for women in state-sponsored customary forums in Tanzania and Uganda. See Nyamu-Musembi 2003.

in facilitating appeals to formal state agencies, and serves as an entry point for quality monitoring.

3.15 Engaging civil society

172 Not just states, but also a wide range of actors and bodies above, below, beside and within states influence the way administrative systems are organised and perform their functions.[61] This group comprises, *inter alia*, international and supranational organisations, non-governmental organizations, and transnational corporations. The vitalizing effect of having such actors exchanging ideas and promoting change cannot be overstated. [62]

173 In countries where there is a free civil society, assistance providers may choose among a range of strategies for empowering NGOs and other civil society institutions as centres for alternative leadership and catalysts for legal and political change. There is a long history of helping such bodies to provide training for members of the judiciary and administration, facilitate and promote debate, and protect the interests of certain weak and vulnerable groups. Civil society can also educate the population concerning what constitutes the rule of law in public administration.[63]

BOX 25 Consultation and sensitization campaigns

In Sierra Leone, UN agencies, in co-operation with the Government, launched a nation-wide consultation campaign in 2004. Its ambition was to formulate national legislation for the implementation of the CEDAW and to empower civil society actors to monitor the implementation of this legislation. In Somalia, the United Nations Operation in Somalia (UNOSOM) II promoted similar consultations on issues such as detention and correction. UNOSOM II had to handpick a group of intellectuals, community representatives, religious and traditional leaders, and artists in order to create a consultative forum.[64]

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174 Although civil society approaches are often effective in 'planting' reforms in society and in creating incentives for national ownership and participation, some caution should be exercised. Some civil society organizations are not established because there is need for their services or because they possess some essential skill, but

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61 Slaughter 2002.

62 Sikkink 2002, pp. 38–40 and Slaughter 2002, p. 16.

63 Hansen and Wiharta 2007, p. 41.

64 Pouligny 2003, p. 362.

rather for opportunistic reasons. Yet others give their principal loyalty to a specific political or religious community, and care little for members of other groups. Furthermore, civil society actors may not have the strength to address structural or institutional problems in the system, or to continue their work once the foreign funding has ceased.

3.16 Transparency enhancement

175 Transparency essentially means free flow of information: processes, institutions and information should be directly accessible to those concerned, and sufficient information should be provided to allow for effective understanding and monitoring of these processes and institutions. While transparency has an intrinsic democratic value, it is also instrumental in promoting the rule of law in at least three important ways. First, lack of transparency prevents individuals from enforcing their rights. Second, lack of transparency prevents accountability. Third, lack of transparency can lead to, or reinforce, serious problems concerning organised crime, corruption and discrimination.

176 The importance of transparency has been accentuated in the last few decades, and international and regional organizations are working to elaborate conventions and other normative instruments to guarantee the right of access to public documents. Among the most important initiatives to this end so far is the Council of Europe *Draft European Convention on Access to Official Documents* (presented in July 2007 by the Steering Committee for Human Rights). The draft treaty states that the right of access to official documents provides a source of information for the public; helps the public to form an opinion on the state of society and on public authorities; and fosters the integrity, efficiency, effectiveness and accountability of public authorities, so helping affirm their legitimacy. The treaty —when adopted—will guarantee the right of everyone, without discrimination on any grounds, to have access, on request, to official documents held by public authorities.

177 The members of Council of Europe must take the necessary measures in their domestic law to give effect to the provisions for access to official documents set out in this convention. Among the 19 articles it could be mentioned that inspection of official documents on the premises of a public authority will be free of charge and that an applicant whose request for an official document has been denied, whether in part or in full, must have access to a review procedure. A special consideration when introducing new principles governing access to documents is whether this right should also encompass documents in the possession of private bodies exercising public functions or operating on public funds.

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Conclusions and Recommendations

178   CONFLICTS HAVE DAMAGING EFFECTS on the public administration. In Kosovo, Liberia and East Timor, they include destruction of physical infrastructure and records, depletion of human resources, and fragmentation and politicisation of the remnants of the administration along ethical and political lines. A dysfunctional administration, in turn, has serious effects for the individual: for example arbitrary or discriminatory provision of civil registrations and licenses prevent people from gaining their rights and in general from living a dignified and productive life. The situation for members of weak and vulnerable groups such as refugees, women and children is often particularly problematic. This study also shows that after peace-builders and local reformers have joined in reforming and reviving the administration, rule of law problems remain enduring features of the system.

179   The rationale for intensified international efforts to incorporate and promote rule of law dimensions in public administration are thus straightforward: 1) the public administration is the main interface between the state and its citizens; 2) there is a strong relationship between the quality of the public administration and the protection of individual rights; 3) improved protection of the rule of law is reflected in increased legitimacy for the state and makes it a more effective promoter of peace and reconstruction; 4) rule of law in the public administration enhances the effectiveness of international aid and assistance.

4.1 Ways ahead

4.1.1 Cross-cutting recommendations

180 There are some cross-cutting perspectives that should guide and limit any rule of law strategy, among them *realism* (strategies should be within international mandates, resources and other capacities); *context sensitivity* (Public Administration Reform and Rule of Law Reform are closely linked to, and dependent on, a wider historical and political context); *knowledge-based, carefully planned and strategic* (interventions should be grounded in thorough assessment to establish that the problems discussed really do exist and the proposed remedies will help to solve them); *individual-centred and rights-based* (reforms should target the problems and needs of individuals first); *international and universal* (norms for how the rule of law should be understood and applied should be derived from international law and universally accepted principles of human rights); and *legitimate and locally owned* (reforms should be based on the broadest possible international and local constituency).

4.1.2 Defining and codifying the rule of law in public administration

181 The widespread confusion about what constitutes the rule of law in public administration, and the urgent need to ensure that the administration works in the interest of the individual, and not vice versa, make it an important international task to develop and elucidate concepts or principles of rule of law in public administration. Since public administration comprises a range of widely varying agencies and functions, it is not possible to promote one single definition or model. However, an international concept enshrining commonly accepted rule of law concepts could be a 'yardstick' against which to measure the quality of procedures and services, and thus help individuals demand high quality services and hold the administration accountable.

182 One authoritative statement on the rule of law that is not limited to the judicial sphere emanates from the office of the United Nations Secretary-General.[65]

> The rule of law is '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'.[66]

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65   S/2004/616, p. 6.

66   Ibid, p. 4.

183 The *Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to Member States on Good Administration* similarly provides a code of good administration. Among the 'principles' therein are that public authorities shall act in accordance with the principles of legality, equality, impartiality, proportionality, legal certainty and transparency. Public authorities shall also act and perform their duties within a reasonable time. Furthermore public authorities shall provide private persons with the opportunity to participate in the preparation and implementation of administrative decisions which affect their rights or interests, and respect the right to privacy, particularly when processing personal data. On the issue of appeal, it is stated that private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests.

184 The codification of certain fundamental principles of administrative law in a specific UN instrument, for example a recommendation of the General Assembly or a supplementary human rights covenant, should be considered. In line with the 1995 UN report *The Legal and Regulatory Framework for Public Administration*, such an instrument may outline, *inter alia*: The right to a fair hearing before any decision is taken affecting the rights of the person; the right to participate in administrative procedure on the basis of widely defined *locus standi*; the rights to judicial review of administrative decisions; the right to access official documents subject to conditions and exceptions provided by the law; the obligation for the administration to provide relevant information to citizens; and the liability of public administration in case of harm caused by its activities.[67]

185 On the issue of the feasibility of codification, it should be noted that a strongly normative document may be difficult to promote within the UN system at present. It would be more feasible to first build a broad-based consensus and political opinion among UN agencies and member states around something that is explanatory and functions as a guide that could eventually lead to norms and principles.

4.1.3 Transformation to national law

186 Peace-builders and other international actors should promote the transformation of international principles into national frameworks of substantive and procedural rules that ensure the presence of rule of law guarantees throughout the public administration. Such frameworks may consist of constitutional provisions regard-

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67 ST/SG/AC.6/1995/L.4, p. 13.

ing the authorities and organisation of the administration, administrative law and administrative procedure law. If they work as intended, such frameworks will offer legal protection of individual rights, enhance the legitimacy of the administration and state, and help to build confidence in the value of the rule of law generally. This approach does not necessarily mean creating new laws or radically changing the substance of the law, but can also mean the consolidation of scattered laws into comprehensive codes that can be more easily understood and applied.

187 Despite variations in matters and capacities, there is often a case for one general law (an 'administrative law' or similar) regulating all processes within public administration. This law should be drafted with sufficient flexibility to allow for differences in topics and capacities, yet rigidly enough to safeguard the right to easy access, communication and appeal, as well as to effectively curtail room for discretion and corruption in decision-making. Experience suggests that the average standard of the processing is higher throughout the administration if common rules and standards are applied, than if separate branches and agencies apply their own specific rules and procedures. Monitoring, supervision and accountability mechanisms also work much better if all agencies need to follow the same rules and are evaluated according to the same standards.

4.1.4 Institutional reforms: judicial remedies and supervision

188 Legal and normative reforms need to be followed by institutional reforms, *i.e.* the establishment, reform and empowerment of administrative courts and other supervisory bodies, to ensure that the language of the law is transformed into reality, and that citizens have access to a judicial remedy. Institution-building is a complex and resource-demanding task, and must essentially be a domestic responsibility. However, a wealth of experience of institution building has been accumulated in the areas of development co-operation and transition support, on which peace-builders should be able to draw.

189 The most important institutional feature of a 'good' system is that it provides for appeal. Whether the appeal should first be directed to an administrative authority at a higher level or to a court is an open question, but as stated in article 10 of the Universal Declaration of Human Rights, everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations. This implies that a person must always have the right to have his case heard in a court, even when it concerns administrative matters. This procedure, in turn, should be guided by common and universally accepted rule of law principles to ensure easy access and a fair trial.

190 In addition to appeal, there is a need for structures for supervision and monitoring, for example an ombudsman performing general and *in casu* supervision of the legality and effectiveness and efficiency of executive or judicial authorities on behalf of the citizens. If the ombudsman is to be effective as an extraordinary institution, outside the regular political, administrative and judicial authorities, he must not be bogged down by too many cases, and must also have the right to determine which cases are important to investigate for principle or symbolical reasons. It is also important for the authority of the institution that the ombudsman is formally and *de facto* independent of all other branches of the state, and that his statements are respected and acted on.

191 Once a final decision has been reached, there must be a mechanism to ensure that the decision is respected and duly implemented, both by the administration and private parties. There is a range of means to ensure that private parties comply, including administrative fines and calling for the assistance of the police or a certain enforcement service. There is also the possibility of bringing matters of non-compliance before criminal courts and using sanctions such as fines and eventually sentencing for those who refuse to comply. Most appealing from a rule of law perspective and realistic in post-crisis environments, seems to be strategies based on fines and assisted enforcement. With regard to ensuring the compliance of public authorities, it is possible to give ombudsmen and other supervisory bodies the right to press criminal charges against insubordinate or obstructive officials. Another option is to allow private parties to request an order of performance with a court of general jurisdiction, and then turn to the enforcement service for coercive enforcement.

4.1.5 Anti-corruption

192 A number of studies show a clear negative correlation between the level of corruption and economic growth in countries worldwide. Corruption also undercuts the ability of the state generally to implement laws and policies, as it creates incentives to keep norms and practices complex, opaque and arbitrary. Further, state and non-state actors have noted that human rights abuses and other infringements of the rights of the individual tend to be particularly serious and frequent in corrupt societies, and that members of weak and vulnerable groups are often the most seriously affected.

193 While anti-corruption strategies comprise a range of tools, some are more relevant and 'to the point' in promoting rule of law in public administration than others. Apart from providing for a sound legal and regulatory environment, among the most promising is the promotion of checklists and indexes for 'diagnosing' the public administration and building pressure for accountability.

194 Another option is the promotion of anti-corruption networks among state and non-state actors. Such networks could help to identify deficiencies in national anti-corruption policies and prompt legislative, institutional and practical reforms through processes of mutual evaluation and peer pressure. They may also provide a platform for the sharing of best practice in the prevention and detection of corruption.

195 Yet another anti-corruption strategy is to help the media and civil society monitor and report on corruption. The principal reason for this is that public attitudes on matters of law and governance are not determined solely by hard facts and first-hand experiences, but also by the preferences, tendencies, and biases of those who report on the matter or otherwise disseminate information. The media may even take the role of *de facto* enforcer of laws and policies that have no other effective enforcement mechanism, for example by allowing the 'court of public opinion' to penalize misuse of power.

4.1.6 Aids for law-makers and institution-builders

196 One of the most important observations in the study is that many international and national policy-makers and implementers are not aware of the rule of law dimensions of Public Administration Reform, and would need some kind of 'yardstick' for what constitutes rule of law in public administration and how to effectively implement it.

197 While much international interest has surrounded the creation of 'transitional legislation' or 'codes' that would help peace-builders to circumvent the lengthy process of designating and amending the applicable law, a number of legal and practical objections have been raised by people inside and outside the UN system against this idea. Changes in strategic outlook within the UN system, particularly arguments that in the future there will be less scope for Kosovo and East Timor-style executive missions with legislative and judicial authority, have also led policy-makers to question the objective need for transitional legislation.

198 The current focus is instead on the creation of various rule of law 'tools' such as handbooks, best practice reports and checklists to assist national and international actors in assessing and reforming arbitrary, discriminatory or otherwise inappropriate legislation in post-crisis environments. Such instruments may also highlight resource and capacity issues needing to be considered when new legislation is created and implemented.

199 There is little doubt about the need in many situations for checklists and similar tools to guide the regulation of new matters. However, before investing in the development of such instruments, a number of trends and recent experiences

should be considered. First, there is a risk that the development of such instruments will be driven more by international 'supply' than local 'demand', *i.e.* that governments and international organisations invest in something they expect to be of use in the future and that they have the capacity to provide, without really knowing what the future will be like or what local decision-makers actually ask for. Second, there may be variations in problems and remedies that render a checklist or handbook too blunt a tool or inoperative.

200 Best practice studies may similarly have inspirational and pedagogical value, but the identification of certain examples as successful and others as unsuccessful without considering differences in original conditions, capacities and other contextual factors is simplifying and may be perceived as patronizing. As in the case of the transfer of laws and institutions, it may also be asked to what extent a best practice example is transferable.

201 There is little doubt about the theoretical and practical utility of handbooks. Yet, the normative status of handbooks is often unclear: they are used for normative guidance but are not developed with the care and procedure that surrounds legislation. Further, where there is little tradition of consulting the actual law, people may also have little inclination to consult other written sources as well. Another issue is that handbooks are usually 'internal' to one specific agency or country.

4.1.7 Assessment and monitoring tools

202 Tools for assessing and monitoring the qualitative dimensions of administrative organization and decision-making should be developed. There is similarly a need for rule of law indicators for public administration. While indicators for monitoring various aspects of governance do exist, they often focus on the 'quantitative' aspects of administration. More attention should be paid to developing indicators for measuring how 'good' (predictable, fair, objective, etc.) administrative decisions are.

4.1.8 Improving inter-agency/sector co-operation

203 It is beyond the scope of this report to suggest changes in international mandates and structures, but the existence of distinct justice sector and public administration mandates and paradigms within peace-building and development agencies is a factor that merits some reflection.

204 In order to overcome such problems, the UN seeks to promote so-called integrated missions. Many thematic and country-specific coordination mechanisms have also been established at UN headquarters to facilitate cross-sector co-operation and help break the rigorous application of the current sequence and methods, for

example the Rule of Law Task Force and Rule of Law Unit. Yet, discussions with mission and UNDP staff indicate that contacts and co-ordination at the field level remain sporadic and *ad hoc*.

205 This suggests that further efforts to integrate rule of law in peace-building are necessary. In particular, there needs to be a strategy for early and progressively integrating rule of law dimensions in the projects of Governance and Public Administration Reform. A first modest step could be to review general and agency-specific organisational structures in order to better match problems on the ground. While a far-reaching overhaul is a long-term and politically complex endeavor, small changes in the everyday operation of peace-building and development agencies in the field may be implemented with little difficulty, *e.g.* joint regular staff meetings between rule of law and public administration departments and units; joint needs assessments and fact-finding missions prior to and during missions; and the 'borrowing' and sharing of concepts and resources.

206 It should also be noted that other organizations have gone further than the UN in bringing Justice Sector Reform and Public Administration Reform together under a shared rule of law paradigm. The WB/IDA has a multi-sector approach to Public Administration Reform, moving beyond traditional government reforms, such as public financial management and civil service reform, to encompass notably Justice Sector/Rule of Law Reforms.

4.1.9 *Support for training*

207 Part and parcel of any sustainable administrative reform policy is to ensure that administrators have the necessary knowledge and technical skills to do their jobs properly. Knowledge in this sense means much more than knowing the norms. The adaptation to a new professional role in a more democratic and transparent society requires absorbing a range of new perspectives, values and techniques.

208 The UN and other peace-building and development actors already devote considerable resources to facilitating and implementing the general and specialized training of police, judges, defence lawyers, prison officers, legislators, journalists, border guards and custom officials on rule of law-relevant topics. Such training should be broadened to encompass various categories of civil servants and focus on the rule of law dimensions and implications of their work. Training curricula should also be coordinated throughout the justice and administrative sectors, as frequently these sectors interact and problems and remedies tend to be identical or similar. Joint training would be another way of helping the judiciary and civil service to see more clearly the various roles and imperatives of others. Particularly where new laws and standards have been introduced, for example on the appeal of

administrative decisions, training for administrators and judges should be synchronized.

209 Best practice suggests that rule of law training for practitioners should be practical and use pedagogical tools that involve active learning, participation, problem-solving and exercises based on real in-country problems. To ensure relevance and sustainability, training efforts should also draw on local capacity to the greatest possible extent. If such capacity is lacking or underdeveloped, the first step may be to train local trainers regarding rule of law dimensions and approaches to Public Administration Reform.

210 Although considerable resources are available for the training of various categories of officials in peace-building environments, it is virtually impossible to retrain the entire public administration. It may therefore be necessary to single out certain professions or categories of administrators. Selective strategies are also fraught with problems, for example that the general performance of the sector depends on effective and equal interaction among the different categories of administrators. A category of professionals that may require special attention and targeted training is independent lawyers or 'the bar'. There is a relationship between the quality of their services and the effective protection of citizens and human rights.

4.1.10 Promoting access, aid and assistance

211 Access problems prevent the individual from gaining on the protection the law provides. The first priority for peace-builders seeking to address access problems should be to gain sufficient insight and information about how the public administration is regulated and institutionally structured, how this structure conditions access, and how the access problems impact on various groups. Once the basic facts about the system have been established, peace-builders and other assistance providers may consider the more ambitious task of promoting reforms of institutions and processes.

212 There are also various legal aid and assistance strategies for promoting access. While ideally, legal aid and assistance should be provided by statutory bodies with adequate and reliable funding from the state budget, certain features of post-crisis governance often make such options impossible. Various actors above, beside and below state level, for example NGOs and other civil society organizations, therefore play an important role in providing aid and assistance.

213 Whether individuals can access and understand the system also depends on the degree of transparency, *i.e.* whether processes, institutions and information are directly accessible to those concerned, and sufficient information is provided to

allow for effective understanding and monitoring of these processes and institutions. It may be argued that transparency is instrumental in promoting the rule of law in at least three important ways. First, lack of transparency prevents individuals from enforcing their rights. Second, lack of transparency prevents accountability. Third, lack of transparency can lead to, or reinforce, serious problems with organised crime, corruption and discrimination. There are strong reasons to continue the work started by the Council of Europe and others to create international standards regarding transparency and to promote their integration into national legal frameworks.

4.1.11 Developing traditional and customary concepts

214 Several studies underline the important role played by customary systems in crisis and post-conflict societies, for example as mediators between the state and individuals and as providers of decentralized governance functions. In addition, where the formal system has 'failed' because of manipulation, corruption or for some other reason, customary systems can be the only viable short-term alternative.

215 Yet, the empowering of such systems is hedged by many concerns. One immediate issue is the lack of knowledge; very little is known about the exact organization and operation of customary systems, particularly the processes by which they reach decisions. Another concern is human rights. There is no doubt that many customary systems reflect power relationships and contain provisions and practices that stand in contradiction to international human rights. A third concern is the effects on the fledgling formal system of a strengthened informal system; there is a risk that fundamental and essentially sound governance institutions become marginalized.

216 Any international support to informal systems thus needs to be preceded by careful analysis. Examples from Liberia and Somalia show that methods and tools developed for mapping and assessing the formal justice and administrative sector may be adapted for this purpose. With regard to the issue of human rights, peacebuilders and assistance providers need to initiate a broad-based dialogue with representatives of customary systems, community groups, and 'users' of the system in order to build understanding and acceptance for fundamental values and principles. In some cases, it may be possible to identify and elevate desirable features of the existing system, for example informal guarantees for procedural impartiality, the right to be heard, equal treatment, and proportionality. Assistance providers may also consider promoting the introduction of written decisions and formal record keeping in order to improve transparency, accountability, and the conditions for successful appeal.

217 There also needs to be an oversight and accountability structure in place to check on deviation and abuse in the informal system. This may mean linking the informal system to the formal under a common constitutional framework. Such frameworks should outline the mandates/jurisdiction of the respective systems, the rights of the 'users', and provide for effective remedies.

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ACHPR   African Charter on Human and Peoples' Rights

AIHRC   Afghan Independent Human Rights Commission

ALPS   Administrative Law and Procedural System Reform Project

AU   African Union

BiH   Bosnia and Herzegovina

BPI   Bribe Payers Index

CEDAW   Convention on the Elimination of All Forms of Discrimination
               against Women

CEELI   Central European and Eurasian Law Initiative
               (American Bar Association)

CoE   Council of Europe

CPI   The Corruption Perception Index

CRPC   Commission on Real Property Claims (BiH)

CSA   Civil Service Agency

DDR   Disarmament, Demobilization and Reintegration

DfID   Department for International Development (UK)

DPKO   Department of Peacekeeping Operations (UN)

EC   European Commission

ECHO   European Commission's Humanitarian Aid Office

ECHR   European Convention on Human Rights

ECOSOC   Economic and Social Council (UN)

EU   European Union

GAP   Governance Accountability Project

GRECO Group of States against Corruption

GRICS Governance Research Indicator Country Snapshot

HPD/CC Housing and Property Directorate and Claims Commission (Kosovo)

IBRD International Bank of Reconstruction and Development

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

IDA International Development Association

IDP Internally Displaced Person

INPROL International Network to Promote the Rule of Law

IRIS Institutional Reform and the Informal Sector

JRI Judicial Reform Index

JSR Justice Sector Reform

KLC Kosovo Law Centre

NGO Non-governmental Organization

ODIHR Office for Democratic Institutions and Human Rights (OSCE)

OECD Organization for Economic Co-operation and Development

OHCHR Office of the High Commissioner for Human Rights (UN)

OSCE Organization for Security and Co-operation in Europe

PISG Provisional Institutions of Self-Governance (Kosovo)

PAR Public Administration Reform

RoL Rule of Law

Sida Swedish International Development Co-operation Agency

SIGMA Support for Improvement in Governance and Management (OECD)

SRSG Special Representative of the (UN) Secretary General

SWAP Sector Wide Approaches (Programs)

UDHR Universal Declaration of Human Rights

UN	United Nations
UNAMSIL	United Nations Mission in Sierra Leone
UNDP	United Nations Development Programme
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISET	United Nations Mission of Support in East Timor
UNOSOM	United Nations Operation in Somalia
UNTAC	United Nations Transitional Authority in Cambodia
USAID	United States Agency for International Development
USIP	United States Institute for Peace
VP	Vaša Prava (BiH)
WB	World Bank
WGA	Whole of Government Approach
WGI	Worldwide Governance Indicators (WB)

In many peace-building and development environments, Public Administration Reform and Justice Sector Reform are promoted as separate projects, each underpinned by different paradigms: While Public Administration Reform is geared to making the administration more effective and efficient, Justice Sector Reform focuses on the introduction and the strengthening of rule of law and human rights principles. As a result, there is a rule of law deficit in the public administration and in the international efforts being made to reform it, which has adverse effects on both states and individuals. This research report analyses the effects of this rule of law deficit, its impact on individuals and communities (in particularly on weak and vulnerable groups), and outlines potential strategies for more closely integrating rule of law dimensions in future efforts to reform post-crisis public administrations.

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