TOWARD A
RULE OF LAW
CULTURE

Exploring Effective Responses *to* Justice and Security Challenges

Leanne McKay

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to Justice and Security Challenges

PRACTICAL GUIDE

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In chapters 1 and 2, except where otherwise noted beneath a figure, all figures were designed and created by Leanne McKay, United States Institute of Peace, and Daniel McLaughlin, Dejure Design.

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FOREWORD

Today, many countries are struggling to effectively counter the effects of violent extremism, terrorism, ethnic and sectarian violence, and even full-scale civil war. Government efforts to bring an end to the violence can be highly reactive, short-sighted, heavily focused on security, and oftentimes themselves violent. Not only do these responses seem not to work, they may even fuel violent extremism, thus contributing to a cycle of violence.

A different approach is needed, which is what makes this guide extraordinarily timely and valuable. The guide presents a sustainable and nonviolent approach to addressing today's complex national and transnational threats. It provides a practical framework for tackling the root causes of the disaffection and dislocation that fuel the violence—root causes such as experiences of injustice, marginalization, and discrimination, and a breakdown of rule of law. It promotes what it calls the "rule of law culture approach," which is an approach to creating stable, rule of law–based societies that is holistic, adaptive, systematic, and people-centric.

A peaceful and prosperous nation requires good governance and robust rule of law. Its people need safety and security from violence. Their basic rights and fundamental freedoms must be protected in a society that ensures justice for all. Yet when faced with serious threats, some governments respond by limiting the rights and freedoms of their people, clamping down on media reporting, restricting opportunities for participation in civil and political life, and operating repressive security systems. When those in society who want to defend their rights and freedoms cannot do so through the justice system, because that system is weak or inaccessible, the seeds of conflict are sown.

Conflict can also arise when those in power are corrupt or kleptocratic; when they practice patronage instead of promoting inclusive democracy; and when they manipulate existing tensions or spark new tensions between ethnic, religious, and communal groups by favoring one group and marginalizing others. As the social fabric of a society begins to break down, disillusionment with government grows, and violent conflict, serious crimes, and terrorism can flourish. In such an environment, criminal organizations or extremist groups perpetuate and accentuate social divisions while exploiting political and security vacuums for their own financial or ideological ends.

Addressing the drivers and consequences of conflict, violent extremism, and crime involves confronting a series of complex, multidimensional, and often intractable problems. Unfortunately, the current responses favored by many governments are inadequate to that task. What we need is a comprehensive approach, one that is both systematic and holistic and that enables multiple stakeholders to work together to address social, economic, and political challenges and to build justice, security, and rule of law.

This approach challenges us to rethink our assumptions about rule of law. It requires us to recognize and embrace the reality that strong rule of law can be achieved only if all people within a society, from both government and civil society, collaborate to reestablish a social contract that embodies the belief that rule of law is not only desirable but also possible. Rule of law can take root only when it effectively addresses the political and power dynamics that can undermine it. This approach requires us to broaden our language beyond the technical realm of rule of law—to make a rule of law culture part of our vocabulary.

This guide describes that approach and provides a framework for finding the solutions to the root causes of disaffection that, when left unresolved, erode rule of law and rip the societal fabric. Justice, security, and rule of law practitioners can use this framework to give a country and its people the opportunity to build resilience to future conflict, sectarian violence, and terrorism.

This guide is the outcome of a two-year partnership between the US Department of State's Bureau of Counterterrorism and the United States Institute of Peace (USIP). USIP's mandate is to prevent, mitigate, and resolve violent conflicts around the world by engaging directly in conflict zones and providing analysis, education, and resources to those working for peace and nonviolent solutions to conflict.

The guide emerged from an extensive design process and the piloting of a USIP course titled "Toward a Rule of Law Culture." The course drew on USIP's decades of work in conflict-affected countries around the world and its vast rule of law research, practice, and training expertise. The pilot courses were delivered with the support of the International Institute for Justice and the Rule of Law (IIJ) in Malta. The IIJ was established in 2014 to deliver innovative and sustainable training to lawmakers, police, prosecutors, judges, corrections officials, and other justice sector stakeholders on how to address terrorism and related transnational criminal activities within a rule of law framework. The IIJ's initial focus is on countries in North, West, and East Africa, and the Middle East, paying particular attention to supporting countries in political transition.

The rule of law culture approach detailed in this guide reflects the shared commitment of the IIJ and USIP to equip practitioners with the knowledge, skills, and tools needed to more effectively tackle serious threats to justice and security through nonviolent and sustainable means. With its conceptual depth, focus on practicality, and wealth of practical examples and tested solutions, this guide is an invaluable tool. This guide and its lessons illuminate a path we can take to escape today's violence, insecurity, and injustice, a path that will lead to a brighter, more peaceful, more just, and more secure future.

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Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	Arab Charter on Human Rights
ASEAN	Association for Southeast Asian Nations
AU	African Union
ATPU	Anti-Terrorism Police Unit (Kenya)
BiH	Bosnia and Herzegovina
CAT	UN Convention against Torture
CHREAA	Center for Human Rights Education, Advice and Assistance (Malawi)
CIC	Commission for the Implementation of the Constitution (Kenya)
CLRG	Criminal Law Research Group (Maldives)
CTITF	Counter-terrorism Implementation Task Force (UN)
DAW	Division for the Advancement of Women (UN)
DDR	disarmament, demobilization, and reintegration
DFID	Department for International Development (UK)
DP	Democratic Party (Albania)
DPA	Department of Political Affairs (UN)
ECOWAS	Economic Community of West African States
EITI	Extractive Industries Transparency Initiative
ESC	Economic and Social Council
EWMI	East-West Management Institute
HiiL	The Hague Institute for the Internationalisation of Law
HNP	Haiti National Police
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICT	information and communication technologies
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDLO	International Development Law Organization
IDP	internally displaced person
IHRL	international human rights law
IHL	international humanitarian law
IMF	International Monetary Fund
IOM	International Organization for Migration
INPROL	International Network to Promote the Rule of Law
INSTRAW	International Research and Training Institute for the Advancement of Women
JSD	Justice and Security Dialogue
JTF	Judiciary Transformation Framework (Kenya)
LSE	London School of Economics
LURD	Liberians United for Reconciliation and Democracy
KANU	Kenya African National Union
KNDR	Kenyan National Dialogue and Reconciliation
MINUSTAH	UN Stabilization Mission in Haiti
MODEL	Movement for Democracy in Liberia
NGO	nongovernmental organization
NRCC	Natural Resources Counterinsurgency Cell
OECD	Organisation for Economic Co-operation and Development
OHCHR	UN Office of the High Commissioner for Human Rights
OLA	Office of Legal Affairs (UN)
OROLSI	Office of Rule of Law and Security Institutions (UN)
OSAGI	Office of the Special Adviser on Gender Issues and Advancement of Women (UN)
PDCA	Plan-Do-Check-Act
PDSA	Plan-Do-Study-Act
RAF	Red Army Faction (German)
RAMSI	Regional Assistance Mission to the Solomon Islands
SMART	specific, measurable, achievable, realistic, and time-bound
SMS	Short Message Service
TFG	Transitional Federal Government (Somalia)
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	UN Convention on the Law of the Sea
UNDP	UN Development Programme
UNDPKO	UN Department of Peacekeeping Operations
UNHCR	UN High Commissioner for Refugees
UNICEF	UN Children's Fund
UNIFEM	UN Development Fund for Women
UNMIK	UN Mission in Kosovo
UNMIL	UN Mission in Liberia
UNODC	UN Commission on Drugs and Crime
UNOHCHR	UN Office of the High Commissioner for Human Rights
UNSC	UN Security Council
UNTAET	UN Transitional Administration for East Timor
UNWOMEN	UN Entity for Gender Equality and the Empowerment of Women
USAID	US Agency for International Development
USIP	United States Institute of Peace

ABOUT THIS GUIDE

This guide is the product of a two-year partnership between USIP and the US Department of State's Bureau for Counterterrorism, during which USIP designed, developed, and piloted a foundation rule of law course for the International Institute for Justice and the Rule of Law.[1] The four 5-day pilot courses were delivered between November 2014 and July 2015 to mid- and senior-level legal, penal, police, judicial, and civil society personnel from fifteen countries across Africa and the Middle East. The courses primarily focused on countries in transition; however, the core messages in this guide are applicable across all contexts, and the practical examples provided draw on lessons from six continents.

Drawing on the findings of an extensive needs assessment, input from a regional experts advisory group, and feedback from the pilot course participants and supporting expert resource persons, the author revised the content and structure of the guide to produce the current version.

The target audience for this guide is mid- and senior-level justice sector stakeholders. These include government officials (such as lawmakers, prosecutors, judges, police, and corrections officials) and nongovernmental representatives (including defense lawyers, representatives of national human rights institutions and other oversight bodies, and members of civil society organizations).

The guide assumes that the reader has some degree of knowledge of and experience within the justice system in his or her own country. Persons who hold or may in the future hold a position of authority within the justice system, and who are therefore well placed to both promote and implement positive change, will find the guide particularly useful.

However, the content is also relevant for early career justice professionals and professionals within the security sector, and for others interested in understanding the concept of the rule of law and how both government officials and members of society can contribute to enhancing the rule of law within their societies.

HOW TO USE THIS GUIDE

The guide has been designed primarily for use by course participants as a reference tool during and after the 5-day course "Toward a Rule of Law Culture." Together, the guide and the course are designed to promote dynamic, experiential, transformative learning. They provide a framework within which participants and facilitators can interact, share their experiences, and learn from and teach one another. Ultimately, the guide and the course emphasize the practical application of rule of law knowledge and skills in order to develop concrete plans for action to strengthen the rule of law in any context.

Course participants may also use the guide to support the development of context-specific rule of law training that they promote and/or deliver in their own contexts. Importantly, any such training must be based on a thorough assessment and analysis of the specific training needs of the target group and the development of relevant learning objectives.

The guide can be used as a resource to support the delivery of other justice, security, and rule of law–related trainings. Its six chapters are designed to build on one another, first addressing the development of knowledge and skills, and then exploring how best to put them into practice. However, some chapters may be more relevant than others to a particular training, and trainers might thus opt to focus on just one or two chapters, drawing from other chapters as necessary (the use of "connectors," mentioned below, will be particularly relevant in this situation).

Finally, the guide functions as a standalone resource for any local or international rule of law, justice, and/or security practitioner or policymaker seeking to expand his or her understanding of the role of the rule of law in addressing contemporary justice and security challenges, including terrorism and other serious transnational threats.

The reader will discover will discover that the main text is punctuated by six types of material designed to enhance the guide's impact and usefulness:

CONNECTORS

Connectors: Connectors link an idea or issue to other relevant ideas and examples elsewhere in the guide in order to reinforce key learning points.

EXAMPLE

Examples: Examples from a range of country contexts and jurisdictions are provided to expose the reader to an array of practical initiatives and lessons learned that can inform his or her own rule of law work.

Multimedia: To emphasize key learning points, weblinks are provided to multimedia resources that are used in the course.

CONSIDER

Consider: Throughout the guide, readers are encouraged to reflect on and answer specific questions in order to enhance their learning experience, stimulate discussion, and deepen their skills development.

Reader Exercise

Reader Exercises: These exercises are used as small group or plenary exercises during the course. Readers are encouraged to perform these exercises alone or with colleagues in order to practice applying the knowledge and skills emphasized in the guide.

+ ADDITIONAL RESOURCES

Additional Resources: A list of additional resources is provided to expand the reader's knowledge of specific issues.

INTRODUCTION

How can a government, when faced with internal or external threats to peace and stability, ensure that the basic rights of all people are protected, respected, and promoted while also addressing national security and community safety concerns? What role does the general population play in creating a society based on a strong rule of law? How can promoters of rule of law garner support for their ideas for change? What impact do complex political, economic, and societal relations have on rule of law and why does this matter? How does a strong rule of law affect power dynamics within societies? What approaches can be adopted to address resistance to initiatives that promote a strengthened rule of law?

This guide addresses these challenging questions and more through an exploration of rule of law, from its theoretical underpinnings to the concrete practicalities of creating a society based on a strong rule of law. With an emphasis on exposing readers to new knowledge and ideas, strategic skills development, and practical analytical tools, the guide seeks to empower readers to be able to better engage in efforts to enhance rule of law in their own countries.

The guide lays out a *rule of law culture approach* to achieving a strong rule of law—an approach that places the human, social, historical, political, and power dynamics of a society at its core. Traditional approaches to promoting rule of law tend to prioritize the role of state institutions and adopt technical, law-led strategies. The rule of law culture approach, in contrast, recognizes that efforts to strengthen rule of law do not happen in a vacuum, but in a specific context of state and social institutions and of complex political, power, and human dynamics and interactions. The rule of law culture approach emphasizes the need to view the justice system holistically and to address identified weaknesses systematically. It requires the equal participation and engagement of both state officials and members of society, and acknowledges that enhancing rule of law is a process of change that must involve altering the assumptions, mind-sets, and behaviors of all people—officials and citizens alike.

Chapter 1 begins the journey with a discussion of the concept of rule of law, its perceived and actual benefits to society, and the role it can play in building the resilience of a state to both internal and external justice and security threats. In defining the rule of law, readers are encouraged to move beyond theoretical and abstract concepts, and to understand the rule of law in a way that protects basic rights and freedoms and resonates with the actual needs and desires of people within a specific context.

This process will result in a rule of law vision or ideal toward which a state should strive. The challenge is then how to achieve that vision. The rule of law culture approach provides a framework for moving toward a society that is based on and upholds the rule of law. The framework involves five core elements:

- There is a relationship of *trust* between the governing and the governed.
- The state and society are bound by and comply with *a system of laws*.
- There is *legitimacy* of justice and security institutions, systems, and actors.
- Justice and security institutions, actors, and laws are *inclusive*; they recognize and respond to the justice and security needs of all persons.
- The "ideal" rule of law vision is grounded in the *reality of the context*.

What these five elements look like in practice is presented in the following chapters.

Chapter 2 approaches the justice system holistically and by doing so introduces the reader to the complexity of the system. Readers are encouraged to consider the role they play in relation to the system and to recognize how the (in)actions of individuals and institutions in one part of the system can have significant repercussions elsewhere within the system and within society as a whole. Addressing weaknesses within a system requires identifying and engaging the right people—government officials and members of society, justice and security stakeholders, and those within and outside the formal justice system. This chapter emphasizes the core notion that a purely technical approach to the rule of law—one that focuses only on laws and institutional structures—that ignores the importance of the attitudes, behaviors, and will of the people within the system and outside the system will be less likely to produce long-term, sustainable, and effective change than a people-focused approach that is grounded in the five elements of a rule of law culture.

Chapter 3 examines the role of international norms and standards within the domestic legal system. Recognizing that a society based on rule of law should, through its system of laws, uphold, protect, and promote international human rights and freedoms of all people within a society, the chapter addresses the very real challenges such obligations pose for lawmakers, policymakers, and other officials. The chapter asserts that a process approach to domestic law reform, framed within the elements of a rule of law culture, can achieve more effective and sustainable reforms in the long term and can contribute to achieving a strengthened rule of law.

Chapter 4 combines the knowledge and skills introduced in earlier chapters to taking a systematic approach to strengthening rule of law. Readers are provided with a series of analytical tools that can be applied to any rule of law challenge in order to devise contextually relevant and effective solutions. These tools will enable the reader to view a justice system objectively, methodically, and holistically; identify the root causes of a problem; engage multiple stakeholders; and identify potential opportunities for action. However, no context remains static and therefore the systematic approach must be an ongoing process that prioritizes continuous learning, improvement, and adaptation. The creation of a strong rule of law–based society can occur only when both government officials and members of society understand and embrace their mutually supportive roles and responsibilities in that process.

Chapter 5 challenges the reader to consider how, in practical terms, he or she can contribute to creating a strengthened rule of law. To be an effective change agent, a rule of law promoter needs to understand not only what the change is that he or she wishes to see, but also to understand who will resist that change and why, and what strategies are available to overcome this resistance. There is a tendency to treat challenges to a strong rule of law as purely technical problems; however, effectively addressing these challenges requires fundamental changes in people's attitudes, perceptions, values, and, ultimately, behavior. A strong rule of law promoter will disrupt entrenched behaviors and ways of thinking, and promote new ways of exploring old challenges.

Practical tools, coupled with an extensive array of examples and lessons learned from across the world, support readers to develop concrete solutions to their own challenges through a creative and intellectual process—a process in which examples and ideas are examined, modified, and then adapted to fit the realities of a specific context. The process recognizes that while each context is unique, and there can be no one-size-fits-all approach to enhancing the rule of law, there are also similarities between experiences from which we can all learn.

Finally, chapter 6 provides a contemporary illustration of the rule of law culture approach in practice. The chapter examines the transformation of the Kenyan judiciary, and gives the reader the opportunity to analyze and critique the Kenyan approach, to learn lessons, to take inspiration, and to embrace his or her role as a rule of law promoter.

ENDNOTE

1   The International Institute for Justice and the Rule of Law (IIJ) is a domestic foundation in Malta with an international governing board of administrators. The IIJ provides training to justice sector stakeholders on how to address terrorism and related transnational criminal activities within a rule of law framework. The IIJ's initial geographical focus is countries, particularly those in transition, in North, West, and East Africa and in the Middle East. See www.theiij.org for further information.

Exploring Rule of Law

Exploring Rule of Law

This chapter explores the concept of "rule of law" and introduces the framework of a rule of law culture as a practical tool for effectively addressing justice and security challenges and for promoting a strengthened rule of law. It also explores the relationship between rule of law and complementary concepts such as "security," "good governance," and "human rights." The chapter examines modern approaches to international rule of law promotion, including identifying key actors within the international rule of law assistance community.

CHAPTER HIGHLIGHTS:

- The complex ways in which laws can be understood

- The many dimensions of rule of law

- Rule of law as a balancer of the tension between the provision of security and the provision of justice

- The rule of law culture and its five elements

- Rule of law and its relationship with complementary concepts

Contents

Part 1 | Exploring Rule of Law

When people hear the phrase "rule of law," they tend to focus on the word "law." They want to know if there are laws, if the laws are being implemented, and if people are abiding by those laws. It is assumed that those best placed to understand rule of law are those who know and uphold the laws: lawyers, judges, prosecutors, and police. Understanding rule of law appears to require us to first understand the law.

So what is the law? There is no universally agreed definition of the law. What people consider to be the law varies from community to community, country to country, and continent to continent. Law may mean different things to different people, depending on where they are or what they perceive themselves to be within society. A well-educated person in an urban setting may see state law as being the main mechanism for regulating his or her interactions with other members of society. For an illiterate person living in a remote rural area, however, law may be the traditional laws and practices of his or her local tribe or clan.

The laws passed by the state are not the only rules that govern our behavior or provide for social order. There may also be customary or traditional rules or norms, such as the practice of arranged marriages. There are religious norms and family norms, and there is social etiquette and business etiquette, dealing with such matters as whether you should turn off your mobile phone in a cinema or a meeting.

The law is a system of rules that govern our behavior within society. These rules promote social order by providing a mechanism with which people in a society can peacefully resolve their disputes.

Chapter 2, Part 2: Understanding the Domestic Legal System

There may be many approaches to the law within one country; for example, formal law, religious law, natural law international law, and customary law may all dynamically interact constantly. Sometimes these laws complement each other, sometimes they clash, and sometimes they function completely separately. Certain matters, such as banking or corporate law, may be strongly regulated by formal law without any overlap with customary laws.

Bodies of law are not implemented or interpreted in the same way across (or even within) countries. For example, if we consider the many national manifestations of Islamic law across the world today, we see the results of various interactions between formal law, religious and moral values, and social norms within societies. Ultimately, what the law looks like in any context depends on the people and the cultural, social, political, historical, and religious dynamics of a particular context.

Chapter 2, Part 2, "Reflections on the Relationship between Islamic Law, State Law, and Custom"

The law should reflect the shared values and aspirations of a society. Oftentimes, these values and aspirations are endorsed in a fundamental statement such as a constitution.

The law is a system of rules that govern our behavior within society.

However, determining which views should be represented in law is a challenge facing all societies, because social norms and cultures are neither static nor absolute. They are constantly changing, interacting, and coming into contact with other cultures and views. Consider, for example, the impact of the global human rights movement, or the rise of the Internet and social media on issues such as gay marriage and women's rights.

A country emerging from conflict and attempting to assert a new national identity may struggle with how to accommodate the reality of a newly diverse society with differing and sometimes competing expectations, interests, and needs. A clash may occur when a society consists of distinct (cultural, ethnic, religious) groups, while the law represents or protects the interests of only one group.

Social and legal norms may clash, reflecting different social, cultural, and moral worldviews. Domestic law may clash with international law; custom and traditional norms may clash with formal state law. A clash may occur when laws are transplanted from elsewhere, either by imposition or through voluntary borrowing. The norms and values of the transplanted law may not match the norms and values of many members of society. Consider, for example, the clash between the formal laws of colonizers, such as the British in Africa, and the customary and natural laws that had regulated those societies prior to colonization. The very language of the law could be different from the common language of groups within society, as is the case in Pakistan, where laws were imported from Britain in English, giving the law an alien and obscure feel.

In these types of situations, the law plays a weak role in preserving social order. If people do not believe in the law, they may feel it is not relevant to their situation or does not address their actual needs. Long periods of war, periods of lawlessness, the effects of corruption and nepotism: all of these circumstances impact how people view and respond to the law. People may be prepared to circumvent the rules because the system does not work in a way that benefits them, or because the existence of widespread corruption leads them to believe that everyone already ignores the rules, or because the laws are outdated, complicated, or not easily understood.

When the law is imposed by a ruler (rule by law), forced on a society, created by illegitimate institutions, or applied only to those who have no power, it will not be seen as legitimate. People might obey the law out of fear of punishment, but they will not abide by the law out of a belief that it exists for their benefit, as a tool for ordering society and protecting and providing for their needs.

▶ **Semaforo**, https://www.youtube.com/watch?v=awdEAK9bTq0.

CONSIDER

Why do we or don't we stop at a red traffic light?

To believe in the law, people must feel that they have a voice in determining what values and aspirations the law upholds. People must see that the laws are created and implemented by legitimate institutions. They must believe that everyone is accountable to the law, including those in power. In this way, the word "rule" becomes critical to understanding the term "rule of law".

Here, "rule" does not mean "rulership" or "the exercise of authority and control over others"; that would be rule *by* law. Instead, "rule" refers to a participatory relationship between those who rule and those who are ruled. It refers to a system that produces rules or laws that consider the needs of all members of a society and protect and uphold their basic rights.[1]

It is clear, then, that rule of law is a complex notion. It is complex because it involves understanding the social, cultural, and historical dynamics of a society. It involves understanding the needs, desires, aspirations, and interests of people, both those who rule and those who are ruled. In the following chapters, this guide explores how to address this complex notion, analyze it, and identify opportunities for strengthening rule of law.

BENEFITS OF RULE OF LAW

Before turning to defining rule of law, it is helpful to reflect on what we want or expect from it. Why is it that politicians, including presidential hopefuls, run their campaigns on a platform of promoting rule of law? Why do businesspersons, professionals, and investors; donors and human rights activists; the international community and the media; as well as people on the street, all invoke rule of law as a core need within their communities?

In a narrow sense, rule of law guarantees us whatever advantages are contained in the law, such as the guarantee of the right to a fair trial. Rule of law can provide certainty or predictability in our interactions with the state and with other members of society, and it can restrict the actions of government officials.[2]

Other benefits of rule of law include:
- Protecting human rights[3]
- Promoting law and order[4]
- Promoting economic development[5]
- Addressing poverty[6]
- Promoting social justice and equality[7]
- Protecting human security[8]
- Managing conflict and promoting peace[9]
- Providing greater resilience against internal and external threats[10]

In today's world, states face a plethora of domestic, regional, and international challenges related to justice, security, economics, and politics. These challenges, or "stresses," can increase the risk of violence and instability within a country. Stresses may include, for example, war, terrorism, transnational organized crime, civil unrest, natural disasters, ethnic or religious conflicts, human rights abuses, discrimination, and perceived injustice.[11]

"Rule" refers to a participatory relationship between those who rule and those who are ruled.

When rule of law and its institutions, such as the judiciary and law enforcement agencies, are weak, internal and external stresses make a country more vulnerable to violence and instability and increase the likelihood of the denial of fundamental rights and freedoms.[12]

A strong rule of law, however, can aid a government in more effectively and efficiently providing essential justice and security services for its people in a sustained manner.

Chapter 1, Part 4, "Human Security, National Security and Rule of Law," & "Rule of Law and Transitional Justice"

THE ROLE OF RULE OF LAW IN BALANCING JUSTICE AND SECURITY

There is a natural tendency for governments, when faced with internal or external threats such as war, civil unrest, or transnational crime, to respond with a heavy national security focus that often results in severe restrictions and limitations on basic rights and freedoms of members of society (see figure 1.1).

"

"Regrettably, for some time to come, Australians will have to endure more security than we are used to and more inconvenience than we would like. Regrettably, for some time to come, the delicate balance between freedom and security may have to shift."[13]

"

For example, when faced with a real or perceived threat of terrorism, a country may announce a state of emergency, restrict the fair trial rights of terrorist suspects, or limit freedoms of association or expression.

Such a security-heavy focus often undermines another core element of security: human security; that is, the protection of the well-being and rights of all people.

Chapter 1, Part 4, "Human Security, National Security and Rule of Law"

When people feel that their rights are being denied with no recourse to remedy, that they have no opportunity to participate in decisions that affect their lives, that their grievances are going unresolved, or that their basic needs are not being fulfilled by the state, then a sense of injustice grows, which in the worst case can manifest itself in violence, which in turn creates greater insecurity and instability within the country.

Conversely, tipping the balance too far toward justice, with too little attention given to security needs, can also have negative outcomes (see figure 1.2). For example, a situation where everybody is demanding their rights and seeking to promote their own interests—whether economic, ethnic or political—without concern for the rights of others, can create chaos, confusion, and instability. Although the provision of justice and security services is a core duty of the state, there is also a very real role for all members of society to play in upholding a rule of law–based society.

Chapter 2, Part 1, The Role of People, & Chapter 4, Part 2: Rights and Responsibilities in a Rule of Law Culture

FIGURE 1.1

Rule of law as a balancer—weak justice focus

HEAVY
SECURITY FOCUS

increased powers for government officials

increased policing powers

increased military role

military / authoritarian rule

state of emergency

strong security institutions

lack of protection/ limitation of rights and freedoms

SECURITY

STRESSES

international organised criminal networks

civil unrest/conflict

legacies of violence and trauma

war/invasion/occupation

terrorism

injustice/human rights abuses

WEAK RULE OF LAW

WEAK
JUSTICE FOCUS

lack of protection/limitation of rights and freedoms

lack of access to justice

weakened justice institutions

lack of public participation/transparency

limited oversight/accountability

lack of regional/ international support

JUSTICE
RIGHTS & FREEDOMS

FIGURE 1.2

Rule of law as a balancer—weak security focus

WEAK
SECURITY FOCUS

revised laws hamper effective responses to crime

legal uncertainty/confusion

policy and resource burdens on government

attitude of the population – all rights, no responsibilities

growing community/ group tensions/discontent/ perceived injustice

insecurity/chaos/instability

SECURITY

STRESSES

civil unrest/conflict

war/invasion/occupation

injustice/human rights abuses

terrorism

legacies of violence and trauma

international organised criminal networks

**WEAK
RULE
OF LAW**

**HEAVY
JUSTICE FOCUS**

law reform to protect rights

strong due process procedures

limitations on actions of state officials

strong accountability/ oversight mechanisms

transparency / public participation

court decisions upholding rights and freedoms

JUSTICE

RIGHTS & FREEDOMS

The relationship between justice and security is critical to understanding the cause of internal and external threats and to addressing them. Indeed, justice and security are two sides of the same coin. Strong justice institutions and systems are as critical to the stability of a country as strong security institutions and systems. Strong rule of law cannot exist without both elements (see figure 1.3).

"

"Justice, including through the rule of law, is essential to safeguarding human security at the personal and communal level. Conversely, a just society is an illusion without security."[14]

"

In other words, both justice and security are critical for a peaceful society, and neither should be addressed entirely separately from one another. The success of one depends on the success of the other.

When a state faces a threat, whether external or internal, and the balance between the provision of security and the protection of rights and freedoms is lost (such as in figure 1.1), a strong rule of law and its institutions allow the state to return to an ideal balance of justice and security, rather than to believe that the choice is between either one or the other. This is the power of rule of law.

"

"We are still shocked by what has happened but we will never give up our values. Our response is more democracy, more openness, and more humanity. But never naivety."[15]

"

A strong rule of law culture and legitimate and effective justice and security institutions, systems, and actors strengthen the resilience of a society faced with internal and external stresses that can trigger violence and threaten peace and security (see figure 1.3).

Strong rule of law enhances the resilience of a society.

EXAMPLE

Rule of law responses to the Ebola crisis

The Ebola crisis that struck Sierra Leone in 2014 was more than just a health issue. The crisis also raised many rule of law issues, including how to protect basic rights to health and freedom of movement while also ensuring the safety of the local population. Justice and security institutions were placed under pressure to manage the ensuing social unrest and political instability. The police and army struggled to maintain basic order and uphold rights while managing quarantine processes and checkpoints. Incidents of gender-based violence rose during the crisis, while access to justice for vulnerable women decreased.

Source: UNDP, *Strengthening the Rule of Law in Crisis-affected and Fragile Situations: Rule of Law Global Programme Annual Report 2014*, (New York: UNDP, 2015).

FIGURE 1.3

Rule of law as a balancer—equal justice and security

SECURITY

JUSTICE

RIGHTS & FREEDOMS

STRONG RULE OF LAW

STRESSES

international organised criminal networks

civil unrest/conflict

legacies of violence and trauma

war/invasion/occupation

terrorism

injustice/human rights abuses
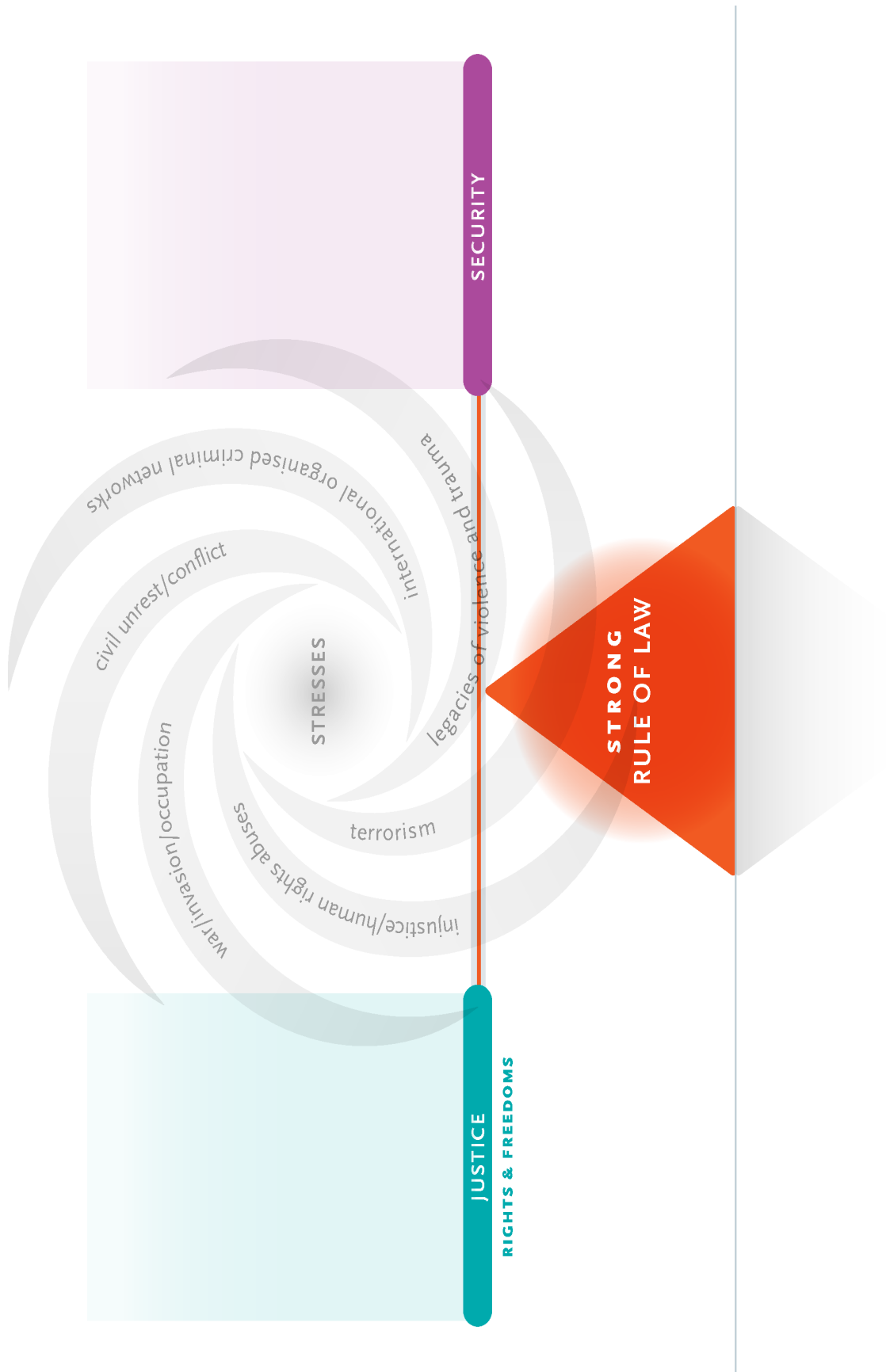
CHAPTER 1 Part 1 ENDNOTES

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10 World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington,DC: World Bank, 2011), 85, http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23252415~pagePK:478093~piPK:477627~theSitePK:477624,00.html.

11 Ibid., 6–7.

12 Ibid., 7.

13 Tony Abbott, the prime minister of Australia, speaking to the Australian Parliament on September 22, 2014, in advance of deliberations on two bills to increase the powers of intelligence agencies and to target foreign fighters. Available at http://www.liberal.org.au/latest-news/2014/09/22/hon-tony-abbott-mp-statement-parliament-national-security-parliament-house.

14 Commission on Global Security, *Justice and Governance, Confronting the Crisis of Global Governance* (Washington, DC: Hague Institute for Global Justice and the Stimson Center, June 2015), http://www.globalsecurityjusticegovernance.org/, xvi.

15 Jens Stoltenberg, prime minister of Norway, speaking at a memorial for victims of the 2011 terrorist attacks in Norway. http://www.americanrhetoric.com/speeches/jensstoltenbergbombingmemorial.htm.

Part 2 | Defining "Rule of Law"

There is no global agreement on the definition of the term "rule of law." However, the existence of a divergence of views as to its precise meaning does not invalidate rule of law as a concept in law. Theorists tend to agree that, at the very minimum, the definition requires that everyone, including the government, is accountable to the law.

Over centuries, the definition of rule of law has evolved and expanded within the Western world to encompass both procedural and substantive elements. In 2004, the international community agreed on the following working definition of rule of law:

"

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 the 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.[16]

"

This definition contains the core element of rule of law, namely, the notion that everyone is accountable to the law. The definition also "has much to say about how the laws are drafted."[17] These elements are known as the procedural elements of the definition and include, for example, that lawmaking processes should be transparent and that laws must be publicized, accessible, enforced equally, applied fairly, and adjudicated by an independent decision-making body.

The definition also includes substantive elements; that is, it "contains requirements about the content of laws,"[18] such as that laws must be consistent with international human rights norms and standards, and must be clear, precise, and foreseeable (people must be able to foresee the legal consequences of their actions).

The UN definition has been criticized for being so full of broad concepts that it is practically impossible to implement,[19] and for failing to explicitly acknowledge the role of customary, or nonstate, justice mechanisms that are not recognized within the formal justice system. Scholars, practitioners, organizations, and agencies around the world have yet to adopt this definition unanimously, although many of the definitions share many similarities. Some of the core elements that are regularly included in rule of law definitions can be seen on the next page.

AN EXPANDED DEFINITION OF THE RULE OF LAW

ACCOUNTABILITY:

No matter who you are, if you break the law you must answer for your action and receive a sanction (e.g., prison, fine, barring from legal office). If a person commits a wrong or violates the rights of another, he or she should be held accountable, either through the formal state justice system or through customary/traditional justice systems.

THE CONTENT OF LAWS:

The laws must protect the human rights of all persons, including the rights of the accused and the interests of victims. They must be clear, precise, prospective (i.e., they do not punish past conduct that was not illegal at the time), accessible, and they must allow citizens to understand their rights and obligations.

THE DRAFTING OF LAWS:

All citizens should know what government agency is responsible for drafting new laws, when the laws will be circulated for comment in advance of being passed, and how the individual citizen can have a voice in the law reform process. After the law is passed, the law must be published, and the public must be notified about the new law and their rights and obligations under it.

THE APPLICATION OF LAWS:

Laws must be applied equally, independently, fairly, and non-arbitrarily by public officials.

PARTICIPATION IN DECISION-MAKING:

Citizens must have the opportunity to participate directly in the exercise of legislative, executive, and administrative decision-making with the goal of repairing the broken relationships between the state and society, increasing trust in, and the legitimacy of, the government and improving general compliance with the law.

SEPARATION OF POWERS:

There must be separation between the executive, legislature and the judiciary and the various powers of each should be clearly defined.

ACCCESS TO JUSTICE:

All citizens must have access to justice mechanisms to seek a remedy for grievances. In order for there to be access to justice, justice mechanisms must be affordable, close by, conducted in a language citizens understand, and citizens (who cannot afford it) should be granted the assistance of a lawyer. The justice system must serve the people and must work to inspire their trust and confidence. Finally, citizens must understand their rights and obligations under the law and how to seek a remedy if their rights are violated.

SAFETY AND SECURITY:

Citizens should feel that they and their property are safe and secure. They should be protected from violence and abuse.

■ END EXTRACT

So what does this lack of a universal definition mean for people working to promote a strengthened rule of law? It does not diminish the fact that rule of law is seen as something good. Many of the principles we believe rule of law should uphold cross both geographical and ideological boundaries.[20] As one scholar writes: "Rule of law appears to be widely accepted by people of different ideological persuasions. Christians, Buddhists and Muslims; libertarians, liberals and Confucian communitarians; democrats, soft authoritarians, even socialists and neo-Marxists all find value in rule of law."[21]

CONSIDER

How has the concept of rule of law developed in your context?

It is important to recognize that defining rule of law is not about creating a checklist of actions a government should take to achieve the perfect rule of law. As we all know, there is no society that has achieved the perfect rule of law. Defining rule of law is about identifying an aspirational goal toward which both government officials and members of society commit to strive.

Therefore, this guide promotes the idea that more important than the end result of a single black-and-white definition of *the* rule of law is the process of engaging government officials and members of society in an open and participatory discussion in order to formulate a clear vision for rule of law for their own society. In other words, the words matter less than what we understand them to mean.

EXAMPLE

The Challenge of Language

Western rule of law theories and concepts have mainly developed in the English language. Sometimes these concepts do not easily translate, in the literal sense, into different languages.

Mandarin Chinese: Chinese phrases do not always use prepositions, so the term for "rule of law," consisting of only two words, meaning "law" and "govern," has been translated as both "rule of law" and "rule by law" in Chinese-English dictionaries. The translation sometimes also suggests "law and order" or "ruling the country according to law."

Source: Josh Chin, "'Rule of Law' or 'Rule by Law'? In China, a Preposition Makes All the Difference," *Wall Street Journal* (blog), October 20, 2014, http://blogs.wsj.com/chinarealtime/2014/10/20/rule-of-law-or-rule-by-law-in-china-a-preposition-makes-all-the-difference/.

French: It has been argued that the essence of the term "rule of law" is better translated as *prééminence du droit.* The United Nations and regional bodies generally apply the more formalistic *état de droit.*

Source: Council of Europe, *The Principle of the Rule of Law*, Report of the Committee on Legal Affairs and Human Rights, Doc. 11343 (July 6, 2007), http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11593&lang=en.

Myanmar: Rule of law "is not an attractive concept . . . . We do not usually equate the rule of law with justice. It has connotations of pacifying, subjugating people. I think most people don't really understand what it means."

Source: Thomas Fuller, "Those Who Would Remake Myanmar Find That Words Fail Them," *New York Times*, July 19, 2015, http://www.nytimes.com/2015/07/20/world/asia/those-who-would-remake-myanmar-find-that-words-fail-them.html.

This rule of law vision serves as a reference point to guide the actions and decisions taken by the government about necessary changes to be made within society to achieve a strengthened rule of law.

Once a rule of law vision has been identified, the critical next step is to determine how best to achieve that vision. This guide proposes that the framework for achieving this vision is the five elements of a "rule of law culture."

CHAPTER 1 Part 2 ENDNOTES

16   UNSC, "Rule of Law and Transitional Justice," 4.

17   Vivienne O'Connor, *Practitioner's Guide: Defining the Rule of Law and Related Concepts* (Washington, DC: International Network for the Promotion of the Rule of Law [INPROL], 2015), 9.

18   Ibid., 7.

19   Camino Kavanagh and Bruce Jones, *Shaky Foundations: An Assessment of the UN's Rule of Law Support Agenda* (New York: Center on International Cooperation, New York University, 2011), 24,http://cic.es.its.nyu.edu/sites/default/files/kavanagh_rol.pdf.

20   See, for example, Ghaleb Ghanem's *Rule of Law,* http://www.acrli.org/Files/pdf2008/CompleteBook.pdf (in English, Arabic, and French). Dr. Ghanem is the president of the Lebanese Council of State.

21   Randall Peerenboom, "Human Rights and Rule of Law: What's the Relationship?" Research Paper no. 05-31, Public Law and Legal Theory Research Paper Series (University of California, Los Angeles, School of Law, 2005), 3.

Part 3 | Toward a Rule of Law Culture

"

"For the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary, proper, and existing part of their political-legal system. This attitude is not itself a legal rule. It is a shared political ideal that amounts to a cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations, surviving episodes in which the rule of law is flouted by government officials. When this cultural belief is not pervasive, however, the rule of law will be weak or non-existent."[22]

"

Establishing a strong rule of law is an inherently political exercise.

Creating a society that is based on a strong rule of law is not a purely technical, law-led exercise involving the reform of laws, strengthened justice institutions, and better-trained legal personnel to operate them. Establishing a strong rule of law is an inherently political exercise that touches on the fundamental interests and concerns of both political and economic elites and the average citizen. Interventions to promote a stronger rule of law always create high-stakes winners and losers. Those in power and benefiting from the status quo are usually the ones with the most to lose from change, particularly in the short term. They are also often the people who can best determine the success or failure of the change. Their support is the most needed but often the most difficult to obtain. Those who perceive themselves as powerless, as unable to change the status quo, are generally those with the most to gain from change. Yet, where there are such significant imbalances of power, it is in everyone's long-term interest to address this imbalance.

Where people are marginalized, when they lack access to justice and basic services, and suffer from real or perceived inequalities and injustices, the failure of the state and its institutions to protect their rights, prevent discrimination, and ensure the equality of every person before the law can be a significant driver of instability and conflict.

Chapter 1, Part 1, The Role of Rule of Law in Balancing Justice and Security

Establishing a strong rule of law that protects everyone from injustice and insecurity requires the genuine willingness of government officials and members of society to hold themselves and one another accountable to the law. However, achieving this willingness on both sides can be a significant challenge. Where governments have shown an unwillingness to protect the rights of all citizens and to abide by rule of law, a lack of trust develops between those who govern and those who are governed. To create a strong rule of law, this relationship of trust must be carefully and intentionally rebuilt. Building trust and confidence between government officials and members of society will take time and patience.

The decision of a previously corrupt police officer to act with honesty and self-discipline does not require a new law. It does require a change in attitude and behavior. It is this change that will help to build trust with the public.

A rights-respecting, rule of law–abiding government does not materialize on its own. It requires the active engagement of all members of society to uphold these principles and to assist the government in creating a social and institutional rule of law culture.

Chapter 4, Part 2: Rights and Responsibilities in a Rule of Law Culture

Involvement by society can provide vital legitimacy and credibility to government-led initiatives to establish strong rule of law.

To achieve a society that embodies rule of law, a consensus must first be reached on a shared vision for a state. Identifying and agreeing on that shared vision takes time. It requires an open dialogue involving all elements of society to identify, acknowledge, and effectively respond to what people want—their values and desires, as well as their concerns and objections. The process of reaching this vision is likely to require societies to grapple with difficult issues, such as national identity, and, often, to confront a history of violence and injustice.

Chapter 1, Part 2: Defining Rule of Law

In many contexts where countries are emerging from conflict or authoritarian rule, a new or revised constitution articulates the rules, shared values, and aspirations on which a society has agreed. The constitution provides a framework for the *system of laws* that apply in a specific context. Further reforms may be needed to ensure, for example, that laws uphold the rights and freedoms enshrined in the constitution, or to define the roles, mandates, and parameters of rule of law institutions, such as protecting the independence of the judiciary.

The *legitimacy* of justice and security institutions, systems, and the officials within them comes not only from this system of laws but also from ensuring that these three entities operate and act with integrity, have the capacity to provide justice and security services for all, are seen to be credible by upholding the shared values of society, and are transparent, and that mechanisms exist for the public to hold them accountable for their actions.

Their legitimacy also derives from upholding, promoting, and protecting the rights of all people and all groups within a society. The idea of *inclusiveness*—namely, that all people are accountable to and protected by the law—is a critical component of rule of law.

Ultimately, there cannot be one universal approach to establishing rule of law. Every country struggles to establish its own rule of law vision based on the historical, political, social, cultural, and legal realities of the national *context*.

A rights-respecting, rule of law–abiding government requires the active engagement of all members of society.

The challenge for all involved is to work out how to achieve that vision. The five elements of rule of law culture provide the framework for that journey. These elements are graphically depicted in figure 1.4 and are described as follows:

There is a relationship of *trust* between the governing and the governed.
Trust is critical to the establishment of a rule of law–based society, but building trust can take generations. Building the trust necessary for a rule of law culture to take root requires state officials to be both cognizant of and adequately responsive to the actual needs and concerns of citizens. This includes not only improving the response to citizens' needs but also addressing their perceptions of the effectiveness and legitimacy of state justice and security institutions. Whether actual or perceived, failure of these institutions to provide justice and security for all can drive conflict and instability. Addressing these failings is critical to rebuilding a society and contributing to future peace and stability.

The state and society are bound by and comply with *a system of laws.*
All countries have a system of laws. Some systems are more complex than others. A single system may be made up of multiple smaller legal systems, each of varying degrees of influence and legitimacy. Regardless of its structure, the system of laws can effectively contribute to a strengthened rule of law only when most members of society believe in, respect, and generally abide by the agreed-on laws. Achieving a rule of law culture requires that laws are established through a legitimate process that ensures that the laws reflect shared values and uphold, protect, and respect the fundamental rights of all people.

There is *legitimacy* of justice and security institutions, systems, and actors.
The legitimacy of justice and security institutions and systems, and the actors (people) within them, comes not only from the law but also from ensuring that those within the system have the integrity and capacity to fulfill their tasks and are held accountable for the way in which they carry out their role in providing justice and security services to the public. These institutions and systems should also function in a transparent manner that reflects and upholds the values and rule of law vision of a society, and that ensures the participation of the public in decision-making processes that affect their lives.

Justice and security institutions, actors, and laws are *inclusive*; they recognize and respond to the justice and security needs of all persons.
The principle of inclusiveness holds that everyone—the people and their government representatives—is equal before and accountable to the law; that laws are created and administered fairly, transparently, and in a manner that respects and protects everyone's basic rights; and that all persons, no matter their financial or social status, have access to effective and efficient mechanisms to resolve their disputes. Excluding portions of the population (on the basis of ethnicity, religion, geography, or other factors) from political processes, access to basic services, or economic opportunities establishes the conditions for triggering and fueling conflict. Conditions of social exclusion, disparities in the distribution of privilege and power, perceived and actual social inequality, together with the sense of injustice that these conditions create, are all factors that have been seen to be potential predictors of radicalization and violence.

The "ideal" rule of law vision is grounded in the *reality of the context.*

Establishing a strong rule of law in any society is not achieved by cutting and pasting reform approaches used elsewhere. Understanding how best to support a strengthened rule of law culture requires a diligent inquiry into the root causes of a weak rule of law. While countries with weak rule of law may share common features, every situation is complex and unique. The response therefore must suit the specific context. Understanding the causes of a weak rule of law requires a thorough analysis of the social, cultural, historical, political, military, religious, and other dynamics that may have contributed to the situation. Understanding the causes will also require giving consideration to drivers of societal stress on domestic regional, and international levels, as well as sourcing information from multiple disciplines and subject areas of expertise beyond the justice and security sectors. For example, historians can assist in better understanding the dynamics and legacies of a conflict, and psychologists can speak to the impact of psychosocial trauma during and after conflict. Other possible sources include sociologists, anthropologists, and political scientists.

Ultimately, achieving a rule of law vision in any society involves creating an environment built on trust between those who govern and those who are governed. Within this environment, the powers of the government are limited and defined, but so too are the actions of members of the society. This recognition by both the people and their government representatives of the joint rights and responsibilities they all hold is the foundation of a society that embodies a rule of law culture.

HIGHLIGHTS:

- **The rule of law culture approach is a holistic perspective that specifically addresses the unique context of a society.**

- **A rule of law culture is grounded in five core elements:**
    - Trust between the state and society
    - A system of laws
    - Legitimacy of institutions, systems, and actors
    - Inclusiveness
    - Context

- **A rule of law culture is framed in the dynamics of people and their relationships. It is not a purely technical approach; indeed, it is mostly adaptive.**

FIGURE 1.4

The five elements of the rule of law culture "tree"

RULE OF LAW CULTURE

inclusiveness

legitimate institutions

system of laws

trust

grounded in

CONTEXT / REALITY
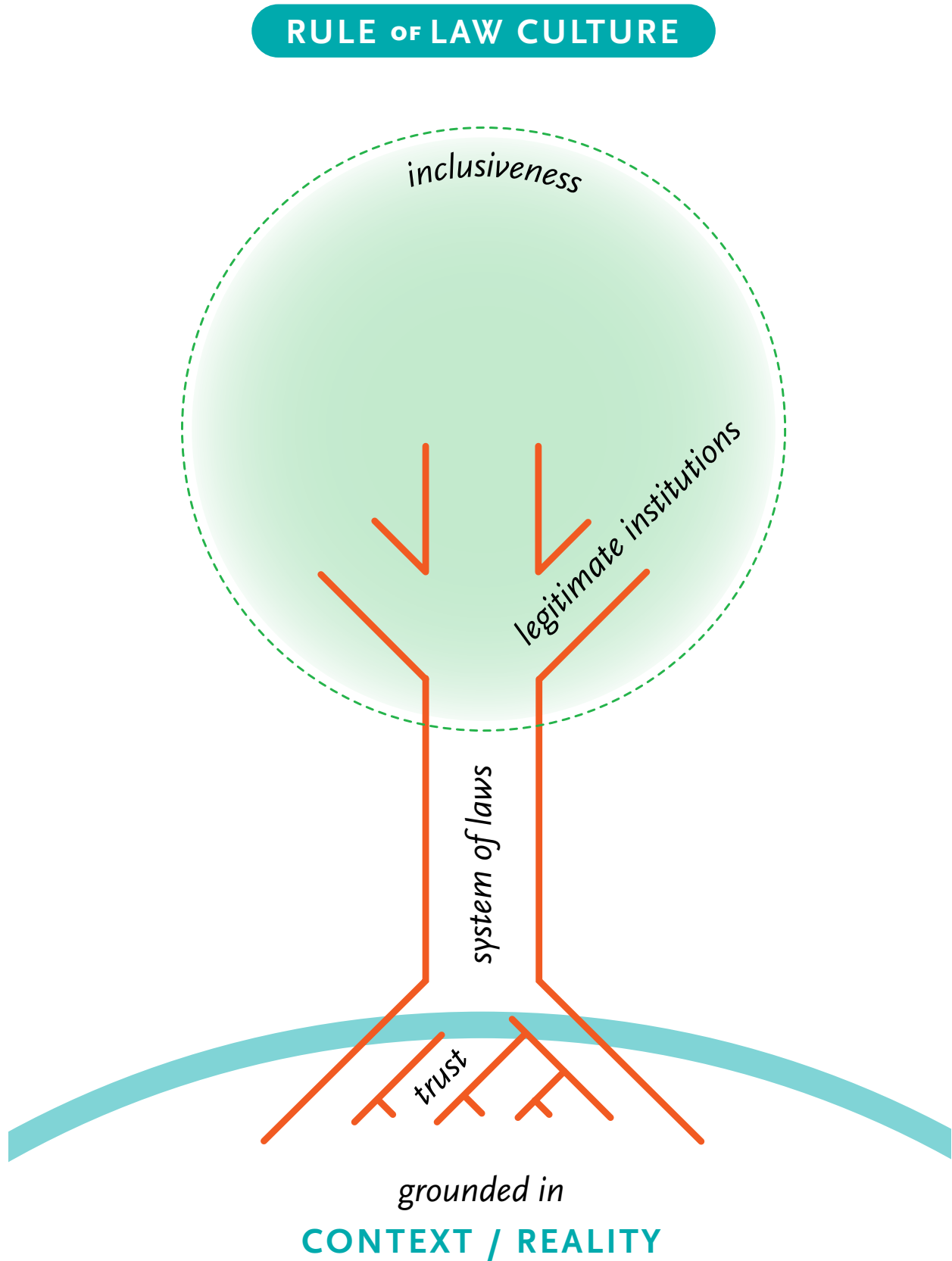
THE RULE OF LAW CULTURE IN PRACTICE

The rule of law culture approach is examined in detail throughout this guide. This approach provides the framework within which we explore how we, as government officials and members of society, can better respond to current justice and security challenges and better promote achievement of our rule of law vision.

Establishing a rule of law culture requires time and more than a little discomfort. It does not follow a linear path to success. It is resisted, because the shift often threatens deeply entrenched power dynamics and challenges political and financial interests. It tests our assumptions and requires a change in our behavior.

At the heart of this change is not a new courthouse, but a newly conceived belief held by both the state and its people that a society based on rule of law is, in fact, possible.

So what does this approach look like in practice? The experience of Palermo, the capital of Sicily, provides one example.

Taking Back Palermo,
http://www.strategycenter.org/programs/education-for-the-rule-of-law/taking-back-palermo/.

Reader Exercise

Taking Back Palermo

The following is the transcript from the "Taking Back Palermo" film (see above).

READ THE TRANSCRIPT AND CONSIDER THE QUESTIONS FOLLOWING.

"For decades, Palermo has been synonymous with organized crime, corruption and violence. Today, the capital of Sicily is the symbol of rebirth, thanks to an extraordinary process that involved political and civil leaders, members of the church, the local media and the law enforcement community. This is a story that teaches some very interesting lessons on how civil society and elected leaders can react with success to violence and intimidation.

In Sicily, organized crime is referred to as "cosa nostra", more commonly known throughout the world as the mafia. During the 70s and 80s, the mafia escalated its activities, turning the region into an international crossroads for drug trafficking. Thousands were killed on the streets of Palermo; many more were threatened and blackmailed. All this without any real reaction from political and civil society leaders.

But during the 80s, a new movement started to take its first steps. It involved young lawyers, politicians, even priests, led by a young professor, Leoluca Orlando. They organized public meetings during which they spoke out against the system of illegality, calling for a new culture, the culture of lawfulness. Pressure from this civic movement gave strength to the most courageous journalists and editors. They started to find space for stories on the role of organized crime in the local economy, in politics, in the everyday life of Palermo.

As a result, Italian politicians in Rome finally took some action, allowing prosecutors and law enforcement to fight back against the mafia. The reaction of the mafia was brutal. But the waves of violence generated the opposite reaction than the mafia expected. Instead of fear, the citizens of Palermo embraced courage. Major centers of moral authority came together to fight for freedom and democracy.

Among the strongest voices to speak against illegality was the church. The voice of the Cardinal of Palermo resounded every Sunday against crime and corruption, followed by Pope John Paul II. He decided to personally come to Sicily to say that anyone that was a member of a criminal organization was out of the family of God. And this message was reinforced by priests at the local level, who explained to citizens that there was an alternative to fear and submission. Under pressure from Sicilian and Italian citizens, the national parliament passed special laws including the seizure of mafia-owned property and the introduction of a tough prison regime for members of the organization.

In November 1993, the citizens of Palermo elected Leoluca Orlando as their mayor. Hundreds of programs were introduced to promote a culture of lawfulness in the everyday life of the citizens of Palermo. Among them, the schools' "Adopt a Monument" project that involved all primary and secondary school students. The project explained to youngsters that all areas of the city were the property and under the control of the citizens, and not of local criminals.

Another important program was conducted by *Giornale di Sicilia*, the leading daily newspaper of Sicily. Every day, it dedicated a full page to the school children who could submit articles and letters about the main issues in their city. This encouraged civic debate among youngsters and their families. The mayor then personally answered all of these articles and letters. This had an extremely positive influence on the whole community, demonstrating that relations with the city administration could be transparent and direct, without the need of corruption and special favors.

Some of the results are remarkable. Among them, the yearly murder rate in Palermo dropped from 240 in 1984 to 3 in 2000. And now, it is next to none. For decades, every time a crime was committed in Palermo, law enforcement officials would struggle to find any witness willing to testify even when the crime happened in crowded locations. Today, this does not happen anymore. The number of tourists has increased, particularly foreign visitors – up 87% since 1993.

Organized crime is not defeated in Sicily; however, the story of the last 20 years in Palermo shows that positive results and the fight against organized crime are not utopian, even in the most difficult countries."

- **What were the justice and security challenges the community of Palermo faced in the 1970s and 1980s?**

- **What was the catalyst for social mobilization in Palermo?**

- **Who advocated for and led the change?**

- **What type of resistance did these change agents face?**

- **Who were the people or groups involved directly and indirectly in the change?**

- **What role did political actors play in both the problems and solutions facing the city of Palermo?**

- **What role did the citizens play in both the problems and solutions facing the city of Palermo?**

The Palermo example shows that sustainable positive change can be possible when a holistic approach is taken in addressing weaknesses in and challenges to rule of law. The rule of law-culture approach emphasizes the need to view rule of law within a broader framework of societal change. The approach also stresses the equal role of state officials and members of society in creating a strong rule of law. The approach is people-centric; that is, it recognizes that justice and security institutions and systems are not purely the domain of the elite. These systems and institutions exist because of people and for people, and the creation or strengthening of rule of law must therefore be a public opinion issue. This approach requires us to expand our traditional rule of law language to include the role of politics, power, and, most importantly, people.

CHAPTER 1 Part 3 ENDNOTES

22   Tamanaha, "Concise Guide to the Rule of Law," 13.

Part 4 | Rule of Law and Related Concepts

This part of the chapter contains a series of primer papers written by experienced rule of law practitioner-academics. The papers prompt further discussions of and reflections on the complexity of what it means to promote a rule of law culture in today's world.

Each paper addresses fundamental questions about the relationship between rule of law and other key concepts that have been identified in the preceding sections.

George Lopez explores the interconnectedness between a strong rule of law and the provision of national and human security in "Human Security, National Security, and Rule of Law."

Colette Rausch considers how a strong rule of law vision can be critical in responding to demands for justice in her reflections on "Rule of Law and Transitional Justice."

Tom Parker describes the symbiotic relationship between rule of law and human rights, and why that relationship is important for security actors in "Rule of Law and Human Rights."

Rachel Kleinfeld and **Diane de Gramont**, in "Democracy, Good Governance, and Rule of Law," emphasize the importance of the active participation and engagement of all members of society in efforts to create a social and institutional culture of rule of law. They warn, however, in their second paper, "Politics, Power, and Rule of Law," that this process of transformation can be met with resistance, because rule of law interventions always create high-stakes winners and losers.

Taken together, the papers support a rule of law culture approach that explicitly recognizes the complex interaction of political and power dynamics in any process to strengthen rule of law, and the need for state officials and members of society not only to participate as equals in that process but also to be seen as equally important participants.

Human Security, National Security, and Rule of Law

By George Lopez*

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The concept of human security burst onto the global scene with the publication of the United Nations Development Program's *Human Development Report [HDR]* in 1994. Human security was developed as an alternative term to the traditional term 'national security' for two reasons. First, it focused on the individual as the unit of analysis. Secondly, it classified conditions such as poverty, environmental pollution, the onset of disease, hunger, threats to livelihood, and violations of human dignity, as being 'security'-related issues. This concept challenged the widely accepted notion that security meant effective *national* security and the defence of national borders from external threats. Instead, human security meant to focus security on the provision of adequate and meaningful protection to citizens, as individuals or as a collective.

In the two decades since its development there has been a division between those who cling strongly to the broad and far-reaching definition originally published by UNDP – broad constructionists – and the more narrow definition, which has focused on real or threatened violence as the key indicator of human insecurity. This latter definition has been developed and used by the Human Security Project [cited below] which defines human security to mean that individuals should live free from violence and from the fear of violence.

The more narrow definition of human security lends itself very much to compatibility with the concept of rule of law. At the first level, both notions focus primarily on freedom from and the actual guarantee that citizens not be victims of direct violence. Secondly, the stronger the legal institutions and respect for rule of law in society, the less likely that violent nongovernmental actors – whether operating on their own goals, or as veiled extensions of the national government – can threaten and undertake threats or actions of violence against minority or other potentially targeted populations. Finally, human security recognizes the reality that the greatest threats from violence occur within national boundaries and at the hands of national governments, or its agents, more than any other type of violence. At its worst, of course, these take the form of gross violations of human rights, mass atrocities, and genocide – violations that occur when there has been a complete breakdown of rule of law.

National security and human security intersect in the shared goal that individuals should be free of arbitrary and harsh violence both in their local community and as citizens of a state. In a macro sense of national security this should certainly mean freedom from internal war, genocide and displacements often associated with such large-scale violence. A strict interpretation of human security would suggest that it entails not only freedom from overt acts of violence, but also threats of violence. Thus the possibility of being besieged by terrorism or being caught as victims of on-going violence, either as designated targets or as so called 'collateral damage' would seem to fit both definitions of security.

Often human security proponents do not recognize that there is also compatibility between rule of law and national security. From one point of view, a popularly supported armed forces and nationally devised security policy to protect borders depends heavily on the respect and trust citizens have in national government as a fair and legitimate developer of law and security and the proper implementation of these in everyday life. Secondly, effective and rights respecting policing can enhance national security against threats of terrorism and internal violence which can jeopardize the very core of the state. Thus strong national security involves effective policing and armed forces governed by the law, with citizens committed to vesting confidence in all three.

At the same time human security and national security concepts can and have often been at odds in the lived experience of many nations and populations. This occurs when doctrines of national security have been used by armed forces and their supporters to justify dictatorship and military rule as necessary to protect against external threats – real or imagined. The logic of this often makes the argument that it is essential to suspend civil liberties and other rule of law rubrics now in light of the security threat. Further, proceeds the argument, the suspension of rights and rule of law is necessary in order to preserve the prospect of their reinstallation later, once the security threat has been fully contained or ended. Human security approaches challenge that logic, by showing example after example in recent history of the national security framework leading to long-term coercive repression of rights and abandonment of rule of law in order to provide the protection that these are meant to guarantee. This was the claim of the apartheid regime in South Africa to its minority white supporters and was especially invoked by generals and their civilian allies who justified their coups and harsh rule in various Latin American states from the 1970s until the 1990s.

Challenges ranging from transnational criminal networks, to the droughts effects of global warming, to the spread of deadly infectious disease teach us that rule of law is absolutely necessary to handle unprecedented crises. Rule of law is the critical and consistent framework wherein societies and their governments can have the best chance of achieving both human security and national security. And when these new challenges hurt populations and put government under stress, rule of law culture and institutions increase a state's resilience against these threats and events. They allow a society to rebound back to the ideal balance of justice and security, rather than believing that the choice is between either one or the other. Rule of law ensures societies and their government can recover from system shocks faster and without having to abandon rights or place too much focus on national security along the way.

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Rule of Law and Transitional Justice

A conversation about transitional justice with Colette Rausch*

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What is transitional justice and what are its goals?

Broadly speaking transitional justice has become a term of art, used in the rule of law, human rights, justice and security world, to mean a variety of mechanisms to address past abuses. Transitional justice looks at how a society experienced violent conflict, determining the truth about what happened and why it happened. Transitional justice goes beyond judicial mechanisms like holding perpetrators accountable and putting them in jail, or providing compensation to victims. There are also a number of mechanisms that focus on the psycho-social element, looking at the social fabric that has been ripped apart by conflict – so things like trauma counselling, monuments that people can visit, or memory museums. For instance, in Ayacucho in Peru, there is a museum of memory that contains the artefacts from their bloody conflict – everything from photos of the victims and their stories, their clothing, as well as a historical analysis of the conflict.

What is the relationship between transitional justice, justice and rule of law?

The challenge a lot of times if you look at international interventions, or the work of international organizations, is that transitional justice is often looked at as a silo of activities separate from the justice and security sector. You have the rule of law people in one camp, justice people in another, security people in their camp and then transitional justice people in their own camp, too.

Years ago, in Kosovo, the transitional justice people were trying to figure out how to hold people accountable for the past abuses. One proposal was to create a war tribunal, like the ones in The Hague, or a local tribunal. But there was a huge backlash against that proposal. People asked why you would spend so much money holding trials for a fairly finite number of perpetrators. What about the other elements of the justice system? What about preventing future human rights abuses? Looking to the past is important, but if the goal is also to try to prevent these atrocities from happening in the future, we need a strong justice and security system that is capable of doing that and also addressing the day-to-day issues, as well. The issue is not prioritizing one over the other, but looking at the system as a whole, taking a systematic approach to justice and security.

Transitional justice can't just be about a nip and tuck here or there. It is not about setting up a court, or holding a truth commission, or have a memorial, and in a couple of years you get to declare the problem is solved. This isn't how things work. I was in Guatemala five years ago, and this was more than 20 years after their violent conflict. A truth commission had been established, but even now, all these years later, they were still dealing with how to hold some of those people still actively serving in the military accountable. While they were debating how to deal with the past, literally the country was falling into disarray with criminal activity. Ironically the citizens were calling for the military to step in but because of the events of the past, the military were afraid to do so. Because they had not dealt with the past trauma effectively, which is a hard thing to do, they were unable to manage the present context.

In post-conflict environments, there is a natural desire to hold people accountable. In Nepal in 2006 after the king stepped down following a popular uprising, there was frustration and anger and calls by the public for an end to impunity of government officials. The same happened in Yemen in 2011 after the killing of protestors across the country who had taken part in the "Arab Spring."

The call for accountability can also be politically motivated too – what is sometimes alleged to be victors' justice. It is not always easy for us to determine how best to navigate these very complicated political, legal and human challenges. Further, there have been questions raised about the applicability of transitional justice mechanisms in Islamic law contexts. A lot of interesting work is being done in this area.

How can we reconcile a rule of law rights-based framework, with the non-judicial transitional mechanisms that focus on healing and rebuilding the social fabric, and which might not necessarily mean prosecuting perpetrators in the courts for rights violations? This point raises two critical questions – one, how can a country emerge from a conflict peacefully by integrating both the supporters and perpetrators and victims of the former regime? How do you do that when some people will say they don't want anyone from the former regime involved in the new system? Consider what happened in Iraq – in their rush for accountability, the Shiite-led government purged all the Baathists from their positions of power, no matter how small, leaving a void of expertise that caused instability. The process needlessly created enemies and spoilers of the Baathists, who actively worked against any peace process or transition toward stability.

So yes, there are hard decisions to make about holding people accountable after conflict. In Kosovo, people said we need the local leaders (former fighters) to help rebuild and to bring security. Yet, if the decision was made to hold them accountable for past abuses, needless to say they would be reluctant to participate in rebuilding the state. Then, the priority was security over justice. Years on, though, people are frustrated because those leaders are now controlling everything through corruption. There was a short-term gain in security, but it created longer-term insecurity as injustice remained.

It is like the issue of immunity. You can't say as a matter of absolute law that granting immunity for criminal actions is against international law. You can say it is disfavoured and the UN, for example, doesn't promote immunity. But many mediators would say that you cannot and should not remove immunity from the peace negotiator's toolbox. Sometimes you need to make hard decisions – you might need that person, the alleged perpetrator, in order for a peace process to take place. Perhaps they need to be exiled to another country now so that you can stabilize the environment and ensure protection of human rights. This doesn't mean they won't ever be held accountable – international tribunals for example, can play a role.

But we need to take the utmost of care when making such decisions, so that greater problems are not created by our actions. It's essential to look at transitional justice as just one tool of many in providing justice and security. The use of transitional justice mechanisms must be situated within this bigger context.

Rule of Law and Human Rights

By Tom Parker*

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I n the modern world rule of law and promotion of human rights are inseparable and mutually reinforcing concepts, which operate in tandem to help open societies to strike an effective balance between collective and individual interests.

So where do human rights come from? As a matter of law human rights are enshrined in treaties signed by states, which are equally binding on all state parties to a particular convention or protocol. If a state has ratified a treaty it is obliged to abide by its terms.

The Universal Declaration of Human Rights (UDHR) was proclaimed by the United Nations General Assembly on 10 December 1948 and, while it is a declaration and not a treaty, it encapsulates the belief of the founders of the United Nations that human rights are the "foundation of freedom, justice and peace in the world."

Two key treaties built on the foundation of the UDHR to give the principles set out within it legal force: the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which both entered into force in 1976. These treaties define human rights and set out the standards that have inspired more than 100 international and regional human rights conventions, declarations, sets of rules and principles.

International human rights law also meshes at the local level with domestic laws and civil right statutes, many of which actually predate international developments, in a dense interconnected web of protections. States have an obligation to bring domestic legislation in line with international law where it is applicable, but, in their day-to-day operations, state officials will of course be guided by their national legal systems.

However, should a conflict emerge between domestic practice and a state's international legal practice, officials should be aware that serious human rights abuses may expose them to international criminal liability.

The prohibition on torture and racial discrimination, the right to equality before the law, due process and the presumption of innocence, and the general legal principle that no one can be tried for an offence that was not an offence at the time the act was committed, are all considered to amount to customary international law, which means they apply to every state regardless of treaty membership, and are thus inviolable.

Many other rights protected by international human rights law can be subject to certain limitations or restrictions, where provided for by law and necessary for specific enumerated purposes. Rule of law is not without its obligations and citizens have duties both towards the state and to their fellow citizens.

For example, the right to freedom of expression enumerated in Article 19 of the ICCPR also involves "special duties and responsibilities" that place limits on that expression such as showing respect for the rights and reputations of others, the protection of national security, and the preservation of public order. You don't have the right to shout "fire" in a crowded theatre and start a panic that might put theatregoers at risk.

The scope for permissible limitations is neither wide nor generous, and state parties are not permitted to act in such a way as to effectively strip that right of any practical meaning. The burden of justification for any restriction lies with the state party to show that a certain limitation satisfies the tests of legality, necessity, reasonableness and legitimate purpose. As a general principle, states should seek the least restrictive solution to the problem and look to lift that restriction as soon as it is possible to do so.

Clearly, concepts such as reasonableness and necessity are open to different interpretation. The challenge for officials in such circumstances is how to achieve the objective they are seeking – for example, to prevent hate speech or incitement to violence, or to prevent widespread disorder – without impacting public life more broadly.

International and domestic jurisprudence can offer guidance on where to draw the line, but security threats seem to constantly evolve in new directions – weapons of mass destruction, suicide bombings, cyber-terrorism, which all pose unique challenges – so states often find themselves confronting these challenges with very little precedent to draw upon.

At such moments, it will be the core values of the state, and its political culture, that will point the way forward. On 22 July 2011 a Norwegian right-wing extremist called Andreas Behring Breivik murdered 77 people – many of them children – in the name of an Islamophobic, white supremacist agenda. Norway was shaken to its core.

The Norwegian Prime Minister Jens Stoltenberg helped to shape his country's response to the tragedy by declaring at a memorial service: "We will never give up on our values. Our answer is more democracy, more openness and more humanity." The police team investigating Andreas Breivik took this statement as their guiding principle as they pursued the case, and Norway has remained the same liberal and open society it was before the attacks.

A robust commitment to rule of law and upholding human rights will help protect the state from making missteps. It should be understood that introducing restrictions often comes with a price – a real diminution in individual and societal freedom that in turn can have a chilling effect on social interaction, creativity and commerce. Striking the right balance is a complex undertaking – getting it wrong can have far reaching consequences.

Periodically the concept of universal human rights comes under attack – typically from authoritarian-minded local elites - as amounting to little more than western cultural imperialism. In the 1970s and 1980s President Marcos of the Philippines and President Suharto of Indonesia promoted the argument that the concept of individual human

rights was antithetical to Asian and African culture. In the past decade, Al Qaeda's Osama bin Laden and Ayman al Zawahiri have similarly dismissed human rights as a western construct.

It is important to acknowledge that this sentiment exists but there are several obvious rebuttals. The ICCPR has been ratified by more than 168 states around the world from Afghanistan to Zimbabwe, which underlines its universal appeal. The adoption of regional human rights treaties such as the Inter-American Convention on Human Rights, the Arab Charter on Human Rights, and the African Charter on Human and Peoples' Rights, as well as the ASEAN Human Rights Declaration, make it quite clear that the concept of fundamental human rights also has deep local roots. International human rights law owes as much to the traditions of the great religious faiths as it does to the European enlightenment – as the Cairo Declaration on Human Rights in Islam powerfully demonstrates.

What the symbiotic relationship between human rights and rule and law means practically for law enforcement and officials on the ground is that any measure designed to uphold rule of law and promote stability – anti-corruption initiatives, counter-terrorism measures, or public order policies – must also respect international human rights law. You can't have rule of law without the protection of human rights.

Executive measures that depart from rule of law are rarely exceptional events – if officials are allowed to break the law once then it is more than likely that they will also do it again and again with increasing frequency, and with less and less justification. History is full of examples of Governments that began by adopting illegal and covert methods to fight terrorists and guerrillas, and ended by killing innocent civilians, civil society activists, media critics, and political opponents.

Furthermore, when the law is ignored in one arena – it also tends to be ignored in others. Cutting corners in the name of security often also paves the way for police corruption, unfair business practices, election fraud, and environmental degradation.

In the late 1890s British coalminers began the practice of taking a caged canary with them down into the pit to warn of carbon monoxide build up. As long as bird was alive, carbon monoxide levels were within safe limits. I tend to think of human rights as functioning in much the same way as the canary in the coalmine – if the canary is healthy, society is healthy. But if the canary becomes ill, then rule of law is most likely to be in peril too.

Democracy, Good Governance, and Rule of Law

By Rachel Kleinfeld* and Diane de Gramont*

I. BASIC CONCEPTS

Democracy, Good Governance, and Rule of Law are each multidimensional concepts. While no consensus exists on their definitions, it is possible to identify core elements of each:

Democracy signifies a political system in which citizens choose a government through competitive elections. Scholars generally agree that a minimum modern democracy requires:

1. Free and fair elections;
2. Equal rights for all adults to participate in politics as voters and candidates (with few exceptions, such as convicted felons)
3. Freedom of expression and association as well as a free press to ensure that alternative views can be heard and elections are competitive;
4. Real power held by elected representatives, so that unelected bodies such as the military, warlords, or other countries cannot override government decisions.

There are two major areas of scholarly disagreement:

1| Degree of voter control:

a. Those favouring more "representative" democracy, such as Joseph Schumpeter, believe that once people elect their representatives, those representatives can decide on policies with minimal or no citizen input. If voters disagree, they can vote their representatives out at the next election. The ability to vote representatives out of office is enough citizen inclusion in decision-making. Citizens are often seen as ill-informed or of having false ideas of what would benefit them, leading representative democracy to be portrayed as yielding better policy outcomes.

b. More direct democrats such as the "Pirate Party" in Europe and proponents of direct citizen referendums believe that democracies must be almost completely responsive to all citizens – and therefore, that democracy requires ongoing structures for citizen engagement between elections. New technological changes are enabling these more direct forms of democracy. Representational democracy is often portrayed as elitist, out-of-touch, or even anti-democratic, particularly by those in a younger generation used to greater transparency and participation in social media.

c. "Deliberative democracy" tries to bring these two forms together, by educating citizens so that representatives can see what citizen preferences would be if people were well-informed about their choices and trade-offs.

2| Ensuring Citizens Can Exercise Their Rights:

a. Most scholars believe elections need to be free and fair well before election-day so that citizens can be educated about all candidates and freely exercise their vote. Therefore, for competitive elections to occur, democracy requires a free media, free speech, freedom to organize, and freedom from political violence or coercion. It also requires that the election be fair: i.e. that it is not subject to corruption or the

buying of votes. To hold free and fair elections therefore requires some degree of rule of law to reduce political violence, coercion, and corruption.

    b. More maximalist interpreters believe that democracy requires enough economic and social equality to give all citizens an equal voice in government; a belief that can be seen in, for instance, the post-apartheid constitution of South Africa which provides guarantees for social and economic rights.

Good Governance has become the main way international donors and other development actors discuss politics in developing countries; it is a goal of many aid programs and is sometimes a condition for economic aid and loans. While donors disagree on precisely what good governance requires, it generally includes an effective bureaucracy, accountability, and transparency in government decision making, with other donors adding more of a focus on inclusiveness and rule of law criteria.

- The International Monetary Fund emphasizes the economic sides of good governance, especially public sector efficiency, financial transparency, accountability and anticorruption.[23]
- The United Nations Development Programme takes a more political view, focusing on capable, responsive, inclusive, and transparent government while referring to good governance as "democratic governance."[24]
- The UK Department for International Development also considers capable, accountable, and responsive governance as good governance, while not including democracy.[25]
- The most widely used indicators of good governance are the World Governance Indicators created by the World Bank. These include indicators of Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption.

Rule of Law has many definitions, but at its root, it is about limiting the arbitrary use of power so that states cannot act with impunity against their citizens, and citizens must also follow rules regarding how they treat each other. As an ideal, rule of law creates a relationship between society and the state so that:

- The government and all individuals are bound by laws which are published and transparent;
- All citizens are equal before the law; factors such as wealth, ethnicity, and corruption should not undermine this equality;
- All citizens have access to predictable and effective justice regardless of their resources;
- Citizens' rights are protected by law and its implementation;
- Citizens are protected by some level of law and order.

Disputes exist about whether human rights are an intrinsic part of rule of law, and what rights should be included. Minimalists favour a "rule by law" whereby laws must be enacted and prosecuted fairly, but there is no necessary human rights content to the laws, while most donor agencies include a list of rights that are in dispute even within their own countries. Others disagree on whether law and order should be included, or is a different concept. Finally, some believe that a bureaucracy that is relatively free from corruption is implicit in each of the above requirements, as are non-corrupt government, judicial, police, and penal officials, while others separate the concept of an efficient, non-corrupt bureaucracy.

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II. HOW DO THESE CONCEPTS RELATE?

Good Governance does not generally require democracy

- **Good governance** requires accountability to citizens, and sometimes inclusiveness, though most definitions stop short of requiring elections.

Democracy can exist without good governance.

- **Democracy** requires accountability, inclusion, and participation but does not always include political stability and the absence of violence, government effectiveness, regulatory quality, or a non-corrupt bureaucracy. It is possible to have a weak democracy with free, fair, and competitive elections while facing significant violence in societies and maintaining a corrupt and inefficient bureaucracy.

However, both democracy and good governance require some aspects of rule of law

- Some rule of law is required to restrain rulers and keep violence in check, so that elections can be free, fair, and non-corrupt, civil liberties can be protected, and leaders give up power after losing elections. Good governance requires government accountability, controls on corruption, and a predictable legal order: sometimes, as with the World Bank indicators, rule of law itself is considered essential to good governance.

Rule of law requires good governance

- Rule of law itself requires some aspects of good governance, such as reduced corruption, functioning bureaucracies, accountability, and law and order

But democracy both supports and undermines rule of law

- Rule of law requires some means of holding government officials accountable to citizens. Democracy is the most effective and certain method of creating accountability, but it is not the only way: for example, traditional chiefs bound by customary law and able to be deposed by other institutions that are responsive to citizens might also serve to create accountability.
- Majoritarian democracy can undermine rule of law by reducing rights for minorities. In strong, liberal democracies, institutions of justice such as the court system are often counter-majoritarian, ensuring that the rights and equality of all citizens are upheld even in the face of popular demands for "law and order" or various forms of ethnic, religious, and other majoritarianism.

III. TENSIONS

Democracy, good governance, and rule of law generally support each other. But some tensions exist within these concepts, including:

1| Majority preferences vs. individual rights.
The democratic principle of majority rule can conflict with rule of law principles of equality and civil rights, as discussed above.

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2| Local perceptions of justice and majority rule vs. international norms.
Democracy requires that governments uphold the will of the majority of their
people. But good governance tends to be based on international standards. These
international rules may conflict with domestic norms, and popular will. For example,
rule of law protects private property, including the property of international
corporations, while popular will may desire nationalization. Giving government
jobs to friends and relatives is considered corrupt by good governance standards, but
can be culturally legitimate in other places. Laws against minority rights, such as
restrictions on the rights of homosexuals, may be domestically popular while against
good governance norms.

**3| Customary and religious laws regulate action even when they are not
sanctioned by the state.**
These traditional legal systems can be a powerful limit on arbitrary government
power. But they can also serve as undemocratic blocks on elected governments, such
as when religious courts declare laws passed by elected leaders to be blasphemous.
Customary law can also hinder the equal treatment of citizens, such as women,
religious minorities, those who are low-caste, etc., in ways that undermine rule of law.
This tension between local traditions and democratic and rule of law norms are often
described as a "Western" democratic or rule of law tradition being imposed on locals.
In reality, it is usually a tension between different local views that tend more towards
majority rule, minority rights, and traditional norms.

4| Capable vs. limited government.
There is an inherent tension between an effective state and a limited state. For
instance, a weak police force is unable to protect citizens from predation from one
another or the state. However, a "strong" police force with substantial resources,
training, and weapons may itself become a threat to citizens if not constrained by
political accountability. Good governance and rule of law are both means to help a
government walk the line between capability and restraint.

IV. MOVING FORWARD

**How can supporters of democracy, good governance, and/or rule of law advance
these concepts while balancing the tensions?**

- **Encourage an active citizenry that feels responsible for democracy, good
governance, and rule of law.**
A democratic, rights-respecting government that abides by rule of law does not
happen on its own. It requires citizens who actively uphold these principles. The
mayor of Palermo, Italy, described the state and society as two wheels on a cart: they
had to turn together for the cart to move forward. Society must take responsibility for
holding its government up to these ideals, and must assist by creating a culture that
supports rule of law, good governance, and democracy. The government cannot create
these on its own.

- **Recognize that reform is not linear, and requires constant citizen involvement.**
  In countries rated high in democracy, good governance, and rule of law indices, these systems took hundreds of years to achieve. They do not precede linearly: historically, countries tend to move forward on one or more measures, generate a backlash, take a step back, and then move forward again. Often, countries advance in one area and not others. Countries also advance for the "wrong" reasons. For instance, European rulers in the Middle Ages gained a monopoly on violence and disarmed their Lords in order to increase their own power. Gradually, they provided more protection to their people so that they would have a larger economy to tax. They reduced corruption so that more of this tax income could be used by the central state. Reforms require a political motive, and do not move forward together, nor are they always pursued for the greater good. Therefore, advancing good government, democracy, and rule of law requires an active citizenry that keeps at the fight. It is never over, even in the most developed countries.

- **Leverage the interrelationships between democracy, good governance, and rule of law.**
  Some citizens and rulers may appreciate some of these concepts more than others. For instance, dictators may balk at democracy but desire some elements of rule of law in order to gain greater control over violence and corruption in their states. Leverage the fact that these goals are mutually supporting by working for one element when there is an opening for it, and using it as a wedge to push for all three.

- **However, don't allow other elements to be lost.**
  Each of these terms is multidimensional. Because they can move forward for the wrong reasons, it is dangerous to only focus on a few aspects of each. For instance, a country that is improving its law and order, but reducing human rights and increasing government impunity is not moving towards better governance and rule of law. Citizens may appreciate the improvements but must also keep up the pressure on such governments to uphold all aspects of these concepts to minimize backsliding.

- **Keep reform focused on power, not technical aspects of change.**
  It is easy to blame inefficient bureaucracies on poor technical skills, or to believe that challenges to law and order require providing more lethal equipment to a state. However, often challenges arise to law and order because a state is seen as illegitimate to its own people. Bureaucracies may be weak because they are intended for patronage, not efficiency. Democracy, rule of law, and good governance are all means to determine who holds power, how much power they can wield, and how resources are allocated – these are inherently political. If reform efforts are apolitical or technocratic, they are unlikely to be addressing the core rule of law challenges.

- **Focus on desired outcomes, not institutional means.**
  Rule of law, democracy, and good governance involve some common ends, including equality, accountability, participation, and effective government. Passing laws or altering institutions are only of use if they serve these ends: they are not ends in themselves. Elections are important because they enable people to choose their governments and hold their leaders accountable: they are of no use if opposition

candidates are banned. Efficient, modern courts are important to rule of law if they deliver justice: they can undermine rule of law if modern court facilities are given to corrupt judges. Keep reforms focused on the ends, and remember that the means are only one way to get there.

- **Focus reform on areas of social agreement.**
  Some aspects of democracy, good governance, and rule of law may be at odds with local culture – such as the equality of all people, creeds, etc. before the law. Work towards these goals – but do not start with them. Instead, start with aspects of strengthening systems that have broad public support. It is impossible to advance any of these concepts if the majority of the country feels they are undesirable, imported ideas or advancing an alien agenda.

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Power, Politics, and Rule of Law

By Rachel Kleinfeld and Diane de Gramont

THE RELATIONSHIP BETWEEN POWER, POLITICS, AND RULE OF LAW

Power is the ability to influence the actions of other people to achieve one's goals. It can draw on multiple means, including economic resources, violence, the transmission of ideas, and political control. Power can come from formal and informal sources: for instance, a warlord exercises power through violence, an oligarch through economic wealth, and a religious leader through reputation and legitimacy. These actors do not need to occupy formal political positions in order to be powerful. In democracies, votes provide power: ordinary citizens can exercise power by banding together in large numbers and supporting candidates who share their beliefs, or refusing to vote for individuals or political parties who do not share their policy preferences.

Politics is the process of making decisions about the rules that govern a society and the use of public resources. Because these choices are so important to lives and livelihoods, people deploy multiple forms of power to affect political decisions— including, in some cases, the use of violence. Choices regarding the rules that govern a society and its distribution of resources should therefore never be seen as purely technical.

Rule of law is at root a system that constrains power to reduce the arbitrariness and impunity of the powerful, such as government leaders, organized criminal networks, religious leaders, warlords, or economic elites. At the same time, it also provides rights and recourse so that the less powerful can stand as equals when seeking justice, even against their own government and influential individuals. Rule of law is contrasted with the "rule of man" in which the powerful can act according to their desires without restrictions, and those with less power have little or no means of seeking justice. Interventions to improve rule of law are therefore political: they affect who gets societal resources and what rules govern relations between the powerful and the less powerful.

IMPROVING RULE OF LAW: ADDRESSING POWER AND POLITICS

Interventions to improve rule of law are political: they affect who gets societal resources and what rules govern relations between the powerful and the less powerful. This creates high stakes winners and losers. If rule of law improves, then a warlord cannot steal land with impunity. A government official cannot extort bribes from businesses. Economic elites cannot expect legislators to pass laws favouring their businesses in exchange for campaign support. Since rule of law improvements threaten powerful interests, they often generate significant resistance to reform. Winners from rule of law improvements are frequently the less powerful, who may have trouble banding

together to support rule of law transformation. Building coalitions of those who benefit from reforms can therefore assist rule of law transformation, particularly when coalitions can include stronger individuals who also benefit from rule of law.

First-generation approaches to improving rule of law treat transformation as a technical, rather than political, process. The idea behind these approaches is that rule of law is weak because legal systems are poorly resourced and equipped and staff lack proper training and knowledge. Following this logic, international and bilateral donor agencies construct court, police, and prison buildings; provide computers and case management software to courts; supply police cars and uniforms; print legal books, and so on. First-generation programs seek to mimic the institutions of the West, assuming that if a country has the same institutions, the institutions will exercise the same checks on power. Too often, however, institutional changes are circumvented by powerful individuals' intent on maintaining their privileges. For instance, judges might have legal books, computers, and software – but are still forced to decide cases based on telephone calls from powerful politicians. Police have cars to get to the scene of the crime- but are prevented from arresting certain criminal figures who have paid off those in the higher echelons of the department.

Second-generation efforts at rule of law transformation recognize that rule of law institutions often appear to be "weak" because they are actually being used not to serve society, but to serve the interests of power holders. Leaders use police forces to harass enemies and protect their regime, rather than focusing their training and resources on protecting citizens. Courts may be manipulated so that friends of those in power do not face punishment for corruption and other crimes, while those in opposition are jailed for similar offenses. Government regulatory authorities may not be used to protect the public equally, but to punish and hound enemies through inspections, sanctions, and fines. Improving institutions therefore requires not just technical changes but changes in power relations and institutional cultures so that these institutions serve society, not just the powerful.

This realization led to a different theory of how to create change:

- It is not sufficient to demonstrate to power holders that increased rule of law is good for overall economic development, democracy, or another valued common good. Few ruling elites voluntarily give up power that helps themselves, families, and friends, in order to serve the abstract good of others.

- Some powerful leaders use specific rule of law reforms to serve their own interests. A government leader, for instance, may force lower officials to stop taking bribes in order to maximize his ability to give out favours. This may reduce violence or petty corruption in the short-term. But it does not improve rule of law if people remain beholden or dependent on unofficial favours of the powerful. Transformation requires constraining the formal and informal power of the powerful

- Therefore, if reforms are not challenging existing power structures, they are unlikely to lead to rule of law transformation. In fact, increasing resources to state institutions

such as courts and police can have the opposite effect—actually increasing the ability of the state to abuse its people. Transformation instead requires rule of law supporters to amass enough power to shift politics.

POLITICAL WILL

Based on this logic, second-generation rule of law building approaches do not assume "political will" or good intentions on the part of leaders. Instead, rule of law reformers in and out of government generally face one of three different types of situations:

1| **Powerful political leaders oppose improving rule of law.** They quell public dissent while dismissing or side-lining government officials who support change. For rule of law transformation to occur, these leaders either need a radical realignment of their political incentives that either forces them to institute rule of law reforms or replaces them with politicians more favourable to rule of law.

2| **Some government officials have a desire to improve aspects of rule of law.** However, they face a "deep state" that may be opposed, economic elites whom they need on their side, and other powerful interests who want to keep their special privileges. For rule of law transformation to occur, reform-minded government officials need to work inside the government and with the people of the country to amass political pressure for change in order to bring more power to their side while side-lining opponents.

3| **Top political leaders desire rule of law transformation, government officials throughout the administration share their beliefs, and their power rests on a popular mandate for change that allows them to pass laws through the legislature.** In these rare cases, some aspects of rule of law reform become a technical exercise. Yet ultimately too much power can corrupt even strong reformers. Moreover, supportive leaders may also eventually be replaced by less reform-oriented politicians. Government officials and social organizations thus need to be vigilant in imposing limits on government power, even when such powers are serving rule of law reforms in the near term.

Once there is political pressure for reform, countries must create structures that constrain power. Getting rid of the old system does not ensure that the new one is better. Instead, countries must begin to create checks on power, both "horizontal" – across government agencies—and "vertical" – from society itself. Such checks include increasing meritocracy in the civil service, judiciary, police, and other legal institutions, efforts to build the status and independence of courts, and laws and training to enable a free and independent media. Sometimes, this "institution-building" can appear technocratic because increasing the status and professionalism of various elements of government can involve providing training, equipment, uniforms, and buildings that make them feel professional and independent. Yet this phase is also political. At each step, those who stand to lose through a real equalizing of power are likely to fight back. While expertise may be needed

to guide the reforms, political pressure to stay on the right course must continue. Those outside the government pressing for rule of law transformation need champions inside the government with the political ability and institutional skill to carry out changes.

OPPORTUNITIES AND CHALLENGES OF POLITICAL TRANSITION

Periods of political transition are often seen as moments of opportunity. When a new set of actors gains power, there may be uncertainty about who will be in power in the future. Politicians are more likely to support checks on state powers if they think they may be in opposition one day – making the moment of transition a good time to incorporate checks on government power into institutions, laws, and constitutions.

But transitions are also a dangerous time. They often involve changes at the top without changes to basic power structures. Economic, military, and political elites often remain largely in place and resistant to change. "Deep state" security and judicial establishments may persist. These forces are likely to immediately work to entrench their power, while the new leaders are just getting started.

Meanwhile, new leaders may not be committed to rule of law. They may believe they can profit from a weak rule of law, and adopt the same corrupt or authoritarian practices as the previous regime. They may talk about rule of law to gain support, and even pass laws they have no intention of following, while consolidating their power and removing checks to their authority.

Equally common, new leaders may want to transform a country politically – and may believe that they need unchecked powers when they are trying to clean house. Many revolutionary leaders start off this way, and are helped by political followers who support their goals and give them free rein – until the regime starts to turn its autocratic powers against broader and broader swaths of citizens.

These dynamics can all occur simultaneously. Transitions are thus fraught moments, when expectations are high and are often dashed.

TRANSFORMING RULE OF LAW

Supporters of rule of law transformation need to adapt their strategies to the unique power structures and political alignment of their countries. Generally, reformers should:

1| **Gain an understanding of who wins and loses from different rule of law reforms, and how much power they have.** Determine how to craft alliances with various factions to add power to those who want a particular reform. For instance, if high levels of violence are reducing tourism, tourist businesses might contribute funds and political weight to an anti-corruption effort. This type of analysis is sometimes called a "stakeholder analysis."

2| **Build a coalition for reform so that high-level government officials, mid-level civil servants, and members of society work together.** The most effective movements tend to have allies in multiple groups both inside and outside government. For instance, in New York City at the turn of the century, the "political machine" that controlled the city was broken when churches, business leaders, and members of the middle class worked together to elect political leaders who wanted to fight corruption, and then kept the pressure on to ensure that reform-minded individuals were appointed to key government positions. Broad, public-based movements are often based in religious organizations or advocacy groups. These may partner with anti-corruption or justice sector NGOs to add expertise to political weight. But all society-based movements need partners who serve in government to effectively catalyse reform. Meanwhile, government reformers need outsiders for their perspective, information, and to keep the pressure on.

3| **Pursue reforms that institutionalize checks on power.** For instance, while opposition leaders often rely on anti-corruption campaigns to gain power, this is frequently just political rhetoric used to arrest opposition politicians, and does not result in real policy change. Smart reformers in government, working with allies in society, might instead push politicians running on an "anti-corruption" platform to commit to fighting tax evasion. This institutionalizes a general rule if implemented fairly. It also provides tax income to the government, allowing officials to pursue development projects that increase their electoral chances. Therefore, it can bring those who may not care about rule of law per se onto the side of reformers.

4| **Build a sense of pride and professionalism that acts against the politicization of rule of law institutions.** When courts, police and other institutions of justice have a strong independent sense of duty and resist being used for political purposes, it makes it harder for political leaders to maintain their impunity. Therefore, instilling a sense of pride, status, and professional identity within these institutions can help them have the courage and desire to fight politicization. Some professionalism and pride can be built through better buildings and uniforms, and trainings that emphasize a strong culture: these are simply for donors to provide, though costly. However, these trappings of professionalism will not instil real pride if the institution itself is not merit-based. Most important for long-term professionalism is undertaking the inexpensive but more political work of creating meritocratic hiring, firing, and promotion and performance incentive systems.

5| **Look for windows of opportunity.** People rarely galvanize around an abstract concept such as "rule of law". They are enflamed by a particularly egregious example of corruption, a shockingly violent act – such as when the mafia killed a well-known prosecutor in Italy, or a moment of hope – such as the election of a new government. Those moments provide short periods of time when political transformation is more possible. Groundwork to build alliances, prepare goals, and create systems to galvanize support must all be done ahead of time, so that when such a window of opportunity opens, reformers are ready to act.

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Part 5 | International Rule of Law Assistance

This part of the chapter provides a snapshot of different approaches taken to rule of law promotion by international organizations and identifies some of the key international actors involved in rule of law promotion today. It allows the reader to critique these approaches and actors, and highlights some of the principles that should guide the work of international actors.

APPROACHES TO INTERNATIONAL RULE OF LAW PROMOTION

At an international level, there is a consensus that rule of law is both inherently good and a desirable goal. As we saw earlier in the chapter, a strong rule of law can bring many benefits (e.g., peace and stability) that positively impact nationally, regionally and internationally.

Growth in international rule of law assistance by Western foreign actors seeking to promote a strengthened rule of law in countries where it was seen to be weak or nonexistent began in the years immediately following World War II. Since that time, the approach adopted by the international community has changed, just as the definition of rule of law has evolved over the decades.

The geographical reach of international assistance has expanded, as has the number and types of rule of law actors. Actors come from both the public and private sectors, and each brings its own motivations, interests, and goals. At a macro level this may include national interests such as in the 1990s with the fall of communism and subsequent focus on market-based economic reform, promotion of human rights and democracy, and focus on national security. At a micro level, for example, a private company may engage in rule of law promotion that ensures greater predictability in contract dealings and investments therefore supporting their business expansion or profit-making.

EXAMPLE

Membership in Regional Bodies

Desire for membership in the European Union (EU) was a strong incentive for many rule of law–related reforms carried out in eastern European countries in the early 2000s. According to the Copenhagen Criteria, which sets out the essential requirements for EU membership, the candidate country must have "stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities." Detailed requirements, such as an independent judiciary and accountable government, are contained in chapters 23 and 24 of the Conditions of Membership.

Source: European Commission, "European Neighbourhood Policy and Enlargement Negotiations: Rule of Law" (September 26, 2014), http://ec.europa.eu/enlargement/policy/policy-highlights/rule-of-law/index_en.htm.

EXAMPLE: Membership in Regional Bodies   *CONTINUED*

> In comparison, there are only two requirements for membership in the African Union: that the state is an African state, and that it has ratified the Constitutive Act of the African Union. The act notes in the preamble that states must commit to ensuring good governance and rule of law. Article 4(m) of the act requires that states must have "respect for democratic principles, human rights, the rule of law and good governance." Requirements for rule of law are not specified.
>
> *Source:* African Union, Constitutive Act 2001, http://www.au.int/en/about/constitutive_act.

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The dominant paradigm for the promotion of rule of law abroad is often referred to as "rule of law orthodoxy."[26] In brief, the typical elements of the rule of law orthodoxy approach include the following:

- A focus on strengthening state justice institutions, particularly the judiciary
- Interventions led by legal professionals (both domestic and foreign)
- Challenges within the legal system defined through a purely technical, law-focused lens
- Law reform activities that include reforming law-related institutions, promoting government accountability and judicial independence, and enhancing processes such as improving court management systems, building courthouses, and training judges and other legal professionals
- A very limited role for civil society, and no engagement with nonstate justice systems or dispute resolution mechanism
- A heavy reliance on foreign expertise including the use of foreign models originating from developed countries[27]

This paradigm has been criticized as being flawed and incomplete, and for generally failing to produce the results expected from the investment of billions of dollars and decades of effort.[28]

Although technical responses such as reforming laws or providing training and equipment are often very necessary, the promotion paradigm does not explore the historical, cultural, political, social, or other dynamics that have led to the current state of rule of law in a specific country. It does not require the rule of law promoter to ask, for example, why the systems and institutions are degraded in the first place, who benefits from maintaining the status quo, if there is genuine political willingness for change, and what needs to be done

to address the causal issues (rather than just the symptoms) of weak rule of law. The focus remains on state institutions, and does not consider the broader relationship between state and society.

Early in the twenty-first century, a growing recognition of the challenges and weaknesses of the rule of law orthodoxy approach led to the emergence of some new paradigms. A focus purely on state institutions failed to address the needs of much of the population, who did not or could not engage the formal justice system to resolve their disputes or access their rights. The justice needs of the poor, vulnerable, and marginalized were given greater emphasis under "access to justice" approaches. Attention shifted to recognize the role of informal, nonstate, or traditional justice and security actors, such as tribal elders or vigilante groups, who could play a crucial role in providing justice and security to the population. Community-driven, bottom-up approaches emerged, such as the legal empowerment of the poor model, which seeks to empower the marginalized and the poor to use the law to protect and realize their rights.

These approaches are gaining support across organizations, but have neither eclipsed nor replaced the rule of law orthodoxy paradigm that continues to be applied by many international practitioners. At the same time, a growing movement of rule of law reformers are now promoting a revised approach to rule of law reform, based on the idea that rule of law is not a collection of institutions and laws that can be built by outsiders, but is an inherently political activity, at the heart of which is the relationship between the state and society. This approach encourages change by focusing on addressing power structures, political dynamics, and human behavior. It considers context, culture, and relationships to be as important as technical, legal, and institutional considerations. It looks beyond the formal system to also encourage the engagement with local communities and civil society. This approach has been referred to as the "second generation approach,"[29] or, in this guide, as the rule of law culture approach. What this approach may look like in practice is discussed in the following chapters.

Despite the emergence of new approaches, international rule of law promotion still faces many challenges and criticisms.[30] At the same time, strengthening rule of law in many contexts is resisted by those elite and powerful who benefit from the status quo. There may be little political willingness of government officials to encourage and support international efforts to create change.

Chapter 1, Part 4, "Power, Politics, and Rule of Law"

Reader Exercise

Rule of Law Assistance in Albania

The following case study is based on the rule of law assistance program in Albania, designed by the US Agency for International Development (USAID) in the 1990s. The case study provides readers with an opportunity to critique and discuss the strengths and weaknesses of USAID's approach to promoting rule of law in Albania.

CONSIDER THESE SEVEN QUESTIONS AS YOU READ THE FOLLOWING CASE STUDY:

- Based on the information that follows, what, in your opinion, were the top three rule of law challenges facing Albania in 1997?

- If you were designing the rule of law program, would you have chosen to focus on the same activities identified by USAID? Why or why not?

- Why do you think USAID chose to focus on these activities?

- What impact do you think the USAID activities would have had on promoting rule of law in Albania?

- The USAID program prioritized the role of the judiciary. What other stakeholders, if any, do you think should also have been engaged to address the weak rule of law in Albania?

- How effectively did the USAID approach address the root causes of weak rule of law?

- Does the USAID approach to rule of law assistance address the five principles of a rule of law culture that we discussed earlier?

BACKGROUND INFORMATION

In April 1992, the Democratic Party (DP) came to power through democratic elections, ending approximately fifty years of communism. The former leader of the DP, Sali Berisha, was elected as the new president.

The new government launched an ambitious economic reform program, and from 1993 through 1996 the economy expanded by 8 percent or more each year. However, during that time, President Berisha became increasingly viewed as authoritarian, and his unpopularity grew. Organized crime was a major problem, and it was known that some parliamentarians were actively engaged in illegal smuggling activities. The executive branch of government had broad authority and control over the judiciary. The president removed hundreds of communist judicial staff and replaced them with his own party members and clansmen from his own region. Many of these people had no legal education and some were illiterate. Many became judges, and the rest became prosecutors or filled other legal positions.

Accusations of corruption across the government were widespread. According to public perception surveys, customs officials, tax officials, and judges were perceived to be the most corrupt government officials. Bribery was common among public servants. One public perception survey revealed that two thirds of people interviewed thought it was justified for a mother to pay a bribe to a public official to obtain a birth certificate. Another survey showed that 50 percent of Albanians admitted to having bribed an official at some time.

Judges were paid low salaries, and the temptation to accept bribes was high. There were massive delays and backlogs within the court system. Court staff were inadequately trained, and case and docket management systems were inefficient. The physical infrastructure of the courts and judicial-system buildings were in an advanced state of disrepair. The judiciary did not have copies of the Albanian laws in force at the time.

Public opinion of the judicial system was very low. One survey revealed that less than 12 percent of those surveyed had strong faith in the judicial system's ability to resolve disputes.

There were only approximately 300 lawyers in Albania (for a population of 3.3 million people). Only a small number of lawyers who were highly trained could also speak English. These few qualified lawyers were recruited to work on redrafting the entire criminal legal code, alongside European and American legal specialists. The laws, passed in 1995, were based on Western European model laws.

Hundreds of nongovernmental organizations (NGOs) were established beginning in 1992. The NGO sector had broad political freedom to operate; however, NGOs were still working to build credibility in the eyes of the public and to develop their organizational capacity.

In May 1996, general elections were held. The DP won the elections amid accusations of intimidation, manipulation, and violent suppression of peaceful opposition protests.

During 1995 and 1996, get-rich-quick investment pyramid schemes expanded rapidly, with at least the silent support of the government. Approximately two-thirds of the population invested money from their savings in these investment funds, amounting to more than US$1 billion.

When the schemes collapsed in late 1996 and early 1997, hundreds of thousands of people lost all their savings and the country slid into anarchy. As many as one million weapons were looted from government arsenals and military bases, and armed conflict broke out in March 1997. More than 1,500 people were killed, and the entire population of 1,309 prisoners escaped. An Italian-led multinational protection force was asked to help restore order.

Elections were successfully held in June 1997 and were won by the opposition Socialist Party. However, the political process from June 1997 was characterized by violence and instability. The opposition party refused to participate in parliament, which delayed moves to draft a new constitution.

USAID commenced a rule of law program in 1998 with the overarching goal of facilitating Albania's transition to a market-oriented democracy. The program identified the judiciary as being the most vital component of a legal system in supporting democratic processes and market reforms. The program planning document noted that the problems within the judiciary had limited the interest of the business community in resolving disputes through the courts.[31]

Therefore, the program logic was: "If the legal system is structured in a way that promotes independence of the judiciary, democratic policing, and due process, and if the people working in that system are highly qualified and behave ethically, . . . the constitutional order will be maintained and laws will be upheld."[32]

The program proposed to undertake the following activities:
- Improving the capacity of the Magistrates School
- Strengthening national and regional bar associations, including institutionalization of continuing legal education for their members
- Developing a sustainable system for disseminating statutes, codes, and law books to the legal community
- Training the judiciary in commercial law
- Providing assistance to a women's legal aid clinic

POSTSCRIPT

Subsequently, USAID expanded its approach to work more closely with NGOs. For example, USAID supported the drafting of the new constitution and at the same time supported NGOs advocating for specific constitutional provisions that promoted the protection of human rights and rule of law. USAID subcontracted a local NGO to advocate for a draft domestic violence bill to be passed into law. The NGO carried out activities that involved obtaining 20,000 petition signatures and raising cultural awareness of women's rights. The NGO continued its work after the contract with USAID ended.

USAID also took a multifaceted approach to addressing the issue of corruption. It placed contractors within the government to create an asset-declaration process for politicians and assisted in the establishment of a government anticorruption agency. The agency also supported the training of journalists in identifying corrupt practices and seeking out and exposing acts of corruption. USAID advised prosecutors in how better to investigate and prosecute corruption cases. It also funded a cultural change program that publicized anticorruption folksongs in rural areas and supported the building of nationwide civil society networks to raise awareness about corruption.

CONSIDER

- **In what ways did the activities described in the postscript differ from the earlier approach adopted by USAID?**

- **In what ways do these later activities reflect a rule of law culture approach?**

REFLECTIONS ON MOVING BEYOND A RULE OF LAW ORTHODOXY APPROACH

How does a rule of law culture approach – an approach that focuses on context, power, politics, and culture in equal measure to the law – differ from the traditional, or "orthodox," approach to promoting rule of law?

Fundamentally, the rule of law culture approach moves beyond treating justice and rule of law reform as a purely technical endeavor led by legal professionals. The approach recognizes that sustainable, effective change requires three things to more accurately identify feasible solutions to identified problems: a deep understanding of the specific context; a detailed analysis of the root causes of the weaknesses or barriers to rule of law; and a comprehensive analysis of the people involved (stakeholders) and their relationship dynamics.

Chapter 4, Part 1: A Systematic Approach

The rule of law culture approach goes beyond focusing only on the formal system of laws and institutions (the focus of the traditional approach) in considering the *relationship between the state and its people,* affecting power structures, addressing political resistance, disrupting mind-sets and assumptions, and seeking to change behavior.

Chapter 1, Part 3: Toward a Rule of Law Culture

Supporters of a new approach to rule of law reform argue that "failings in justice programs can often be traced to the predilection of development actors to treat challenges requiring fundamental changes in people's attitudes, perceptions, values, and behavior (as governance and legal reform invariably does) as variants on technical problems" that require technical solutions.[33]

This rule of law culture approach recognizes that focusing only on replicating Western laws, systems, and institutions is not enough to bring about sustainable, long-term rule of law change. The approach promotes the notion of *inclusiveness* by requiring an understanding of the many ways that people seek and obtain justice and of people's experiences and perceptions of these justice mechanisms, and then exploring how and when we can engage with those systems and mechanisms to promote *legitimate institutions, systems, and actors.*

In many conflict-affected and transitioning states, formal justice institutions are decimated, lacking in legitimacy, or otherwise inadequate to meet people's justice and security needs. Nonstate systems can be the primary form of law and order and dispute resolution within a community. A rule of law culture approach acknowledges the *complexity of justice systems* and the equal complexity of finding effective short- and long-term ways to promote a strengthened rule of law.

Chapter 2, Part 1: An Effective Justice System

The approach recognizes that systems are built on and for *people.* Therefore, to change the systems, there must be engagement with the people affected by them, both those within the system and those who interact with the system from the outside. There is a need to identify and support change agents and influencers who can themselves promote and support the desired change as well as address resistance to change in its many forms.

A rule of law culture approach is based on the "3 P's" – people, power and politics.

Finally, the rule of law culture approach focuses on addressing the reality of any given *context*. The approach posits that long-term change works best when it addresses power dynamics, politics, and the social, cultural, and historical dynamics and drivers of conflict in any given context. On the basis of this analysis, it is possible to conceive of relevant, realistic, and effective solutions to rule of law challenges.

EXAMPLE

Transforming the Haitian Police

"The transformation of the Haiti National Police from the least to the most trusted institution of the state over five years can be attributed to a reform plan of internal and external actors. Reform was viewed not only as an internal technical activity, but first and foremost as a political process requiring the buy-in of Haiti's leaders. Their political support ensured that financial resources were allocated to pay salaries and support day-to-day police operations. ... [T]he UN Stabilization Mission in Haiti (MINUSTAH), through its military and police presence, contributed to internal security, allowing space for a thorough police training program. ...

The Haiti National Police (HNP), supported by MINUSTAH, professionalized the force, raised the morale of its officers, and boosted public confidence. It implemented procedures to vet existing officers and recruit new ones. Including women in the police force was given a priority by both the government and police leadership. A strengthened internal affairs unit acted decisively in cases of wrongdoing, reinforcing the value of and need for officer integrity. Each officer was properly equipped to undertake his or her policing functions and received regular salary payments. The police uniform, closely associated with the corruption and human rights abuses of the past, was changed—both to prevent former officers from using their uniforms for illegal activities and, more important, as a public symbol of the change in the police force. The HNP also strengthened its management, delegated more authority to the field, and enhanced its administrative and support functions.

Haiti's population has recognized the changes in the HNP: asked in 2009 whether they had seen a change in police work over the past year, 72 percent reported a positive change, and 83 percent reported that the security situation in the country was either "a lot" or at least "a little" better than in the year prior."

Source: The World Development Report 2011: Conflict, Security and Development, p153.

CONSIDER

- **Other than technical support, what type(s) of support did the Haitian police receive?**

- **What impact did this have on the transformation of the police from the least-trusted to the most-trusted state institution in five years?**

- **What role did the international community play in enhancing the effectiveness of the Haitian police force?**

INTERNATIONAL RULE OF LAW ASSISTANCE ACTORS

Countries emerging from conflict or other disasters, or transitioning from authoritarian rule may become overwhelmed by the number of different organizations seeking to assist them in building or rebuilding rule of law. The following excerpts summarize some of the different types of these organizations, their specific mandates, their interests, and the type of support they can offer local justice and security practitioners. Understanding the international rule of law community assists local practitioners to more effectively target certain organizations, depending on the practitioner's specific needs. It is also useful to understand an organization's organizational approach to rule of law. That approach may not match the approach the practitioner, or the practitioner's community, wishes to take.

The United Nations

At least forty UN entities and specialized agencies undertake rule of law activities of some kind at the national and/or international level. There are nine main agencies, however, that provide most rule of law assistance on the ground in countries emerging from conflict. Descriptions of these agencies follows.

Since 2007, responsibility for the overall coordination and coherence of rule of law within the UN system has been with the Rule of Law Coordination and Resource Group, under the ultimate authority and direction of the secretary-general.[34] The group is supported by the Rule of Law Unit, which is tasked with "ensuring coordination and coherence among the many United Nations entities engaged in rule of law activities; developing system-wide strategies, policy direction and guidance for the Organization's activities in promoting rule of law; and enhancing partnerships between the United Nations and other rule of law actors."[35] In 2012, the secretary-general designated the Department of Peace Keeping Operations and the UN Development Programme to establish the Global Focal Point for Police, Justice and Corrections Areas in the Rule of Law in Post-Conflict and other Crisis Situations (hereafter, Global Focal Point). The Global Focal Point is a mechanism for joint UN operational country support in conflict and crisis settings.[36] The Global Focal Point partners include the UN Office of the High Commissioner for Human Rights (OHCHR), UN Women, and the UN Office on Drugs and Crime (UNODC), which are described below. The Global Focal Point aims to mobilize expertise and resources more rapidly and effectively to address complex requests for rule of law assistance.

In addition, the main UN organs, including the General Assembly and the Security Council, have essential roles in strengthening UN attention to rule of law. For example, the Security Council has the power to authorize the use of force or the establishment of UN peace operations.

Other UN entities include judicial mechanisms, such as the International Court of Justice, the ad hoc criminal tribunals (e.g., the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda) and hybrid tribunals (meaning that they are part domestic and part international, like the Special Court for Sierra Leone), and nonjudicial mechanisms, such as cross-border commissions and commissions of inquiry.

Office of Legal Affairs (OLA):

The OLA is part of the Secretariat. It provides a unified central legal service for the Secretariat and the principal and other organs of the United Nations on questions of international public and private law of a constitutional, procedural, criminal, humanitarian, treaty, commercial and administrative nature. It ensures and promotes rule of law in and through the United Nations and the proper and orderly conduct of business by its organs. It also provides trainings, fellowships, technical assistance and capacity-building seminars on international law, treaty law, commercial law and law of the sea at Headquarters and at the regional and country levels in order to promote greater awareness and understanding of international law and uniform legal standards, as well as facilitate the enactment and harmonized application of international law and standards by States.

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

OHCHR is headquartered in Geneva and is part of the Secretariat. Its aims are to work for the protection of all human rights for all people; to help empower people to realize their rights; and to assist those responsible for upholding such rights in ensuring they are implemented. Its activities include: 1) supporting human rights bodies (e.g., new Human Rights Council and the treaty bodies); 2) supporting human rights thematic fact-finding procedures (e.g., Special Rapporteurs and Working Groups); 3) ensuring human rights mainstreaming, research and analysis, methodology and training; 4) providing advisory services, technical cooperation and field activities; and 5) supporting regional and country offices, peace operations and United Nations country teams.

United Nations Development Programme (UNDP):

UNDP is a subsidiary organ of the General Assembly, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life. It is on the ground in 177 countries as of June 2012. UNDP's areas of focus include: 1) human development issues and the Millennium Development Goals; 2) poverty reduction; 3) democratic governance (including elections, strengthening of democratic institutions, and decentralization); 4) crisis prevention and recovery (including disaster risk reduction; conflict prevention; transitional governance and rule of law; DDR; armed violence reduction; and mine action); 5) energy and environment; 6) HIV/AIDS; 7) gender mainstreaming (with special partnerships with UN Women, which includes the former UNIFEM); and 8) coordination (managing the Resident Coordinator system). UNDP's Global Programme on Strengthening the Rule of Law in Crisis-affected and Fragile Situations forms the blueprint for UNDP's engagement on rule of law, justice and security in crisis contexts, supporting programmes in approximately 37 crisis-affected countries and 21 priority countries. These include joint programmes with DPKO, UNHCR, UNODC and UN Women.

United Nations High Commissioner for Refugees (UNHCR):

UNHCR falls under the General Assembly's Programmes and Funds. It has received a legal mandate by the international community to protect refugees, asylum seekers and stateless persons, ensuring that international norms are respected, particularly the prohibition of refoulement, the involuntary return of refugees to countries where they would

face persecution. UNHCR also ensures that adequate and well-coordinated assistance is available for persons of concern, and that durable solutions are found to their plight. The international community has gradually conferred new responsibilities to the agency. UNHCR has increasingly been called upon to involve itself with reintegration of returnees in their countries of origin. At the same time, UNHCR has increased its support to the collaborative effort to address the protection, assistance and durable solutions needs of internally displaced persons. Within the context of the Humanitarian Reform and the Cluster system devised in 2005 to clarify agency responsibilities in emergencies, the Inter-Agency Standing Committee has conferred onto the agency the responsibility to lead the sectors (or clusters) of protection, emergency shelter, and camp coordination and camp management in complex emergencies where there is significant internal displacement.

United Nations Office on Drugs and Crime (UNODC):

UNODC, which is part of the Secretariat, is mandated to fight against illicit drugs and serious crimes (including terrorism), and to assist countries in developing strategies to prevent crime and build the capacity of their justice systems to operate more effectively within the framework of the rule of law. It conducts a combination of normative, operational and research work, including: 1) assisting States in the reform of their criminal justice system in line with international instruments, standards and norms; 2) assisting States in the ratification and implementation of international treaties and developing domestic legislation on drugs, crime and terrorism as well as providing secretariat and substantive services to treaty-based

and governing bodies; 3) carrying out research and analytical work to increase knowledge and understanding of drugs and crime issues and expand the evidence-base for policy and operational decisions; and 4) implementing field-based technical cooperation projects to enhance the criminal justice capacities of Member States to counteract illicit drugs, crimes and terrorism.

Department of Political Affairs (DPA):

DPA is part of the Secretariat. Its aims include: 1) providing advice and support to the Secretary-General in the discharge of his global responsibilities related to the prevention, control and resolution of conflicts, including post-conflict peacebuilding; 2) providing the Secretary-General with advice and support in the political aspects of his relations with Member States and other international governmental bodies; 3) providing the Secretary-General with advice and support on electoral assistance matters and ensures appropriate consideration of and response to Member States' requests for such assistance; 4) providing substantive support and secretariat services to the Security Council and its subsidiary bodies; and 5) providing substantive support to the General Assembly and its relevant subsidiary organs.

UN Women:

The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) was created by the United Nations General Assembly in July 2010. UN Women merges and builds on the important work of four previously distinct parts of the United Nations system, which focused exclusively on gender equality and women's empowerment: the Division for the Advancement of Women

(DAW); the International Research and Training Institute for the Advancement of Women (INSTRAW); the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI); and the United Nations Development Fund for Women (UNIFEM). The main roles of UN Women are to: 1) support intergovernmental bodies, such as the Commission on the Status of Women, in their formulation of policies, global standards and norms; 2) help Member States to implement these standards, standing ready to provide suitable technical and financial support to those countries that request it, and to forge effective partnerships with civil society; and 3) hold the United Nations system accountable for its own commitments on gender equality, including regular monitoring of system-wide progress. Grounded in the vision of equality enshrined in the United Nations Charter, UN Women works on issues including the elimination of discrimination against women and girls; the empowerment of women; and the achievement of equality between women and men as partners and beneficiaries of development, human rights, humanitarian action and peace and security.

United Nations Children's Fund (UNICEF):

UNICEF is a subsidiary organ of the General Assembly and is mandated to advocate for the protection of children's rights, to help meet their basic needs and to expand their opportunities to reach their full potential. It is guided by the Convention on the Rights of the Child and strives to establish children's rights as ensuring ethical principles and international standards of behaviour towards children. Its areas of focus include: (a) young child survival and development; (b) basic education and

gender equality; (c) HIV/AIDS and children; (d) child protection: prevention and response to violence, exploitation and abuse; and (e) policy advocacy and partnerships for children's rights.

Department of Peacekeeping Operations (DPKO):

DPKO was formally established in 1992 as part of the UN Secretariat, but has roots extending back to the first United Nations peacekeeping operation in 1948. The primary function of DPKO is to provide political and executive direction to United Nations peacekeeping operations by planning, preparing, managing and directing peacekeeping operations in order to effectively fulfil their mandates under the overall authority of the Security Council and General Assembly, under the command of the Secretary-General. DPKO is headed by the Under-Secretary-General of Peacekeeping Operations. DPKO's Office of Rule of Law and Security Institutions (OROLSI) was established in 2007 to provide an integrated and forward-looking approach to United Nations assistance in rule of law and security entities. OROLSI unifies police, justice, corrections, mine action and disarmament, demobilization and reintegration, as well as new security sector reform functions, primarily in support of United Nations peacekeeping operations, as well as globally with regard to police and corrections in the context of countries without peacekeeping missions.

■ END EXTRACT

UN Rule of Law Activities

Some examples of UN rule of law activities globally include:
• Drafting and implementing national justice and security strategies and development plans
• Promoting legal reform
• Promoting transitional justice
• Strengthening of police and other security and justice institutions
• Supporting gender justice
• Promoting justice for children
• Combating organized crime, including anti-trafficking
• Drafting constitutions
• Promoting access to justice
• Strengthening legal awareness and empowerment
• Furthering research, including documenting lessons learned and best practices, and developing guidance materials
• Training UN personnel

UN Funding

The United Nations obtains its funding from the mandatory contributions of member states.[37] According to article 19 of the UN Charter, a member state in arrears in the payment of its contribution in an amount that equals or exceeds the contributions due for two preceding years can lose its vote in the General Assembly. An exception is allowed if the member state can show that conditions beyond its control contributed to this inability to pay.

When states do not pay their dues, the United Nations cannot work to its fullest capacity. When there is a shortfall, the United Nations may resort to voluntary or extra-budgetary contributions to finance specific activities.

UN peacekeeping operations are financed by a separate budget that is now larger than the UN regular budget. The UN regular budget for 2014–15 was approximately US$5.5 billion.[38] The UN peacekeeping operations budget for the fiscal year 2015–16 is US$8.27 billion.[39] According to the UN peacekeeping website, this is less than half of 1 percent of world military expenditures (estimated at US$1.747 billion in 2013).[40] Peacekeeping budgets are funded by member states, but the largest burden is placed on the permanent members of the UN Security Council: China, France, the United Kingdom, the United States, and Russia.

UN agencies such as the UN Development Programme and the UN Children's Fund have separate budgets funded by voluntary contributions from member states and the general public. Voluntary funding is also sought for humanitarian assistance where appeals can capitalize on public concern over natural or human-made disasters.

Voluntary funding means that crises that attract significant public attention or enjoy a high political profile receive adequate resources, while less-publicized tragedies are generally underfunded.

OTHER INTERNATIONAL RULE OF LAW ASSISTANCE ACTORS

International Organizations

The UN is an international organization, meaning that it is comprised of governments from many different countries, and it is established by a treaty agreed to by these countries. Beyond the UN, there are a range of other international organizations that also provide rule of law assistance around the world.

The *International Organization for Migration (IOM)*55 works for humane and orderly migration. In terms of rule of law assistance, it focuses on counter-trafficking, complex land and property issues, and victim reparations after conflict.57 IOM has both regional and country offices.

The *Organizations for Economic Cooperation and Development (OECD),* through its Development Assistance Committee, focuses on issues of justice and security reform in developing and conflict-affected countries (although it does not have field presence in countries).

Another two rule of law-focused inter-governmental organizations of note are the *Institute for Democracy and Electoral Assistance (IDEA),* which provides constitution-making assistance and the *International Development Law Organisation (IDLO),* which is committed to enabling governments and empowering people to reform laws and strengthen institutions.

An important hybrid organization should be mentioned here: the *International Committee of the Red Cross (ICRC).* The ICRC is a private association under Swiss law, but its functions and activities are mandated by the international community. The ICRC has a mandate to visit detainees and inspect detention facilities during conflict and in situations of violence. It also provides prison reform assistance in conflict-affected countries.

Regional Organizations

Regional organizations are international organizations, whose member-countries all come from a specific region. Regional organizations have become increasingly more involved in rule of law assistance. Regional organizations tend to focus their efforts on their region or countries within their membership, with the exception of the European Union, which provides rule of law assistance around the world.

As part of efforts to promote the rule of law, regional organizations may conduct peacekeeping missions with the UN. Some regional organizations will undertake one-off rule of law projects, while others have in-country offices and provide rule of law assistance directly either to the government or civil society in a conflict-affected country. The European Union even has specific rule of law focused field missions in Kosovo and Afghanistan, while other missions such as the mission in Libya work on rule of law related issues as part of a broader mandate.

Legislative drafting and ensuring consistency of legislation in a region, for the purpose of prosecuting transnational crimes, are important elements of rule of law assistance for some regional organizations. For example, the Commonwealth, the Organization for

American States (through the Justice Studies Center of the Americas), the Caribbean Community (CARICOM), and the Pacific Islands Forum (through its Secretariat) work to provide legislative drafting assistance to their members in the area of rule of law reform.

The following list is a non-exhaustive list of regional organizations that provide rule of law assistance in one form or another:

African Regional Organizations
   The African Union

Arab Regional Organizations
   The Arab League
   Organization of the Islamic Cooperation

Asia-Pacific Regional Organizations
   Pacific Islands Forum

European Regional Organizations
   The Council of Europe
   The European Union (EU)
   The Organization for Security and Cooperation in Europe (OSCE)

Latin American Regional Organizations
   The Organization of American States

Other
   The Commonwealth
   The Caribbean Community

Multilateral Development Banks (International and Regional)

Multilateral Development Banks are international organizations because they are inter-governmental (comprised of a range of country member-states) in nature. The multilateral development banks provide loans and grants to developing and conflict-affected countries to promote economic development and reduce poverty. They also provide "professional advice for economic and social development activities in developing countries."

The growing belief that poverty can be defined broadly to include a lack of justice and rule of law, in addition to the belief that rule of law is necessary to support economic development and private sector development, led to the multilateral development banks engaging in rule of law assistance from the 1980's onwards. The World Bank is the most well know of the multilateral development banks. Its rule of law assistance activities have expanded over the years from focusing solely on the development of state institutions and laws to working with civil society and "legal empowerment" activities. It has country-offices in more than 100 countries.

In addition to the World Bank, there are also regional development banks, including the Inter-American Development Bank, the Asian Development Bank, the Caribbean Development Bank, the European Bank for Reconstruction and Development, and the African Development Bank. Both the Asian Development Bank and the African Development Bank have begun to focus on rule of law and access to justice. They both have offices in developing and conflict-affected countries.

Bilateral Donors

Countries that provide rule of law assistance directly to another country are called "bilateral donors". Depending on the country in question, assistance can come from the Ministry of Justice (or Department of Justice), the Ministry of Foreign Affairs or its equivalent, the Ministry of Defense, or another Ministry. With most bilateral donors, there is usually more than one Ministry or Department providing assistance to a conflict-affected country. There can even be multiple offices within one Ministry or Department providing assistance (that is often not coordinated). This can be very confusing for those in country because these ministries or departments

can be pursuing different approaches and have different priorities. For example, the United States has seven Cabinet level departments and twenty-eight agencies, bureaus, and offices involved in rule of law reform, from the Department of Defense to the Department of the Treasury.

In addition, many countries have a Ministry or Department (usually within the Ministry of Foreign Affairs) dedicated to providing development assistance.

Examples of development ministries or departments that are particularly active in providing rule of law assistance are:

United States
> The US Agency for International Development (USAID)

United Kingdom
> The UK Department for International Development (DFID)

Sweden
> The Swedish International Development Cooperation Agency (SIDA)

Belgium
> The Belgian Development Agency (BDA)

Denmark
> The Danish International Development Agency (under the Danish Ministry of Foreign Affairs)

Ireland
> IrishAid (under the Irish Department of Foreign Affairs and Trade)

Germany
> Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ)

Switzerland
> The Swiss Agency for International Development and Cooperation

Norway
> Norwegian Agency for Cooperation

Japan
> Japan International Cooperation Agency

In Sweden, there is also a government agency devoted entirely to working in conflict-affected countries – the Folke Bernadotte Academy.

Some bilateral donors will have their own offices in country, while others will be based at the Embassy of their home state in the country they are working in. In some cases, as will be discussed below, some bilateral donors will contract the implementation of their projects to private consulting firms, universities, or international non-governmental organizations, which may or may not have a country office.

International Non-governmental Organizations, Foundations, and Others

Non-governmental organizations (NGOs) can be nationally focused or internationally focused. NGOs, whose mandates are not limited to a particular country, are called "international NGOs." Each international NGO has its own area of focus. Some may be dedicated to helping provide legal assistance to poor people, while others may be focused on anti-corruption efforts, for example. Some international NGOs use the services of volunteer lawyers (e.g., Lawyers Without Borders), who have full-time jobs in their home countries but who travel for short periods of time to conflict-affected countries to provide assistance. Other international NGOs have full-time staff.

Examples of international NGOs that provide rule of law assistance include the following:

- The American Bar Association provides legal reform assistance with a special focus on working with lawyers and bar associations.

- Amnesty International undertakes research and advocacy on human rights abuses.

- Article 19 works on the defense of the freedom of expression and the freedom of information.

- The Association for the Prevention of Torture focuses on upholding human rights in places of detention.

- Avocats Sans Frontieres (Lawyers without Borders) provides free assistance on rule of law, capacity building, and access to justice.

- Human Rights Watch undertakes research and advocacy on human rights abuses.
- International Legal Alliances – Microjustice for All focuses on delivering legal assistance to the poor as well as ensuring they know their rights.
- The International Bar Association seeks to shape the future of the legal profession around the world (includes a Human Rights Institute).
- The International Corrections and Prisons Association provides assistance in prison reform around the world.
- The International Legal Foundation assists conflict-affected countries to set up public legal aid programs.
- International Rehabilitation for the Victims of Torture focuses on the prevention of torture and the rehabilitation of torture victims.
- International Senior Lawyers Projects provides volunteer legal services by senior lawyers to assist on legal reform programs.
- No Peace Without Justice works on the promotion of human rights, rule of law, and international justice.
- Penal Reform International works on prisons and criminal justice reform.
- The Public Interest Law and Policy Group provides free legal assistance to states and governments.
- The Peace and Justice Service (Servicio Paz y Justicia en America Latina) focuses on truth-finding and justice in the process of democracy building in Latin America.

It is also worth mentioning quasi-NGOs that are NGOs but also have governmental status. For example, the United States Institute of Peace is a US federal institute and an NGO. There are also many foundations that are working on rule of law. A foundation, like an NGO, is non-governmental in nature. It is established to make grants in a particular field. Foundations such as the Asia Foundation, the Carnegie Endowment for International Peace, the Ford Foundation, the MacArthur Foundation and the Open Society

Foundations all fund projects related to rule of law, justice, and security. Finally, universities can also provide rule of law assistance. Universities and international non-governmental organizations may receive their funding to provide rule of law assistance from private sources like foundations. In addition, they can receive funds from bilateral donors.

Private Firms and Corporations

With more and more money being invested into rule of law assistance, the for-profit sector saw an opportunity. Existing businesses were either expanded to include overseas rule of law assistance or businesses were established dedicated to implementing rule of law assistance projects in developing and post-conflict countries.

Private firms and corporations are increasingly being used by bilateral donors to implement their rule of law projects. For example, the US Agency for International Development and the UK Department for International Development rely heavily on private firms to implement projects. These firms will go through a competitive tender process in order to win the bid for a particular project. The so-called "funder" (the bilateral donor) will specify the tasks that it wants the firm or corporation to undertake with the money it has assigned for the project. The funder will oversee the implementation of the project, and the firm will be required to report periodically on its performance. The firm may hire full-time project staff and have an office in a conflict-affected country. In the alternative, its staff may travel back and forth to the country in question. It can be quite confusing for those in country to distinguish between private firms and government agencies.

■ END EXTRACT

CHAPTER 1 Part 5 ENDNOTES

26   See, for example, Stephen Golub, "A House without a Foundation," in *Promoting the Rule of Law Abroad: The Search for Knowledge*, ed. Thomas Carothers (Washington, DC: Carnegie Endowment for International Peace, 2006).

27   Ibid., 109.

28   Ibid.; Thomas Carothers, "The Rule of Law Revival," 77 *Foreign Affairs* (1998): 95–106; and Vivienne O'Connor, *Practitioner's Guide: Understanding the International Rule of Law Community, Its History, and Its Practice* (Washington, DC: INPROL, June 2015).

29   See, for example, Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Washington, DC: Carnegie Endowment for International Peace, 2012).

30   O'Connor, *Understanding the International Rule of Law Community.*

31   USAID Albania, USAID/Albania Strategic Plan FY 1998-2002, May 1998: 89.

32   USAID Albania, USAID/Albania Strategic Plan FY 1998-2002, May 1998: 90.

33   Deval Desai, Deborah Isser, and Michael Woolcock, "Rethinking Justice Reform in Fragile and Conflict-Affected States: The Capacity of Development Agencies and Lessons from Liberia and Afghanistan," in *World Bank Legal Review*, vol. 3, *International Financial Institutions and Global Legal Governance*, ed. Hassane Cisse, Daniel Bradlow, and Benedict Kingsbury (Washington, DC: World Bank, 2011).

34   See Report of the Secretary-General, "Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law," S/2006/980, S/2006/980/Corr.1, December 14, 2006, http://www.unrol.org/article.aspx?n=Rule%20of%20Law%20Coordination%20and%20 Resource%20Group.

35   See Report of the Secretary General, "Strengthening and Coordinating United Nations rule of law activities," A/63/226, 6 August 2008, [48].

36   Global Focal Point, "Global Focal Point: Police, Justice & Corrections Fact Sheet," February 2015, http://www.undp.org/content/ dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Fact_Sheet_Global_Focal_ Point_for_Police_Justice_and_corrections_Feb2015.pdf.

37   See, for example, UN Secretariat, "Assessment of Member States' Contributions to the United Nations Regular Budget for the Year 2015," ST/ADM/SER.B/910, December 29, 2014.

38   UN General Assembly, "Programme Budget for the Biennium 2014–2015," A/68/6/Add.1, 110, April 22, 2014.

39   UN General Assembly, "Approved Resources for Peacekeeping Operations for the Period from 1 July 2015 to 30 June 2016, Note by the Secretary-General," A/C.5/69/24, 3, June 26, 2015.

40   UN Peacekeeping, "Financing Peacekeeping," http://www.un.org/en/peacekeeping/operations/financing.shtml.

Part 6 | Guiding Principles for the International Rule of Law Community

What are some of the challenges you have experienced in working with or observing the work of international actors in your own context?

Common criticisms of the international rule of law community include:[41]
- Their priorities are driven by donor interests, not the actual needs of the community
- They do not share information, resulting in inadequate coordination
- Their organizations overlap or duplicate their work, resulting in wasted resources
- They lack a comprehensive strategy
- They do not understand the complexities and dynamics of the context
- They try to lead reforms rather than facilitate local ownership
- They are untrustworthy or dishonest

CONSIDER

What advice would you give the international community to guide their approach to rule of law assistance?

Guidance Note of the Secretary-General on the United Nations Approach to Rule of Law Assistance (2008) details eight guiding principles for UN rule of law activities that apply in all circumstances, including in conflict, postconflict, and development contexts. The full text in French and English can be found at: http://www.unrol.org/doc.aspx?doc_id=2124.

This is a tool for holding UN partners accountable for their actions in promoting rule of law. The principles can be summarized as follows (but note that this list is not exhaustive):
- Base assistance on international norms and standards
- Take account of the political context
- Base assistance on the unique country context
- Advance human rights and gender justice
- Ensure national ownership
- Support national reform constituencies
- Ensure a coherent and comprehensive strategic approach
- Engage in effective coordination and partnerships

For a more detailed explanation of these principles, see O'Connor, *Understanding the International Rule of Law Community*, 27–32.

CHAPTER 1 PART 6 ENDNOTE

41   O'Connor, *Understanding the International Rule of Law Community*, 23–26.

The Justice System

The Justice System

This chapter explores the key components of an effective criminal justice system and the relevant institutions and individuals involved in the provision of justice and security. The chapter emphasizes the potential similarities between and the uniqueness of different domestic legal systems and provides some basic tools to begin the process of analyzing a specific context.

CHAPTER HIGHLIGHTS:

- The elements that make a justice system effective

- Understanding how systems work and recognizing the difference between the parts and the whole

- The criminal justice process and its components

- The key justice and security actors and their roles in the justice process

- The different lenses and experiences of the justice system

Contents

Part 1 | An Effective Justice System

UNDERSTANDING THE JUSTICE SYSTEM

A system that provides justice to all members of a society is a fundamental part of promoting a rule of law culture. There is, however, no perfect justice system model that can be applied to ensure a rule of law culture. Certainly, no country today has a perfect justice system. But all countries do have a domestic system for people to resolve their disputes and address their grievances. This system can be complex, untidy, and often inconsistent.

For promoters of a rule of law culture, understanding how a specific system works in practice, its different elements, and the various people and institutions involved in it is a critical first step in the process of identifying what an effective system should look like in a specific country context. This understanding allows us to identify the barriers to achieving an effective system and the steps that can be taken to promote an effective system that can support, uphold, and foster a strong rule of law culture.

CONSIDER

- **What does it mean to have an effective system?**
- **What are other words we could use instead of "effective"?**

An effective system is many things: It upholds and promotes the core elements of a rule of law culture. It operates in a manner worthy of people's *trust*. It is seen to be, and in practice is, *legitimate* in the eyes of members of society. It is staffed by people, such as judges and police, who are technically capable and disciplined and who uphold the values of the system. It applies to *all people* and ensures that everyone is treated fairly and equally before the law. It ensures that the *laws* applied and the decisions reached are predictable, and that processes and procedures are transparent, known, and properly applied. It is efficient, impartial, fair, and *accessible* to all people. It is adequately resourced with sufficient infrastructure and staff to respond to the *actual needs* of the society it serves. It suits the social, cultural, political, and economic *realities of a context.*

CONSIDER

What other expectations do we have for an effective justice system?

Why do we want an effective system?
- To protect, uphold, and promote the basic rights of all people, including victims and accused persons
- To protect, uphold, and promote the concept of a rule of law culture
- To provide nonviolent means of addressing grievances
- To hold all people accountable for the harm they cause others
- To promote peace and stability through the peaceful resolution of conflict
- To provide an impartial, fair mechanism for addressing grievances within society

SEEING THE SYSTEM AS A WHOLE

For promoters of a rule of law culture, being able to see and understand the justice system in its entirety—including its functions, institutions, and legal frameworks—makes it easier to begin the process of analyzing why the system is not operating effectively and what needs to be done to improve its effectiveness.

The justice system is made up of many interconnecting parts. Changes in one part of the system, whether positive or negative, have an impact on other parts of the system. For example, enhancing the capacity of police to make arrests cannot alone effectively contribute to a strengthened rule of law if there are no modern laws to be applied, no humane and properly resourced and supervised detention facilities in which to hold those arrested, no functioning judiciary to try an accused lawfully and expeditiously, or no defense lawyers to represent them.

EXAMPLE

Rubik's Cube Think of the criminal justice system as being like a Rubik's Cube. Our goal is to have each side of the cube in one color. Achieving that goal is not always easy.
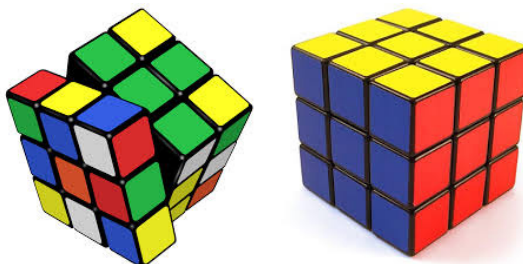
CONSIDER

What is the impact of making a turn of the cube?

ELEMENTS OF THE JUSTICE SYSTEM

Let us begin by considering the state, or formal, justice system. Every country has a formal justice system, although in countries affected by conflict this system may be weak or virtually nonexistent.

The diagrams in this chapter (see figures 2.1 to 2.8) focus specifically on the criminal justice system. Justice issues, however, are not limited to matters that fall within the criminal realm, and include civil law and administrative law matters. Therefore, the chapter also discusses justice systems more broadly.

CONSIDER

Look at figure 2.1 on the following page.
What are the elements that make up your formal criminal justice system?
For example, where would "Arrest" or "Sentencing" go on this diagram?

FIGURE 2.1

The criminal justice process

criminal justice process

pre-trial

adjudication

sentence

state justice

ALLEGED CRIME

?
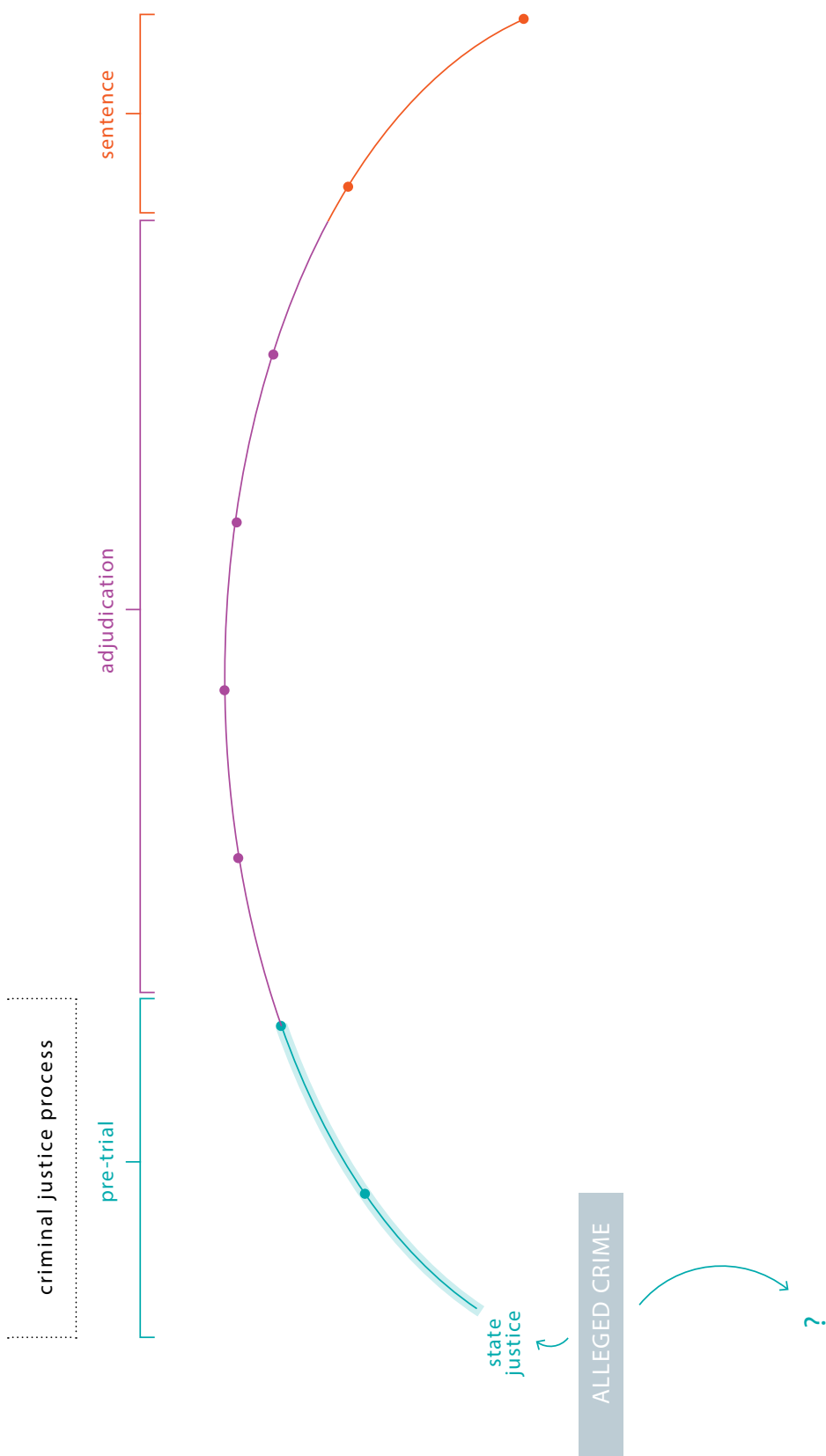
FIGURE 2.2

Elements of the criminal justice process

criminal justice process

pre-trial

confirmation
of charge

adjudication

sentence / prison

state
justice

arrest

investigation

detention

criminal charge

(plea)

guilty
plea

trial

appeal

conviction

appeal

sentence

prison

ALLEGED CRIME

non-state
justice
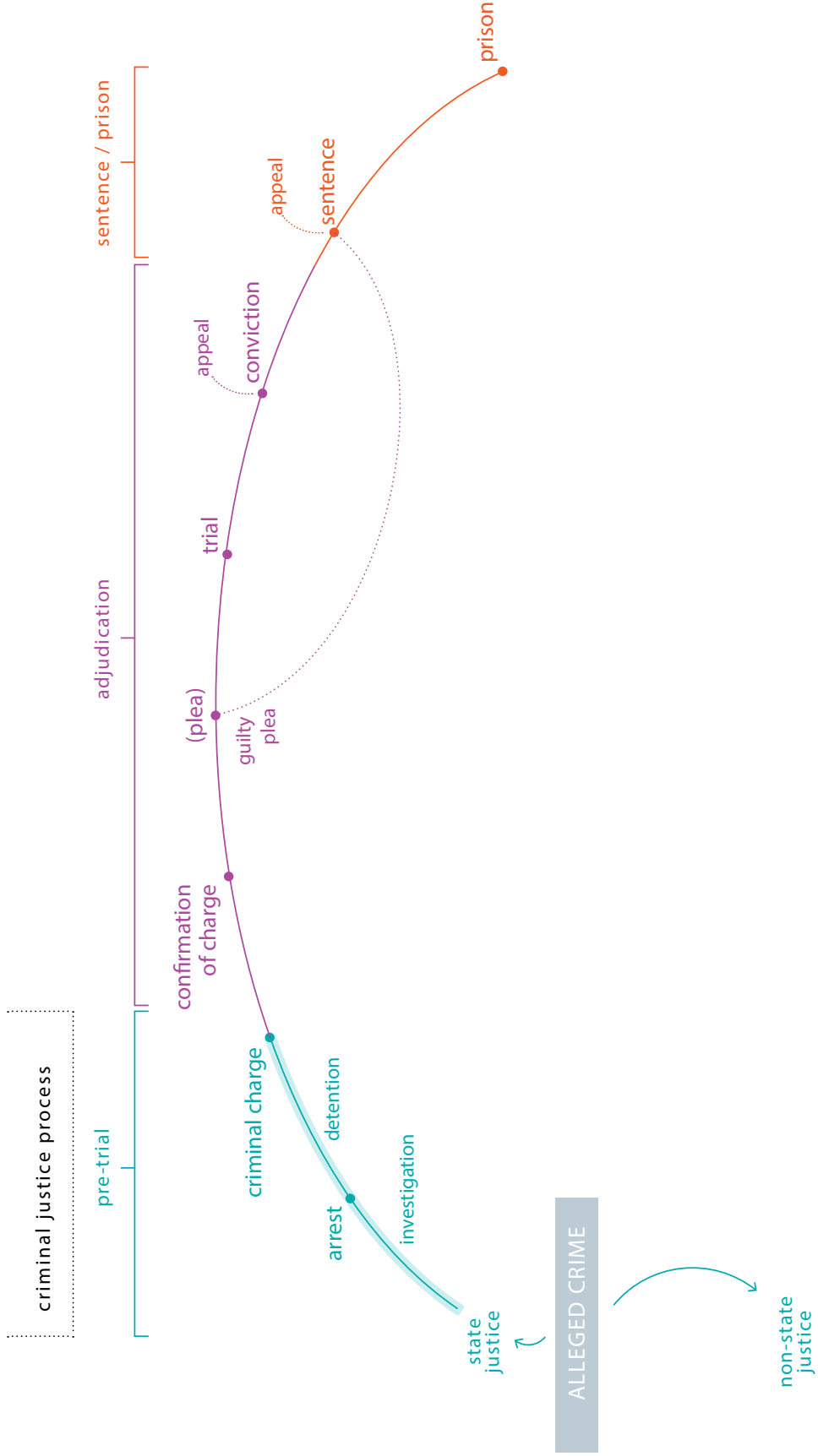
Compare your system with figure 2.2, which provides an overview of the various potential elements of the criminal justice process from both a civil law and a common law perspective. Not every system has all these components, and even systems that share a legal tradition, such as a civil law tradition, may have some differences.

Chapter 2, Part 2, Formal Legal Systems

INSTITUTIONS AND ACTORS WITHIN THE JUSTICE SYSTEM

A justice system is made up of a wide range of organizations, institutions, and agencies, which themselves are managed, operated, and staffed by individuals.

CONSIDER

- **Which institutions and individuals are involved in the delivery of justice?**

- **Is it only government officials who can provide justice?**
  What nonstate actors or institutions might have a role?

- **What about the public?**
  What role do members of society have in the justice system?

- **What involvement might security actors have in the justice system?**
  The police, for example, are mandated to both prevent and detect crime, and to maintain public order. Nonstate security groups, such as militias or vigilante groups, may also play a role in dispensing justice in their communities.

When people think of the justice system, they usually think of the institutions and actors that *deliver* justice (e.g., the courts or the police; see figure 2.3). This is because those who deliver justice are those who are most visible to ordinary people in their daily lives.

However, the delivery of justice is just one function of the justice system; there are many other intersecting and inter-reliant functions, including policy and law making, management and budgeting, oversight and accountability, and education and training, depicted in figure 2.3.

FIGURE 2.3

Functions of the justice system

In addition, as we saw in chapter 1, the justice and security services are integrally connected. Therefore, when we analyze the justice system, we should consider the role of both justice and security organizations, as well as institutions and individuals.

Figures 2.4–2.8 explore some of the justice, security, state, and nonstate institutions, organizations, and individuals that may be involved in the various functions of a justice system. Not all actors exist in every context, and the lists are not exhaustive.

More detailed descriptions of the functions of the justice system, and of some of the relevant actors within the system, follow the diagrams.

FIGURE 2.4

The delivery function of the justice system and its actors
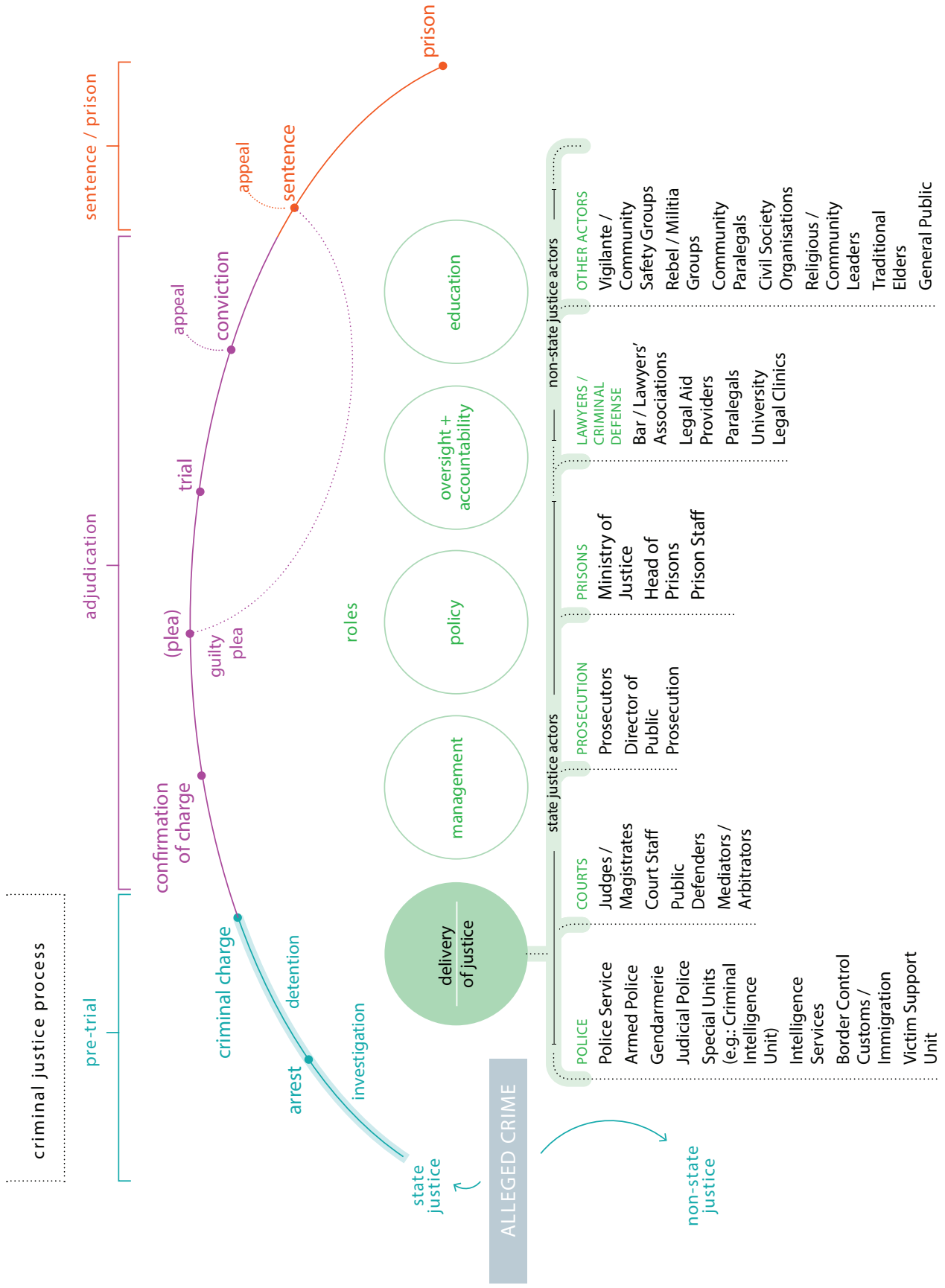
FIGURE 2.5

The management function of the justice system and its actors

FIGURE 2.6

The policymaking function of the justice system and its actors

criminal justice process

pre-trial

criminal charge
arrest
investigation
detention

confirmation of charge

adjudication

(plea)
guilty plea

trial

conviction
appeal

sentence / prison

appeal
sentence

prison

state justice
non-state justice

ALLEGED CRIME

roles

delivery of justice
management
policy
oversight + accountability
education

state justice actors

EXECUTIVE
Head of State
Council of Ministers / Cabinet
Ministry of Justice
Ministry of Interior
National Security Council

LEGISLATIVE
Parliament
Parliamentary Committees
Law Reform Commission

non-state justice actors

OTHER ACTORS
Bar / Lawyers' Association
Civil Society + Interest Groups
Religious + Community Organisations
Think Tanks
Academia + Universities
Media
General Public

The oversight function of the justice system and its actors

criminal justice process

pre-trial

confirmation of charge

adjudication

sentence / prison

state justice

criminal charge

arrest

detention

investigation

(plea)

guilty plea

trial

conviction

appeal

sentence

appeal

prison

ALLEGED CRIME

non-state justice

roles

delivery of justice

management

policy

oversight + accountability

education

state justice actors

non-state justice actors

EXECUTIVE
Head of State
Council of Ministers / Cabinet
Line Ministries

LEGISLATIVE
Parliament
Parliamentary Committees

COURTS

INDEPENDENT BODIES
Ombudsman
Human Rights Commission
Audit Office
Anti-Corruption Commissions
Public Complaints Commissions

INTERNAL BODIES
Internal Audit Units
Inspectors General
Departments of Internal Affairs
Judicial Council

OTHER ACTORS
Bar / Lawyers' Association
Civil Society Groups
Religious + Community Leaders
Think Tanks
Academia + Universities
General Public

FIGURE 2.8

The education function of the justice system and its actors
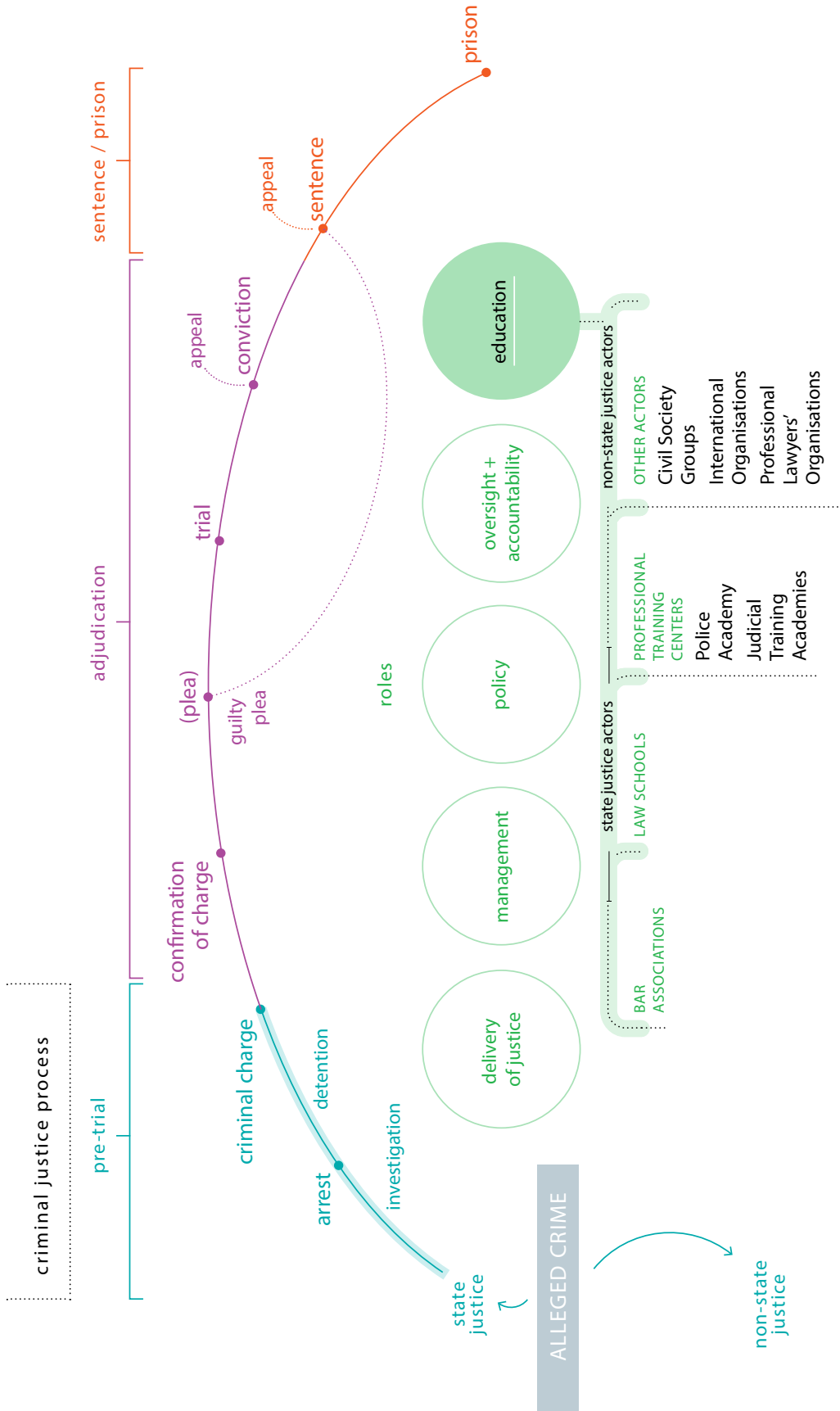
criminal justice process

pre-trial

adjudication

sentence / prison

criminal charge

confirmation of charge

(plea)
guilty plea

trial

conviction

appeal

sentence

appeal

prison

investigation

arrest

detention

state justice

ALLEGED CRIME

non-state justice

roles

delivery of justice

management

policy

oversight + accountability

education

state justice actors

non-state justice actors

BAR ASSOCIATIONS

LAW SCHOOLS

PROFESSIONAL TRAINING CENTERS

Police Academy

Judicial Training Academies

OTHER ACTORS

Civil Society Groups

International Organisations

Professional Lawyers' Organisations

THE FUNCTIONS OF THE STATE JUSTICE SYSTEM

Policymaking

In the aftermath of conflict a country will face lots of problems across many different sectors that all need to be addressed. Unfortunately, because time is short and resources are limited, the government cannot address all these problems at once. They must prioritize what problems or issues they are going to address at any given time. In other words, they must create a "policy agenda". A "policy agenda" or "agenda" is a list of the issues or problems currently receiving serious attention from government officials, and citizens at a given time. The government's policy agenda is an important part of mapping a justice system as it indicates which parts of the system the government is or would like to reform in the near future. "Agenda-setting" is the process in which those who set the national policy agenda form their opinions about which issues are important and require the government's immediate attention. Issues may be put on the agenda in reaction to an event or crisis, for example, if there is widespread media attention or if there have been national protests about a particular issue. Items may also be put on the agenda proactively, meaning that policymakers deem certain problems or issues to be strategic or political priorities even without a related crisis or other event. While media, civil society and others can influence policy, the government is ultimately responsible for agenda-setting. Depending on the particular political system and the powers given to the various branches of government, it might be the President or Prime Minister (and his or her cabinet) that has the most influence in agenda-setting.

"Policy-Making" or "Policy Formulation" is "a process of generating policy options in response to a problem established on the agenda". In other words, policy-making means coming up with a number of possible solutions to address a problem or issue that is on the government's agenda. The government may come up with the various policy options or they may be generated by those outside the government (e.g. civil society, the media, religious or other interest groups). Eventually, one policy response will be adopted from the range of policy options by the relevant decision-making body (e.g. the government, the parliament). For example, the legislature might draft a new law to address the issue. Once a particular policy has been adopted, it will then be implemented by the relevant government agencies.

Budgeting

In understanding how a justice system works it is important to know which body or bodies are responsible for allocating and approving the budget for the justice system. Though often overlooked, these bodies are important as it is their responsibility to ensure the justice system has adequate funds to operate in its current form and that there are additional funds available to cover the cost of any new reforms that are proposed. In many political systems the legislature, or a committee of the legislature, approves the annual budget for the justice system. The Ministry of Finance may also have a role in allocating the funds to the justice system

Law Making

The power to pass laws in a conflict-affected country may be given to one or more bodies at the national, regional, state or local level. At the national, state or regional level, this may include the President, the parliament or assembly and the senate. At the local level, a regional or town council may have certain limited law-making functions. In a conflict-affected context, there may be a transitional government or administration that will have the power to pass laws, pending national elections.

For example, in Libya the National Transitional Council governed for ten month in the aftermath of the revolution. In Kosovo and East Timor, the UN temporary held law-making functions as part of the UN Mission in Kosovo (UNMIK) and the UN Mission in East Timor (UNTAET). In Liberia, under the Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties (August 18,2003), the National Transitional Government of Liberia and the National Transitional Legislative Assembly governed from 2003 until the 2005 general elections.

In some instances, legislation may give the power to a government body (e.g. a Ministry) to create secondary legislation to fully implement the new law. In such a case, the relevant Ministry will have law-making power to create so-called "implementing regulations", "clarifying regulations" or "standard operating procedures", all of which will be discussed below.

The type of entities responsible for drafting new laws varies from country to country. In some countries, professional parliamentary draftspersons (permanent legal drafters who are parliamentary staff members) will create legislation based on the policy guidance of the legislature. In other countries, line Ministries (e.g. Ministry of Justice, Ministry of Interior) will be responsible for drafting laws that concern issues within their area of competence. In yet other countries, a law reform commission or an ad hoc working group creates draft laws. In an ideal scenario, a post-conflict country would have a cadre of professional legislative draftspersons whether in the parliament, in a Ministry or as part of a law reform commission or working group, although this is rarely the case.

In some countries, civil society creates draft legislation and presents it to a member or members of the legislature for consideration. If the draft law finds support, the member or members may present the draft law to the parliament for consideration and passage into law.

For example, after the conflict in Liberia was over, a transitional government was in power for two years. During this time, the transitional government was not passing legislation even to address pressing issues. In the absence of government action, the Association of Female Lawyers in Liberia created a draft law to address the problem of gang-rape. They then undertook a comprehensive consultation process with women and men around the country before presenting the draft law to members of the transitional legislature. The law was presented to the legislature for consideration and a law on gang-rape was passed by the National Assembly in 2005.

Justice Management

During a dictatorship or in an oppressive regime, the state justice system is tightly controlled by a small group of powerful people. While ministries and other justice managers (e.g. Chief of Police, Chief Prosecutor, Head of the Prison Service) may have significant management or decision-making powers on paper, in practice they do not have the kind of autonomous management functions their counterparts exercise in ministries and justice institutions around the world. In fact, many oppressive regimes actively work to keep the Ministries weak "with complicated dysfunctional bureaucracy and confused duplicative, and often competing roles". In this way, no single Ministry acquires enough power to oppose the regime. The resulting lack of real management experience within Ministries, coupled with the deliberate creation of a dysfunctional bureaucracy, makes it very difficult to reshape justice management in the aftermath of conflict. In some instances, there may be a "management gap" in the transitional period after conflict, where senior staff is in place but lack the necessary knowledge, skills and abilities to effectively run the institution or to lead reform efforts. This often prompts non-state actors -- especially at the local level – to step in and fill this gap, as will be discussed below.

What follows is a discussion of the various ministries that a rule of law practitioner may encounter when mapping justice management. Of course, the name of the relevant ministries and their responsibilities will vary from country to country.

The main Ministries that oversee and manage the work of justice actors and institutions are usually:
- The Ministry of Justice; and
- The Ministry of Interior (sometimes called the Ministry of Home Affairs).

Prisons are usually managed by the Ministry of Justice. Depending on the legal system of the country, the prosecution service may fall under the Ministry of Justice or the judiciary (see discussion below about the status of prosecutors as part of the judiciary in civil law countries). The police usually fall under the leadership of the Ministry of Interior.

Below the Ministerial level, each justice agency will have its own leadership. The Chief of Police will run the national police. The Prosecutor General or Chief Prosecution will manage the prosecution agency. The Chief of Prisons will lead the prison service. The various levels of leadership and their roles should be considered when mapping justice management within the broader system. In addition, each Ministry will be divided into smaller departments whose areas of responsibility should also be mapped in order to determine which department should be involved later on in which reforms.

When thinking about rule of law reform, other Ministries may also be relevant even if they do not have a direct management role over the justice system. These include Ministries that lead on certain themes, such as women, children or human rights, or that have general planning or coordination functions for the government. They can include the following:
- Ministry of Women;
- Ministry of Human Rights;

- Ministry of Children;
- Ministry of Civil Society;
- Ministry of Culture;
- Ministry of Religious Affairs (important if religious law plays a role in the country);
- Ministry of Planning (important as this Ministry might be responsible for planning for new reform or new activities that the government will undertake in the future);
- Ministry of Coordination (important for the international community because international actors may need permission from the Ministry of Coordination in order to meet with other Ministries, including the Ministry of Justice); and
- Ministry of Finance (important to ensure that new reforms have enough government funding).

There are two components of the justice system that generally lie outside ministerial management of the justice sector both of which should operate independent of the executive branch of government. The first institution is the judiciary. Judicial independence is required, under a principle called the "separation of powers" (which states that the executive, legislature and judiciary should be distinct) to ensure that the power of each branch of government is subject to checks and balances from the other branches. Instead of a Ministry being responsible for judges, a senior judicial figure (e.g. the Chief Justice) or body (e.g. Judicial Council) should be responsible for managing and leading the judiciary. In addition to judicial leadership, there may also be an administrator or court manager, to whom responsibility for the day-to-day operation of the court has been delegated. Under a dictatorship however, there may have been excessive executive influence over

judges and interference in cases they are adjudicating. This may or may not be reflected in the structure of the justice system, particularly in who has managerial responsibility for the judiciary.

The second institution of the justice system that should be independent from the executive branch is the legal profession. Lawyers should operate independent of the executive and should be managed and regulated by an autonomous national, regional or local bar association that is governed by legislation (bar associations will be discussed in more detail below). However, in some former dictatorships, all lawyers were deemed to work for the government (e.g. Libya) and therefore were not independent.

Justice Institutions and Actors

i. Judges, Investigating Judges, Lay Judges and Juries

In countries with a civil law tradition, there are both "investigating judges" (*juge d'instruction*) and regular judges, or "sitting judges". Investigating judges was first seen in the French Napoleonic Criminal Procedure Code of 1808 and the institution was introduced to French colonies (e.g. Haiti, Burundi, The Ivory Coast, Cape Verde, Egypt, Tunisia, Syria, Lebanon) and colonies of other European countries that adopted this model (e.g. Mozambique; East Timor).

An investigating judge is responsible for leading the criminal investigation and finding any evidence relevant to the case, either in favour of the accused person or against the accused person; as such the investigating judge is required to investigate both incriminating evidence and exonerating evidence. He or she gives directions to the police as to actions they

should take in investigating the crime. The investigating judge has the power to give the police permission to arrest or detain an individual, conduct a search or to undertake other investigation actions (e.g. search property or persons). Unlike, in the common law system where the police take this role, the investigating judge interviews the accused, the victim, and witnesses. The investigating judge can also visit the crime scene or carry out a crime reconstruction. Finally, the investigating magistrate is responsible for preparing the case file, which contains all the evidence in the case. At the conclusion of the investigation, the investigating judge determines whether to refer the case for trial or not. If the case is referred to trial, the case file is transferred to the sitting judges who will review the file and hear the case.

In civil law countries, sitting judges hear cases in court. The sitting judge may sit alone for minor cases but, for more serious cases, will sit in a panel of judges (normally, three judges). A sitting judge in a civil law country has a very different role at trial than a common law judge. Rather than being an impartial referee, like a common law judge, a civil law judge is the central actor, with the responsibility of finding the facts and the truth. The judge reads the case file prepared by the investigating judge in advance of trial, so the trial itself will be much shorter than in common law countries. At trial, the judge examines the witnesses, while the prosecutor and the defense counsel are limited to requesting that the judge ask particular questions in his or her examination. Where there is no jury, the judge will also determine the final verdict in the case.

In the common law tradition, there are no investigating judges. Instead there are only sitting judges. The sitting judge acts in an impartial, oversight capacity during criminal investigations and plays a far less active role than the sitting judge in the civil law tradition. He or she is responsible for deciding whether the evidence justifies issuing orders or warrants requested by the police, but the judge does not direct the investigation. At trial, the judge acts like a referee between the prosecution and the defense as they present evidence, and call and question witnesses, rather than taking center-stage like in the civil law tradition. While common law judges' role in criminal investigations and trials may seem limited, in another sense they have much greater powers than do civil law judges. Traditionally common law judges are vested with the power to make law through their decisions at trial. Historically, judges' decisions relating to a particular legal issue or question became case law that served as a source of law for future cases. Today, judges still have this power but are also bound by laws and statutes that cover many areas of the law.

In both civil law and common law countries, most judges who hear serious cases are professional judges, with specialized legal training or experience. However, many justice systems give some decision-making powers to people without these qualifications. Both common and civil law systems may include "lay judges" and juries. Lay judges do not generally have a law degree. They fill a role similar to that of a professional judge, but are usually restricted to acting in courts of limited jurisdiction (e.g. minor crimes, civil cases of limited value) or on a panel with professional judges in civil cases or less serious criminal cases. Additionally, for some civil and criminal trials a jury of randomly selected citizens

may determine the verdict. Where a jury is present at trial the role of the judge will be to direct the jury as to the law that applies in addition to the responsibilities discussed above.

ii. Court Staff

Court staff assist judges in the administration of justice. They can perform a range of functions, including:

1. Managing court facilities;
2. Assisting with case management;
3. Protecting evidence;
4. Facilitating the appearance of accused persons and witnesses;
5. Helping judges conduct legal research and draft decisions;
6. Ensuring judicial decisions are announced and published;
7. Processing and maintaining case files;
8. Ensuring budgetary and financial controls; and
9. Fostering strong public relations and transparency in court proceedings.

iii. Prosecutors

As with judges, the role of the prosecutor differs significantly between civil and common-law countries. Even between civil law countries, the role of the prosecutor can vary from one country to another. In many civil law countries the prosecutor is part of the judiciary. This is evidenced by the fact that the prosecutor will walk out with the judges at the beginning of the court session and will sit close to the judges rather than in the same position as the defense counsel (as is the case in the common law system). The recent trend, however, is for greater independence of the prosecutor.

When the police in a civil law country inform the prosecutor about an alleged crime, it is the job of the prosecutor to open and lead a preliminary investigation. At this stage of the investigation the main role of the prosecutor is to determine if there is enough sufficient evidence to open a judicial investigation. The prosecutor also lays out in a written format what crimes are to be investigated as a result of the alleged criminal conduct. In countries with investigating judges, if the prosecutor determines that a judicial investigation is needed, the case will then be referred to the investigating judge. In civil law countries where there is no investigating magistrate, the prosecutor will lead and supervise the entire investigation. In some civil law countries, the prosecutor will direct the police to take action to gather evidence. In other civil law countries, the prosecutor may also take action to gather evidence himself or herself. This can include interviewing witnesses, victims, and expert witnesses. For coercive actions that would impinge upon the rights of the suspect or other persons (e.g., searches, seizures, and covert surveillance), the prosecutor must seek a warrant or an order from a judge.

If there is no investigating judge, at the end of the investigation the prosecutor will draft an "indictment" and must present written charges to the court. If the court confirms that there is sufficient evidence in the case, it will proceeds to trial. Once the case goes to trial, irrespective of whether there is an investigating judge, it is the prosecutor's duty to present the case in court. However, because the judge takes the lead at trial, presenting a case in a civil law country requires much less of prosecutors in civil law countries than is required of common law prosecutors, whose are detailed below.

In common law countries the prosecutor's main responsibilities are: (1) filing an indictment against the accused; and (2) presenting the criminal case at trial. In some countries, and particularly in the investigation of complex crimes (e.g. organized crime, complex fraud, trafficking in persons), the prosecutor may work with police in gathering evidence or arrested suspects. In most instances however, the police will conduct their own investigation and then hand over a file to the prosecutor. If the prosecutor determines that there is sufficient evidence to proceed to trial, the prosecutor will file an indictment. If the court approves the indictment, and the case moves forward, the prosecutor will represent the state at the trial. The prosecutor plays a very active role in the trial compared to the civil law prosecutor. He or she will give an opening statement, cross-examine witnesses and experts, present evidence, and finally will present a closing statement at the end of the trial.

iv. Police

The police service is normally the first institution that people think of when they think of the justice system. This is because police are front-line actors, interacting with the population more frequently than other justice actors. In a post-dictatorship context, the word "police," may be strongly associated with security forces whose primary mission was to enforce the will of the former dictator. Sometimes called "secret police" or "state security police" such forces are a common feature of law enforcement in oppressive regimes, but are usually the first institution to be disbanded after conflict. This section on police is talking about regularly constituted police and not so-called "police" that operated as henchmen for a dictator.

Irrespective of the legal system, police around the world usually share similar basic duties to: (1) prevent and detect crime; (2) maintain public order; and (3) assist those in need. Given this public service role, the term "police service" is preferred over the more archaic term "police force".

The specific powers of the police service, and its individual police officers, have will be laid out in the Constitution, the Police Act or any other policing legislation. Police powers vary from country to country and will depend on whether the country has a civil law legal tradition or a common law legal tradition. That said, policing models also vary within countries with the same legal tradition so it is important to look at the domestic police law to determine the exact role of the police.

In many civil law countries, there are regular police officers that carry out public order functions (such as traffic control, policing public gathering and patrolling) and the investigation of minor crimes. In addition, there are specially designated "judicial police" who are tasked with in the investigation of more serious crimes. In investigating crime, the police will act under the authority of either an investigating judge or the prosecutor. Immediately after the police learn about a crime, they have the power to conduct a preliminary investigation. They may search or arrest a suspect, or collect evidence, for example. When urgent circumstances arise, the police may have the power to also search premises. The law usually sets a timeline within which the police must report the crime to the prosecutor or investigating judge. To ensure that the human rights of the population are protected, when the police wish to undertake actions

that infringe upon the rights of persons (e.g. search of premises and persons infringing on the right to privacy; arrest or detention infringing on the right to liberty), a judge must grant permission for the action. In civil law countries where there is an investigating judge, the investigating judge can give the police permission to undertake such actions. In civil law countries that do not have the investigating judge model (and thus where a prosecutor not only defines the crimes to be investigated but also oversees the investigation) or in common law countries, the prosecutor or the police will need to seek the permission of a judge to undertake such actions.

Compared to the civil law tradition, police in common law countries have significantly greater independent investigative powers. The police will conduct the initial investigation of a crime, from minor to more serious crimes without supervision or direction from a prosecutor. Indirect oversight is provided by a judge where police actions may infringe on a person's human rights. As in the civil law tradition, a judge is required to grant permission in the form of a warrant or order where a particular action taken by the police would be coercive or otherwise interfere with the rights of a person. For example, barring in exceptional circumstances, searching a home, arresting a suspect or conducting covert surveillance requires a judge's permission. During the investigation, the police are responsible for collecting and securing the evidence that will be used at trial. This evidence is then handed over to the prosecutor who will use it file an indictment and as the basis of the case at trial.

When mapping the police service, it is important to also look for "special police units", "task forces" or "bureaus" may exist to address special or serious crimes. These units receive specialized training and equipment and perform specialized functions. The following are examples specialized police units:

1. *Tactical Response Team.*
   These units carry out high risk tasks such as high risk arrests;

2. *Border Control Unit.*
   This unit works to control and manage the country's border and address problems such as cross-border crime, border crossing by insurgents or hostile military forces or other illegal border crossings. Such units usually work closely with the domestic customs and immigration bodies and the military;

3. *Criminal Intelligence Unit.*
   This unit gathers, analyzes and shares intelligence information on specific crime trends and high-level criminal activity. It should be differentiated from the type of intelligence agencies found in dictatorships, which are established to spy on the population and to address any opposition to the dictatorship;

4. *Surveillance Units.*
   A surveillance unit in a regular police service is tasked with gathering surveillance on specific individuals who are suspected of committing serious crimes (as opposed to the criminal intelligence unit that gathers information on crime trends). The law sets out very strict standards for undertaking surveillance. Permission to undertake surveillance must be granted by a judge, who oversees the legality of the operation;

5. *Financial Investigations Unit.*
   This unit has specialized training and resources to investigate financial

crimes like corruption or money laundering. In addition, such a unit can identify, trace and seize or confiscate the proceeds of crime;

6. *Narcotics Unit.*
   This type of unit investigates trafficking in drugs;

7. *Organized Crime Unit.*
   This unit investigates all sorts of organized crime from trafficking in persons to people smuggling to weapons smuggling;

8. *Anti-Corruption Unit.*
   This type of unit investigates corruption-related criminal offenses;

9. *Close Protection Unit.*
   This unit is tasked with protecting judges, prosecutors and lawyers that are in danger because of their role in a case;

10. *Witness Protection Unit.*
    This unit is tasked with protecting victims, witnesses and their families who are in danger because they, or someone close to them, is testifying in a trial;

11. *Victim Assistance Unit.*
    Victims of serious crimes, especially vulnerable persons such as children and victims of human trafficking, may need assistance. This assistance may include help locating shelter, medical assistance, mental health counselling, and legal advice. It may also include providing information, such as how the criminal justice system operates, so that victims will have a better understanding of what to expect from the system;

12. *High-*Risk *Prison Transport Unit.*
    This unit transports prisoners where there is a risk of escape during transit. This is usually part of the prison service but in a post-conflict context, it may be better placed under the power of the police service; and

13. *Internal Affairs/Professional Standards Unit.*
    This unit is an internal unit within the police that is tasked with upholding professional standards and integrity and with the prevention, detection, and investigation of misconduct, transgressions, and corruption of police officials.

v. Prison Staff

As previously mentioned, the prison service will likely be managed by the Ministry of Justice and led by the Head of Prisons. In some countries, the term "judicial police" is used for prison staff; not to be confused with judicial police who assist the investigating judge in criminal investigations. Prison staff exercises a security or supervisory role in prisons. The precise roles and responsibilities of prison staff will vary from country to country and will be laid out in detail in the national Prisons Act and any accompanying guidelines or standard operating procedures.

vi. Lawyer/Avocat, Defence Counsel and Notary

Lawyers in the civil law tradition are split into two distinct professions: avocats and notaries. An avocat roughly equates to a lawyer in the common law system acting as an advisor, an advocate, an intermediary, a custodian, an arbitrator, or a trustee among other roles. For example, he or she may negotiate and draft contractual agreements; act as an agent for his or her client; and receive funds on behalf of the client. In addition, he or she may assist clients in planning business and property affairs. Usually, an avocat operates as a lone practitioner rather than in partnership with other senior

lawyers. Avocats are independent and self-regulating through the bar association. Where avocats' duties differ significantly from common law lawyers is in their role in criminal trials. In the common law tradition, defense counsel's first duty is to protect their client's interests, representing their clients "zealously within the bounds of law". An avocat may also act as defense counsel at trial, sometimes called "avocat de la defense." However, civil law countries' codes of legal ethics mandate that defense counsel is independent of both the state and the client. According to Luban, in Germany for example, lawyers are trained as impartial advocates rather than the common law- style partial advocates.

The second type of lawyer in the civil law tradition is a "notary". A notary has three main functions. First, a notary drafts legal documents such as wills, corporate charters, conveyances of land, and contracts. Second, he or she authenticates instruments (called "public acts"), which are written documents establishing an agreement between two or more people. Finally, a notary acts like a kind of public record office, retaining originals of every instrument prepared and furnishing authenticated copies on request. Countries and towns are divided into notarial districts, in which a notary has a monopoly and operates as an independent practitioner; a new notary can only take over when the existing one vacates office.

In countries from the common law tradition, the notary-avocat typology does not exist. In most common law countries, once a law student has graduated and has completed any further examinations or certifications required, he or she will be designated as a "lawyer". There are a number of exceptions to this general rule such as the United Kingdom and its current and former colonies where lawyers are divided into "solicitors" or "barristers". Lawyers provide general legal services such as the provision of legal advice, the representation of clients before government institutions or arbitration bodies, the preparation of lawsuits or other legal documents (e.g. contracts and wills). In the context of a criminal case lawyers (or barristers) acting in the role of defense counsel, play a far more active role at trials than do civil law avocats. From the moment of arrest, a defense counsel can be present during the questioning of a suspect and can advise his or her client on how to answer a particular question, unlike the civil law avocat who can be present during the questioning but lacks the power to ask questions or give advice. During the investigative phase, a common law lawyer or barrister can gather evidence independently, hire independent expert witnesses (a concept that does not exist in the civil law system where expert witnesses are retained by the court), and select witnesses to call at trial. Civil law avocats may not do this. Instead, they can only submit a written request to the judge to undertake certain investigation actions, such as interviewing a particular witness. During the trial, the common law defense counsel is considered an equal party to the prosecution. The prosecution and the defense sit at opposing tables before the judge. Defense counsel has the opportunity to make an opening statement; to examine witnesses called by the prosecutor; to call its own witnesses; and to make closing remarks at the end of the trial. The civil law advocate, on the other hand, is more silent during proceedings because the judge is responsible for examining witnesses, including expert witnesses.

vii. Bar Association

A bar association is the professional body responsible for the regulation, education and representation of the legal profession. There may be a national, regional and local bar associations in a conflict-affected country, or a combination of all three. In some countries, such as East Timor, immediately after the conflict, there may be no bar association. The regulatory role of a bar association involves admitting law students to the practice of law, developing a code of conduct for legal professionals, receiving complaints of lawyers' misconduct from the public and taking disciplinary action when a lawyer is found to have violated the code of conduct. This disciplinary action may result in the suspension or the revocation of the lawyer's license to practice. In its capacity as an educator of lawyers, and as discussed below, bar associations provide continuing (often mandatory) legal education to qualified and practicing lawyers. Finally, it has a representation function that involves lobbying and negotiating on behalf of its members. As part of this function, bar associations can become involved in law reform, and rule of law reform more broadly.

Oversight Mechanisms

Oversight mechanisms hold public officials (including justice actors) responsible for their actions and impose sanctions if they violate the law. Oversight supports accountability, a core element of the rule of law. For obvious reasons, oversight mechanisms are rarely found in countries under dictatorship or with oppressive regimes.

Accountability or oversight can be horizontal (state institutions overseeing the actions of state institutions) or "vertical" (citizens overseeing the actions of the state). Examples of horizontal oversight mechanisms include:

1. Courts;
2. Parliament and Parliamentary Committees;
3. The Executive and Ministries; and
4. Independent bodies like ombudsman offices, anti-corruption commissions, public complaints commissions; audit office; inspector general or human rights commissions.

Vertical mechanisms tend to be more informal and can include civil society groups. These groups may have a role in informally monitoring court proceedings or the conduct of justice actors. While they may have no formal enforcement powers, they are crucial to the extent that they provide an independent accountability mechanism that may otherwise be lacking in a post-conflict state.

It should also be noted that oversight mechanisms can be internal or external to the institution they regulate. A police Bureau or Department of Internal Affairs that sits within the police service and investigates complaints made by the public against individual officers is an example of an internal oversight mechanism. In contrast, a Police Ombudsman, whose office is not a part of the police service, is an external, independent oversight mechanism to which citizens can make complaints. External oversight mechanisms usually provide more safeguards and are viewed as more effective and trustworthy because of their independence.

Coordination Mechanisms

Coordination mechanisms serve as a way to link the various parts of the justice system ensuring the separate components of the system work together effectively. These mechanisms also provide an important space for collective problem-solving when aspects of the law are not working well in practice. Coordination mechanisms can range from an informal weekly meeting to a more formal structure with its own budget and staff, or even a dedicated Ministry of Coordination. Coordination mechanisms may include civil society and local leaders in addition to representatives from the various justice institutions. Too often, in post-conflict situations there is no prior history of inter-agency coordination and these mechanisms will need to be established from scratch

Legal Education and Training

Legal education and training institutions are the foundation for the development of the formal justice system and its ancillary institutions. Unfortunately, they are often overlooked when the justice sector is being mapped. Legal education institutions refer to universities that provide an academic education in law, whether at the undergraduate or postgraduate level. In turning out qualified law graduates, law schools provide the human capital that feeds into the courts, bar, prosecutorial bodies, ministries and other justice agencies. Moreover, law professors can play a leading role as critics of the justice system and promoters of reform.

Training institutions provide professional training for certain justice professionals and continuing legal education for justice personnel who have already completed their initial qualifications. They include police academies and in countries with the civil law tradition, magistrates' schools where judges and prosecutors receive specialized training. National, regional and local bar association should also be included as they provide continuing legal education for lawyers.

■ END EXTRACT

THE ROLE OF PEOPLE

The criminal justice system could not function without people, who include the people who access the system to obtain justice services (the public) and the people who work within the system to ensure the delivery of justice.

Understanding that the system exists for and because of people, and is therefore susceptible to the same fallibilities as people, helps us to see why a purely technical approach to rule of law is inadequate in truly effecting change.

Chapter 1, Part 5: International Rule of Law Assistance

Efforts to change or improve the justice system require people to change. The challenge is not only that a system is complex (explored in part 2 of this chapter) but also that people are complex, and emotional, beings, with different motivations, attitudes, beliefs, and opinions.

A change-oriented approach that focuses only on reforming laws and institutional structures, and that ignores the attitudes, behaviors, and wills of individuals, is less likely to produce long-term sustainable and effective change than an approach grounded in the principles of a rule of law culture.

If a system is based on people, what does this mean for having an effective justice system?

Where we sit within the justice system affects our perception of and experience in the justice system. Individuals working within the system tend to give little thought to the impact of their role on people outside their immediate sphere of interaction. For example, a police officer who is focused on meeting his or her monthly targets for arrests might detain a large number of youths on the basis of weak or nonexistent evidence without considering the impact that decision may have on the prosecutor's caseload, the pressure the new cases may place on an already-backlogged court system, or the social or financial impact the detentions may have on the detainees and their families.

- **How would you, as a character in one of the following scenarios, perceive the justice system?**

- **Would each character see the system in the same way?**
  - **If not, why not?**
  - **What attitudes, interests, motivations, or beliefs influence the behavior of each of these characters?**

    - **You are a sixteen-year-old girl living in a large city.**
      You have been raped by a man in your neighborhood. Your family does not want you to go to the police, because doing so would reflect badly on the honor of the family.

    - **You are a senior prosecutor.**
      You have been a prosecutor for twenty years. You have been told you will be promoted this year only if you achieve a high rate of successful prosecutions.

    - **You are the minster of justice.**
      With a recent increase in arrests of suspected terrorists in your country, you are under pressure to explain why the judiciary is often releasing the accused persons instead of convicting them.

    - **You are a senior politician and member of the ruling party.**
      You have been in politics for twenty years. There are many allegations of corruption associated with you, although you have never been charged with any crime.

    - **You are an elder in your community.**
      People in the community come to you for advice and assistance in resolving their daily disputes with one another.

The perceptions, beliefs, and decision-making processes of an official within the justice system could be affected by a range of factors:
- Gender, ethnicity, or social status
- Political, religious, or ideological views
- Education or training
- Personal life experiences
- Cultural attitudes in the organization where employed
- Attitudes and behaviors of people in the work environment
- Treatment by colleagues, superiors, or the public
- Availability of resources to carry out work

EXAMPLE

Valuing Judicial Staff, Kenya

During the judicial transformation process that began in Kenya in 2011, some court stations in rural areas had so few desks that staff had to create a daily roster for using the available ones. One person would work at a desk for two hours, then leave to let another person work. The lack of basic furniture was demotivating, and resulted in a significant loss of productivity and staff members' feeling that they (and their work) were not valued or respected.

Source: Interview with Kwamchetsi Makokha, Communications Officer, Office of the Chief Justice of Kenya, Nairobi, August 2014.

Effective advocates for a rule of law culture are able to view their system holistically, seeing it not only from a technical perspective but also from a human perspective.

CONSIDER

- **In addition to training and resources, what does a justice professional, such a police officer or prison guard, need to effectively carry out his or her role within the justice system? Suggestions could include:**
  - **Integrity** (such as agreeing to and being held accountable to an institution's code of ethics)
  - **Trust** (from superiors, colleagues, and the institution)
  - **Dignity and respect** (from colleagues and the public)
  - **Motivation** (such as adequate remuneration, clear and transparent promotion procedures, etc.)

- **What about the needs of the general public?**
  In order for them to develop trust in the justice system and the officials responsible for delivering justice, members of the public need to be treated fairly and with respect and dignity by officials. Members of the public also want to be provided with adequate information about their individual cases, specific legal rights, and legal procedures.

EXAMPLE

Court Help Desks, Kenya

One of the early initiatives implemented in the Kenyan judicial reform process that began in 2011 was a requirement that court staff establish a help desk in every court station. In some places where there were no resources, staff designed their own banners and signs using paper and pens. The "form" of the desk was less important than its function. Court users now had a place to come to seek information about the court docket, to check into their case, or to ask procedural questions. They were greeted by a court officer who smiled and welcomed them. Staff noted several months later that these small changes had drastically improved their relationship with their community, improved the overall mood and functioning of the court, and created a sense of pride in "serving" the public.

Source: Republic of Kenya, *State of the Judiciary Annual Report, 2012–2013* (Nairobi: Supreme Court of Kenya, 2013), 66.

Part 2 | Understanding the Domestic Legal System

At the heart of rule of law is the requirement that all people are accountable to the law. However, determining what the law is in a specific context can sometimes be challenging. This section explores why understanding the legal framework in any context is an important part of establishing a strong rule of law culture, and introduces an analytical framework and simple tools for understanding that legal framework.

As we saw in chapter 1, a core element of a rule of law culture is the need for a legal framework or a *system of laws.*

The content of these laws should respect, protect, and uphold the rights and freedoms of all people. Laws should be publicly accessible, clear, precise, and understandable, and should not be retroactive. People need to know what laws are applicable to them and how those laws regulate their behavior.

Chapter 1, Part 3: Toward a Rule of Law Culture

Importantly, for a rule of law culture to be successfully established, most members of society should believe in, respect, and generally abide by these laws. When people do not trust the formal legal system to address their problems or solve their disputes, they may turn to other mechanisms outside the formal system for redress. Building *trust* in a legal framework requires a transparent and participatory procedure for drafting laws. The laws need to be fair and equitable, and *inclusive;* that is, they should be responsive to the needs of the entire population, not just of the powerful elites.

Understanding why people seek these alternative mechanisms and how these mechanisms do or do not provide justice is a critical element in the analysis of the effectiveness of a country's justice system. For some members of society, certain legal systems may be perceived as being more *legitimate* than others. In analyzing the legal framework, it is important to look beyond the formal legal system and also to recognize and understand the other systems that may exist.

Every country context is unique, with a unique system of laws. Many countries share similarities; for example, countries that have experienced colonization may share similar legal traditions. The challenge in establishing a rule of law culture is that, in many cases, particularly in countries emerging from conflict, the system of laws in a *specific context* can be as complex, untidy, and frequently inconsistent as the justice system itself. Understanding the system of laws is the first step in determining how we can better promote a rule of law culture.

The reality in most countries is that there is not just one legal system being used by the population to resolve disputes. There may be multiple systems that overlap, intersect, or, at times, conflict and compete with one another.

These systems may include:
- Formal state law
- Customary and/or traditional practices and law
- Justice systems that developed out of a conflict (e.g., rebel/militia justice systems)
- Religious legal systems
- International law

Chapter 3, Part 2: An Overview of International Law

A country's legal framework, therefore, may contain many subsystems that encompass the legal and social, the formal and informal, the written and unwritten norms, as depicted in figure 2.9. The various legal systems may have different conceptions of permissible actions and of procedures for dealing with conflict and differing conceptions of justice. The systems often cannot be neatly classified into tidy and consistent parts. This state of affairs is referred to as "legal pluralism," a term that describes the multiple forms law takes within a particular community, region, or state.[1]

FIGURE 2.9

Legal pluralism
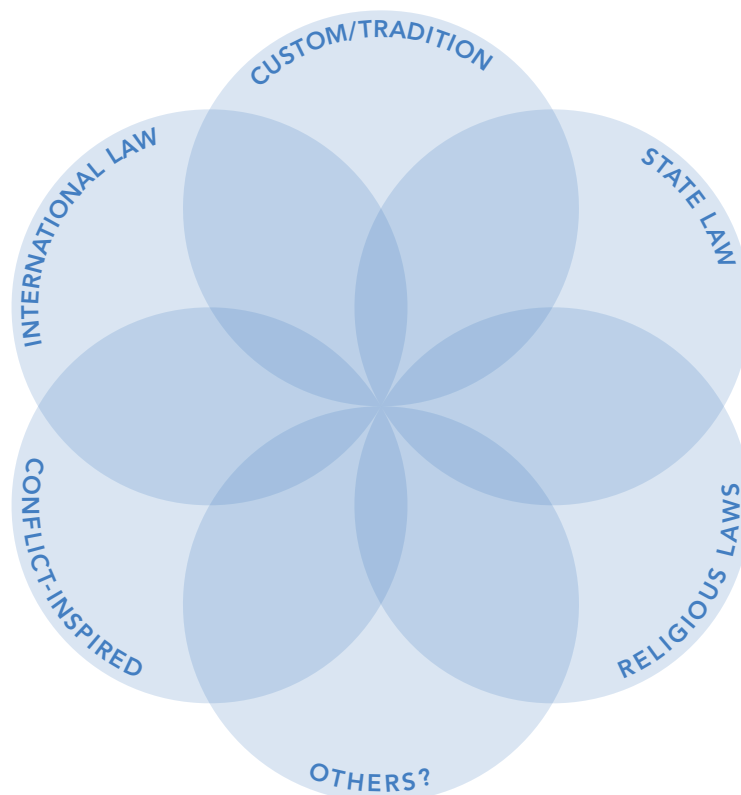
Not all systems apply in all facets of life. For example, many components of commercial law exist only within the state's formal legal system, and not in other systems such as customary law. Systems may operate in parallel; for example, a *jirga*, a village council that acts as an informal dispute resolution mechanism in Pakistan, is neither formally recognized nor sanctioned by the state legal system.

In some cases, there may be clashes between legal systems or, alternatively, systems may be complementary and mutually reinforcing. For example, custom in one country may require that a rapist must marry his victim in order to preserve family honor, but this may conflict with state law that classifies rape as a serious crime to be prosecuted through the court system. In other situations, state law may allow for religious law to apply in certain cases and for certain groups within a society. The areas where there are contradictions and clashes between legal systems are of most concern when determining the way forward toward a rule of law culture. These clashes can undermine people's belief and trust in the justice system and the government. The clashes can also often undermine the rights of certain people or groups, therefore undermining the principle of inclusiveness—that all people are equal before the law and all people's rights and freedoms are respected and protected. These clashes undermine progress toward achieving strong rule of law.

For the purposes of this guide, the specific content of these various systems is not discussed. As explained above, every context is unique, and therefore this guide focuses on providing readers with basic knowledge and tools for undertaking the analysis of their own systems.

The first step in applying analytical skills and tools is to acquire a good understanding of how people seek and attain justice and security; that is, what are the legal systems in a specific context? For example, the Nigerian context is analyzed below.

Chapter 4, Part 1: A Systematic Approach

To fully understand the legal framework or system of laws in a specific context, rule of law culture promoters should ask questions such as:
- Why do these systems exist?
- What level of influence does each system have within a society?
- What is the level of legitimacy of each system within a society?
- Which groups perceive the systems as more or less legitimate and why?
- Whose interests do the systems serve?
- Who stands to gain or lose by reforming these systems?
- How do these systems interact with one another?

EXAMPLE

Nigeria

In Nigeria, there are eight overlapping sources of law that make up the country's legal system, namely: English common law; military decrees and edicts; British statutory laws; customary law; Nigerian statutes adopted by civilian administrations following 1960; Shari'a law; the penal code, imported from Pakistan; and informal customs and practices.

Statutory laws include those that were imported from England by the Statute of General Application of 1900, which made all statutes in force in England on January 1, 1900, automatically part of the Nigerian legal system. Statutory laws also include English law (statutes) made up to October 1, 1960, when Nigeria gained independence, that extended to Nigeria and that have not yet been repealed. English common law is most often used in courts and can be applied in any case. Military decrees have generally become statutory laws; for example, the Land Use Decree became the Land Use Act. Nigerian statute law exists at a federal level; each of the country's thirty-six states and the federal capital territory Abuja also has its own statute law.

Customary laws vary across the ethnic groups of Nigeria but are all based on the concept of reconciliation. Customary courts are the lowest-level courts. Nigerian evidence law states that a custom cannot be regarded as law if it is "contrary to public policy, or is not in accordance with natural justice, equity and good consciousness."

In Nigeria, there are three hundred different ethnic groups, leading to many different practices for resolving issues, and often involving the chief or king of a community as a decision-maker rather than having recourse to the courts.

Islamic law and the Pakistani Penal Code are applied only in states in northern Nigeria, where the population is predominantly Muslim. Islamic law originally applied only in civil matters. However, in the early 2000s, some northern states in Nigeria introduced the full Islamic legal system, including religiously based criminal offenses. The Supreme Court of Nigeria has not yet pronounced on the constitutionality of such punishments as amputation and the stoning of a person to death.

Not all the sources of law are codified, and sources can conflict with or contradict one another. For example, statutory law does not allow for polygamy, while customary law allows for males to have up to five wives. Similarly, adultery is a crime that is punishable only under Islamic law and not under any of the other sources of law.

Source: Interview with Adewale Ajadi, Nigerian barrister, in Valletta, Malta, June 2014

FORMAL LEGAL SYSTEMS

All domestic formal legal systems have a designated hierarchy of laws. The hierarchy can differ between countries but fundamentally plays a role in determining which laws prevail in the case of a conflict between two laws.[2]

In many countries, the constitution is the highest form of law, aimed at preserving the fundamental principles and values of a society.

Chapter 1, Part 1: Exploring Rule of Law

The hierarchy of laws may also include:
- Case law of the Constitutional Court
- International law
- Decrees and presidential orders
- Codes and ordinary legislation
- Case law of lower courts/precedent
- Implementing regulations

> For further details of applicable domestic laws, see O'Connor, *Mapping the Justice System,* 28–30.

ADDITIONAL RESOURCES

The exact structure and content of the hierarchy of laws differ, particularly between countries with common law traditions and countries with civil law traditions. Variations also occur, however, among countries that share the same legal tradition.

The two largest formal legal-system families are common law and civil law, described on the following page. Most countries base their legal tradition on one of these families. One exception is Saudi Arabia, where the legal system is based on Shari'a.

Today, however, the idea of a "mixed" or "hybrid" system is increasingly becoming the norm. It is increasingly common for a country's legal system to include components of both legal traditions. For example, in certain cases, some civil law–based systems are now relying on judicial precedent, a common law doctrine.

Scotland and South Africa are two of the main exponents of the hybrid system.[3] Cameroon is a country where a legacy of colonialism means that civil law applies to one people and common law to the other. Efforts have been taken to create a unified legal system, including, for example, the passing of a new criminal procedure code in 2007, which merged key features of both systems.[4]

Common Law

Common law[5] is a peculiarly English development. Before the Norman Conquest, different rules and customs applied in different regions of the country. But after the invasion of England in 1066 by William the Conqueror, monarchs began to unite both the country and its laws using the king's court. Justices created a common law by drawing on customs across the country and rulings by monarchs. As such, common law traditionally gives case law preeminence as a source of law. Legislation became more and more important in common law countries in the nineteenth and twentieth centuries.

Common law is based heavily (though not exclusively) on case law and the principle of stare decisis, which provides that cases decided by a higher court must be applied by a lower court. Case law is occasionally overruled by higher courts. The decisions of lower courts can be used to interpret the cases of higher courts and can be followed, but they are not binding. In common law systems, court cases continue to be a preeminent source of law, although statutory law has become more important over time. Statutes in the common law tend to be interpreted narrowly.

In a typical common law system, the initial investigation of a crime is carried out by the police, who gather evidence (often independently) and thereafter transmit the evidence to a prosecutor, who then files an indictment and prosecutes the case. The case is adjudicated by a judge and may be decided on by a jury of laypersons. Defense counsel will also participate actively prior to and during trial proceedings. Victims do not generally play an active role in common law proceedings, except as witnesses and in making victim-impact statements.

Common law spread to areas that had direct contact with England through settlement, conquest, or other means (for example, Australia, Canada, the United States, South Africa, New Zealand, and India).

Civil Law

In contrast to England's common law, other European rulers drew on Roman law, and in particular on a compilation of rules issued by the emperor Justinian in the sixth century which was rediscovered in eleventh-century Italy. With the Enlightenment of the eighteenth century, rulers in various Continental countries sought to produce comprehensive legal codes. Civil law[6] spread through parts of Europe and in nations on other continents that had adopted their own codes (e.g., Latin America, Africa, and Asia).

Civil law adheres to a strict hierarchy of laws: the constitution sits at the top, followed by treaties and international agreements, organic laws, laws and regulations (which are also called "implementing regulations"), and custom. Most branches of law are embodied in statute books or codes with annotations to specific law cases. In many civil law systems, prior judicial decisions are not technically binding on other decisions, although higher court decisions generally serve as persuasive precedent.

Civil law is a codified system based on the principle of legality, which provides that the legislature makes law and judges apply law. In civil law countries, legislation is seen as the primary source of law. Courts base their judgments on the provisions of codes and statutes, from which solutions in particular cases are derived.

In a typical civil law system, the prosecutor is a member of the "standing" magistracy (as opposed to "sitting" magistracy) and represents public order. The chief prosecutor generally initiates preliminary investigations and, if necessary, asks that an investigating judge, or *juge d'instruction*, be assigned to lead a formal judicial investigation. When an investigation is led by a judge, the prosecutor plays a supervisory role, defining the scope of the crimes being examined by the judge, police, or other law enforcement agencies. The investigating judge otherwise directs the investigation, instructing the police, interviewing witnesses, and going to the crime scene to collect evidence. In some countries, judicial police are solely responsible for criminal investigation under the supervision of the investigating judge. During criminal proceedings, prosecutors are responsible for presenting the case at trial to either the bench ("sitting" magistracy) or jury. While defense counsels play an active role during the trial, judges dominate trials in civil law systems. Victims have an important role in civil law proceedings and in some countries are parties to the proceedings.

Today, the difference between common and civil legal traditions lies in the main source of law. Although common law systems make extensive use of statutes, judicial cases are regarded as the most important source of law, which gives judges an active role in developing rules.

In civil law systems, by contrast, codes and statutes are designed to cover all eventualities, and judges have a more limited role of applying the law to the case in hand. Past judgments are no more than loose guides. When it comes to court cases, judges in civil law systems tend toward being investigators, while their peers in common law systems act as arbiters between parties that present their arguments.

Legal minds in civil law jurisdictions like to think that their system is more stable and fairer than common law systems, because laws are stated explicitly and are easier to discern. But English lawyers take pride in the flexibility of their system, because it can quickly adapt to circumstance without the need for Parliament to enact legislation. In reality, many systems are now a mixture of the two traditions, giving them the best of both legal worlds.

The "mixed" or "hybrid" system is increasingly becoming the norm.

ADDITIONAL RESOURCES

Vivienne O'Connor, *Practitioners' Guide: Introduction to Common Law and Civil Law Traditions* (Washington, DC: INPROL, 2012),
http://inprol.org/publications/11042/common-law-and-civil-law-traditions.

Juriglobe, a research group based within the Faculty of Law of the University of Ottawa, has developed an online database of general information relating to the different legal systems in the world.
Available at http://www.juriglobe.ca/eng/sys-juri/class-poli/sys-mixtes.php.

CUSTOMARY JUSTICE SYSTEMS

There is no fixed definition of the term "customary justice." Generally, however, the term refers to norms and institutions identified with custom, tradition, or religion that operate alongside state legal institutions and that resolve disputes and regulate social conduct through adjudication or other assistance from a third party (for example, a mediator).

The term is often used interchangeably with "traditional justice," "informal justice," "community-based justice," and "nonstate justice," among others.

Examples of customary justice mechanisms include traditional or religious authorities; local administrators with adjudicative functions, such as a village chief or elder; customary courts; and community mediators.

80 to 90% of day-to-day disputes in developing countries are resolved through customary systems.

In some countries, customary norms and justice mechanisms may have existed for generations. Sometimes new systems emerge from conflict. For example, in Misurata, Libya, postrevolution justice and security entities such as the Anti-Crime Unit, the 154 Brigade, the Union of Thuwar, and local militia groups emerged as providers of justice and security services to the local population.

Customary systems throughout the world deal with people's everyday problems, such as settling disputes over land, property, family issues, and, sometimes, criminal matters. Development and rule of law practitioners generally agree that 80 to 90 percent of day-to-day disputes in developing countries are resolved through nonstate legal systems such as traditional or customary systems.

The relationship between customary legal systems and formal legal systems differs widely within and between country contexts, and it is often impossible to make a clean, sharp distinction between state and customary legal systems.

Customary systems can operate entirely independently of and be unregulated by the state. At times, elements of customary systems may be recognized and incorporated into the formal system, as was the case of the Gacaca courts in Rwanda. The Gacaca system drew on customary practices motivated by ideas of restoration and healing of communities, and attempted to adapt those ideas to address the wide-scale horrors of the genocide when it became apparent that the formal legal system would be inadequate to provide justice. In other contexts, customary justice mechanisms may be explicitly condemned by the state, such as in Pakistan, when in 2004 the Sindh High Court issued a decision stating that decisions of a *jirga* are unlawful and in breach of provisions of the constitution and the law.

Ewa Wojkowska, "Doing Justice: How Informal Justice Systems Can Contribute," (report prepared for the UNDP, New York, December 2006), http://siteresources. worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf.

Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (report prepared for the UNDP, UNICEF, and UN Women, September 2012), http://www.undp.org/content/dam/undp/library/ Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20 Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement.pdf.

Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington, DC: United States Institute of Peace Press, July 2011).

ADDITIONAL RESOURCES

RELIGIOUS LEGAL SYSTEMS

Religious law here is used to describe the system of religious laws that apply to people in both their private and public lives, not laws governing the religious practices of believers.

Although many countries throughout history have had legal systems based wholly or partly on religious laws and teachings, the most common systems in use today are those aligned with Islam (discussed below). Other religious legal systems include:

Jewish law (*halakha*): applied in personal law (such as in marriage and family matters) in Israel, Morocco, and other countries that recognize the application to specific religious communities.

Christian canon law: (Roman Catholic Church)**:** applied in Andorra, the Vatican City, and the Philippines, among other countries.

Hindu law: applied in Bangladesh, Kenya, and Malaysia, among other countries.

Buddhist law: applied in Myanmar (Burma), Laos, Thailand, and Sri Lanka, among other countries.

Confucian law: applied in China, Taiwan, and Korea, among other countries.

Islamic law:

"

In over fifty nations, Muslims are the majority religious community and number some 1.6 billion people worldwide, making Islam the world's second-largest religion and, as a consequence, one of the most widely subscribed legal systems in the world. . . .

THE JUSTICE SYSTEM

Like the system of common law originally developed in medieval England or the system of civil law that first evolved in ancient Rome, Islamic law should be regarded as a body of law, or a system of law, rooted in history but very much alive today. Islamic law is one of the oldest systems of law, having emerged more than fourteen centuries ago. . . .

"Shari'a" is an Arabic term that literally means "a path to the source of water." The term appears only once in the Qur'an, where it is used to distinguish between a completely whimsical path of lawlessness and a straight path bound by certitude. Thus, according to the Qur'an, the Shari'a is the certain or straight path within religion. Of course, what constitutes that "certain path" is open for debate. Most Islamic legal scholars attempt to define the Shari'a as the clear and specific commands attributed to God as laid out within the Qur'an and the Sunnah (the spoken and acted customs of the Prophet Muhammad, discussed in further detail below). And while this definition is broadly accepted, it still fails to take into account that even specific commands from the Qur'an and the Sunnah are bound by time and context, shaped by the transmission of revealed knowledge, and subject to the inherent ambiguity within any written language. Consequently, the Shari'a cannot readily be deciphered simply by repeating a command from the Qur'an and the Sunnah. Scholars caution that because the Shari'a is the law as laid out by God, but understood and interpreted by humans, all that results from its interpretation is a human—and therefore fallible—understanding of Divine law, which, in effect, is not the Shari'a.

"Islamic law" is a broader and more appropriate term than the "Shari'a." Islamic law not only describes the specific commands contained within the Qur'an and the Sunnah but also encompasses the broad array of legal interpretations articulated by scholarly jurists (known as jurisprudence, or fiqh), political rulers (known as siyasa al-Shari'a), and philosophers and theologians. In short, "Islamic law" refers to the totality of the commands and interpretations found under the Islamic legal umbrella.

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Source: Hamid Khan, *Practitioner's Guide: Islamic Law* (Washington, DC: INPROL, July 2013), 11–13, http://inprol.org/publications/12470/inprol-islamic-law-guide.

Reflections on the Relationship between Islamic Law, State Law, and Custom

A conversation on Islamic law with Hamid Khan*

What are some of the most common challenges that states face in reconciling Islamic law with formal or state law?

One of the challenges overarching any discussion about Islamic law and a modern state, is that Islamic law emerged before the arrival of 'the state'. The state assumes that it is the starting point of legal authority, and that stands in contrast to Islamic law, where the law comes from the most educated religious scholars. When we think about the state and how it makes law, there is always the question of the political process, politics and the human consideration. With Islamic law, it is supposed to be the consideration of God. So when a state defines itself as implementing Islamic law, it defines itself as the agent of God. This raises the very real tension of the intermingling between religion and politics. In Islamic jurisprudence and the history of Islam there is a deep-seated suspicion between the role of God's law and the law of politics – and the two were traditionally kept at a distance.

Today however, with the emergence of the nation state, and the trends in the Muslim world, beginning in Egypt and extending to places like Afghanistan and Pakistan, these states have made themselves the legal authority for Islam, and religious scholars, have become at the service of the state. This means that these same religious figures once thought of as the guardians of Islamic law, are now seen as political puppets. The legitimacy of Islamic law has been diluted the more the state tries to use it. And what has happened now is that non-state actors or a particular political actor will claim to be the ones to truly uphold Islamic law. This explains the sometimes-violent figures that have emerged to counteract this dilution of Islamic law. Islamic political theory believed that once you had political power, that political power would continue to extend if left unchecked. Islamic law was seen as the ultimate check upon politics. This is something challenging many Muslim countries today, where they are wrestling with questions like what is the role of parliament and how much authority should we give to religious scholars on the question of law?

How is this debate playing out in today in countries like Tunisia or Afghanistan?

In Afghanistan, they declared themselves to be an Islamic state and they have tried to create a political orientation that is consistent with Islam, by saying that all laws must be consistent with Islam, that individuals in senior political roles, such as the president and vice president, must be Muslim, and then redrafting the substance of the law, so for example, displacing modern criminal law with the classical *hudud* law. In many Muslim countries, we can find Islamic law in areas most related to the person and their relation to society, such as marriage, child custody, divorce and inheritance. One of the reasons why Islamic law fits well in those areas in that there Islamic law is very explicit. So rather than risking political trouble by challenging these notions, many of these states have not only accepted these laws for the sake of expediency, but they also have done it to achieve measures of legitimacy.

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In Tunisia, it was very different. They wrestled with including Islamic law in their constitution, like in many post-conflict counties and decided ultimately not to include Islamic law because it was ambiguous. Rather, they moved Islamic law to the realm of consciousness and personal practice, instead of placing it in the hands of the state. While many countries emerging from conflict have found themselves in a greater embrace of Islam, such as the case of Egypt (even if it is more vacillated), Afghanistan, or Iraq after the US invasion; Tunisia went in a different direction. There, the debate was most concerned with the question, "who defines Islam?" In defining Islam, would they be excluding some people from their citizenry? So they decided to remove it from the constitution and leave it in the realm of a person's consciousness. So you see a different variety of responses depending on the social make-up and experience of a state.

Some countries, like Sudan, for example, had hudud punishments in the formal law, but for a long time they were never enforced. Recently, some of these punishments are now being applied but there seems to be a tension between wanting Islamic law and the social or cultural reality. How can these be reconciled?

The example of Sudan encapsulates the very tension between the politics of Islamic law and the reality of Islamic law. Up until the modern era, Islamic criminal law punishments were rarely ever enforced because the evidentiary burdens were so difficult to overcome – that is, these devastating punishments and high evidentiary burdens were not necessarily intended to be enforced. That classical orientation of Islamic criminal law stands in a very strong contrast with what is happening now, where both state and non-state actors claim to uphold Islamic law by carrying out these punishments, without the various rigors that made Islamic law operate as a rule of law-based system, in other words, a system that was predicated on having a trial, a judge, legal advocacy, and most importantly, rules of evidence that focused on the weight of the evidence, the inevitability and the imputability of reason, the intent to commit a crime. If we look at non-state actors who want to achieve the political specter of law and order, they will often ignore all of these elements, just so they can achieve the victory of saying 'I've stoned someone' or punished them for theft.

It's not necessarily the law *per se*, but the totality of the law that needs to be understood. In fact there were many admonitions by the prophet and by jurists that says that you will never go directly to the punishment, that you need to try to avoid punishment, in order for the law to be more just, more flexible, and to uphold the rule of law. It also meant that there are a whole series of institutions that need to play their part, society needed to play its part. During the time of the famine in 638, for example, the caliph made unanimous that the punishment for theft could not be passed upon the citizens because society itself was unwilling or unable to meet the needs of its citizens. The state was disabled in its ability to punish in that same respect. This vast mosaic of Islamic law has been truncated and ignored, and ignores the importance of social conditions.

There is often seen to be a blurring between what is custom, culture, tradition and Islam. This becomes a challenge for states in transition trying to open up a dialogue around democratic governance and the vision for the state. How do we address this?
The primary concern in Islam, early on, was the spread of the religion rather than the establishment of a system of law or to remove or eliminate custom. That meant that Islam is very flexible in places like Africa or Indonesia, where it accorded great deference to customary practices as long as they did not contradict Islam. The question now is where is that dividing line? Where is the dividing line, for example, between female genital mutilation being tolerated as a matter of custom, and giving it the legitimacy of Islam. If you suggest, like some have, that the line drawing in Islam means that there is to be no set of practices beyond the time of the prophet and his companions, what do you do about modern issues such as the use of cell phones, or modern practices or holidays that do not fit in the narrow pantheon of Islamic practices. For example, many Afghans will celebrate the beginning of the spring, which has its origin in ancient Persia. Some saw this practice as completely consistent with Islam, because there is nothing directly hostile or conflicting between the celebration and Islam; others however, said that because this celebration didn't exist in the time of the tribes of Arabia and the companions of the prophet, it should be denied. Other practices, like forced marriage, are against the strictures of Islam, but for the sake of social cohesion, for the sake of public interest, have largely been ignored or tolerated.

I think that we have to understand that Islam has always had a long standing and deeply intertwined relationship with customary practices, because the rule in Islam has always been "unless it is expressly prohibited, it is permitted." On the other hand, we have also entered an age where legal and religious purity has also divided Muslim against Muslim. Often times the linchpin of this discourse has been accepting customary practices. In Muslim societies, it can be anything from the rights of marriage, or the role of the tribe, and of course this is indeed the challenge given that you have significant Muslim communities, in 54 countries all with different cultures, different backgrounds and different histories.

Reader Exercise

Mapping My Legal System

Below, at figure 2.10, is an example of the domestic legal framework applicable in Sudan prior to the recognition of the independence of South Sudan in 2011.

We can see that the Sudanese legal framework is complex and made up of a variety of subsystems, all with different roles, mandates, and levels of influence within society.

What other systems might exist in this legal framework?

FIGURE 2.10

Sudan's domestic legal framework
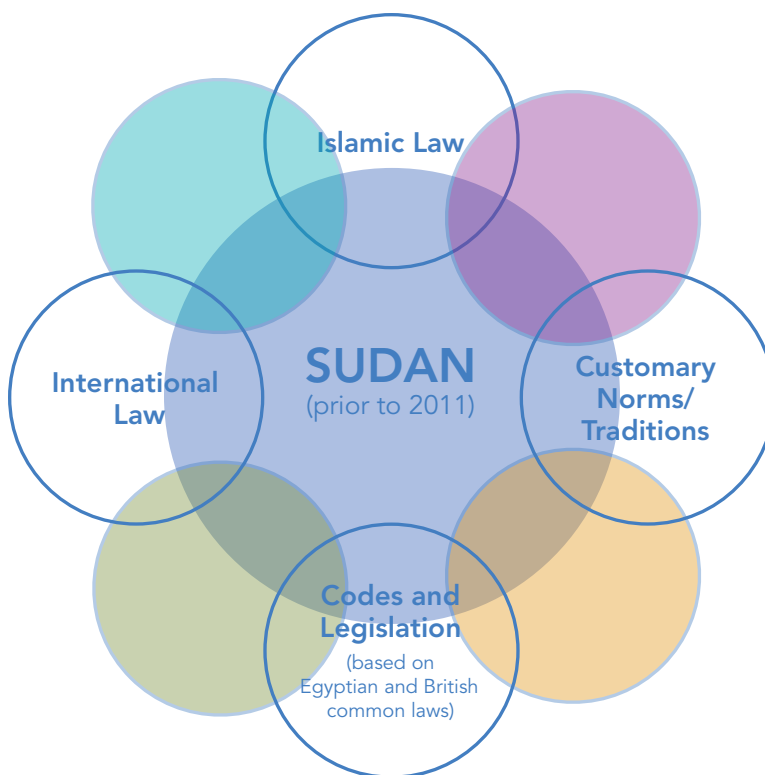
CONSIDER

What would this diagram look like for your own context?
(see figure 2.11)

Complete figure 2.11 filling in each circle with the different systems that apply in your own country context.

If the four figures next to each circle represent the total population in your country, how many figures would you shade in to demonstrate the level of legitimacy that system has within society? For example, in a country such as the United Kingdom, the formal legal system is regarded as a legitimate system of law by the entire population; therefore, all four figures would be shaded in.

Systems of law
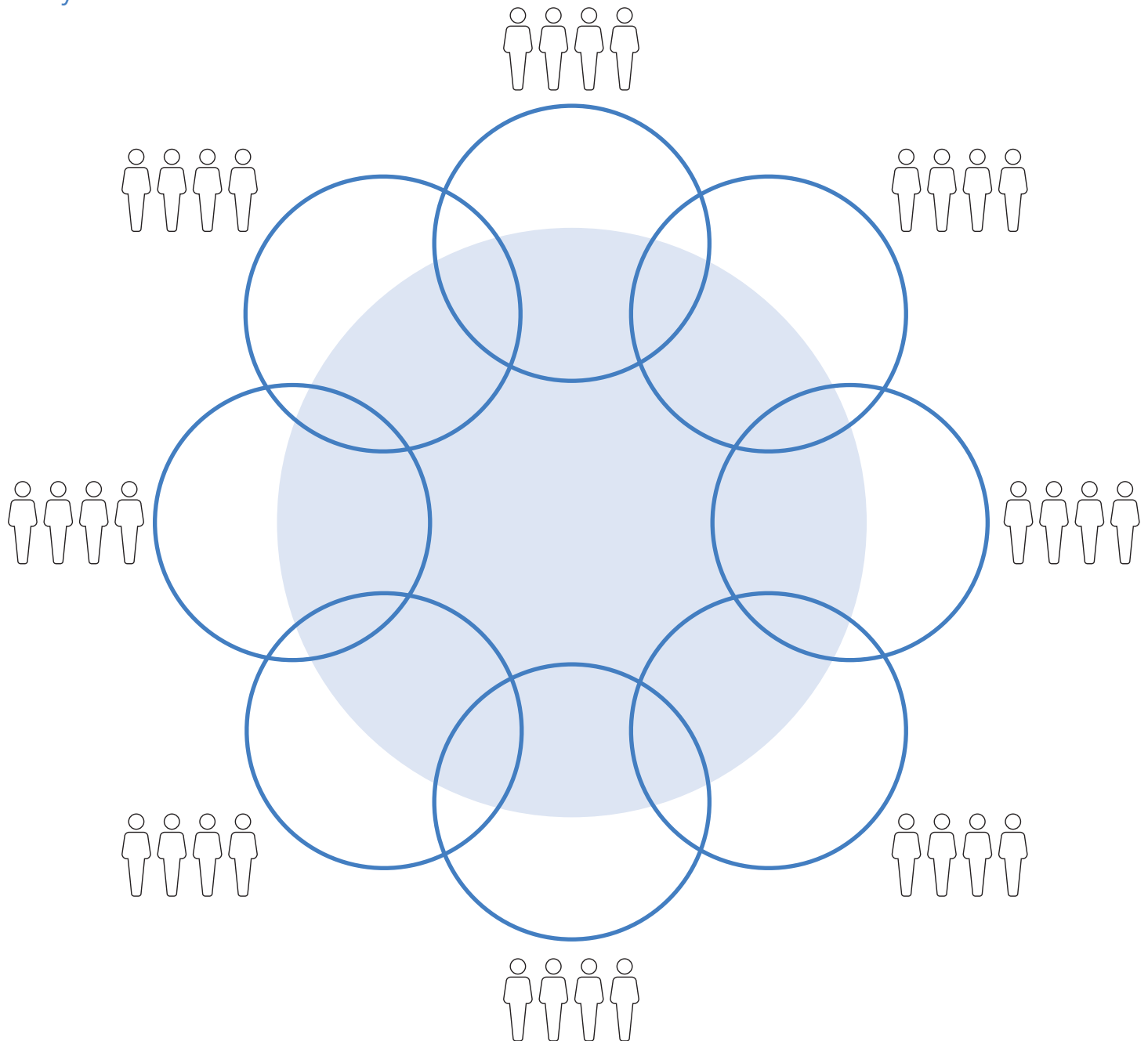
CHAPTER 2 Part 2 ENDNOTES

1 Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008): 375.

2 Vivienne O'Connor, *Mapping the Justice System and Legal Framework in a Conflict-Affected Country* (Washington, DC: INPROL, 2015), 28.

3 Reinhard Zimmermann, "Double Cross: Comparing Scots and South African Law," in *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa*, ed. Reinhard Zimmermann, Daniel Visser and Kenneth Reid (Oxford: Oxford University Press, 2004).

4 Cameroon Center for Democracy and Human Rights, "Press Release: New Criminal Procedure Code Comes into Force, Custodians Still Ignorant," January 1, 2007, http://www.ccdhr.org/press-releases/2007/01-01-NewCPCNowInForce.htm.

5 This section draws from Vivienne O'Connor, *INPROL Practitioners' Guide: Introduction to Common Law and Civil Law Traditions*, (Washington, DC: INPROL, 2012), http://inprol.org/publications/11042/common-law-and-civil-law-traditions.

6 This section draws from Vivienne O'Connor, *INPROL Practitioners' Guide: Introduction to Common Law and Civil Law Traditions*, (Washington, DC: INPROL, 2012), http://inprol.org/publications/11042/common-law-and-civil-law-traditions.

The Role of International Law in Domestic Legal Frameworks
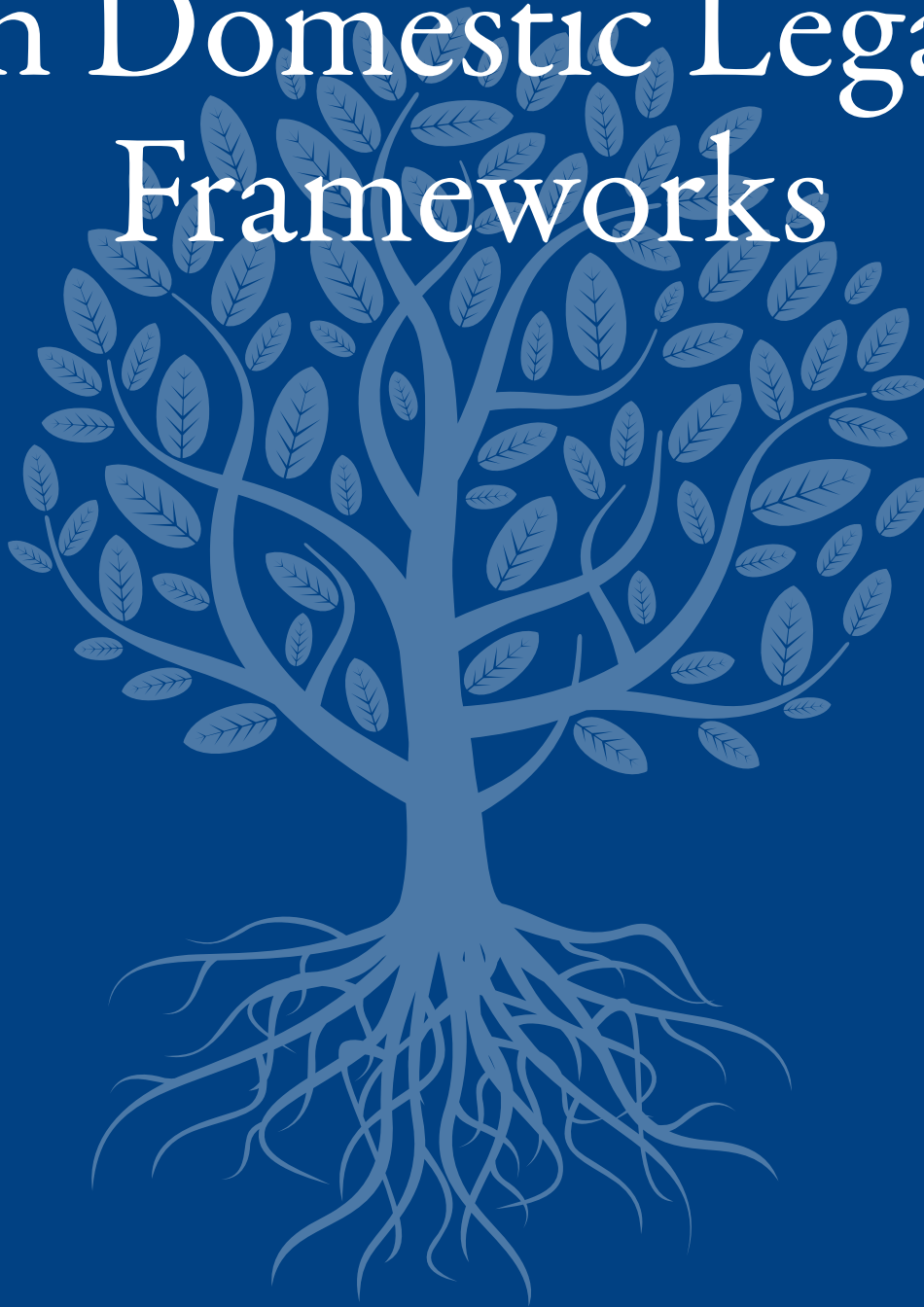
The Role of International Law in Domestic Legal Frameworks

This chapter considers the role of international law within a domestic legal framework and explores the challenges of translating international laws and standards into domestic law and practice. The chapter also introduces readers to a good practice–based process - approach to law reform, emphasizing the role of this approach in promoting a rule of law culture. Case studies and exercises allow readers to explore the application of this approach to addressing serious crimes, including terrorism.

CHAPTER HIGHLIGHTS:

- The role of public international law in a rule of law culture

- Treaty obligations and their treatment in domestic laws

- Human rights obligations, approaches, and practices

- Challenges and good practices of reforming the law

Note: *The chapter deals with international law as part of understanding key elements of a rule of law culture. The chapter is not technical instruction in international law itself.*

Contents

Part 1 | Introduction

International norms and standards impact the domestic legal system of every country to varying degrees. Certain international norms, such as the prohibition against torture, apply to all countries. Other obligations stem from a country's ratification of specific international treaties (see the section on binding law in part 2). In addition, a rule of law–based society should, through its system of laws, uphold, protect, and promote international human rights and freedoms of all people within a society.

As members of a broader international community, countries are also often encouraged to adopt specific international obligations related to issues of global concern, such as terrorism, organized crime, and the environment. Generally, all of these international obligations require a country to amend its domestic legal framework in some way to be able to implement its commitments to rule of law and international law. However, the process of reforming the legal framework can be extremely challenging.

EXAMPLE

Liberia

In September 2005, the UN secretary-general convened a treaty event, "Focus 2005: Responding to Global Challenges." UN member states were encouraged to "demonstrate their continuing commitment to the central role of the rule of law and international relations" by ratifying a range of treaties reflecting a broad array of interconnected concerns, including terrorism, human rights, and disarmament. Liberia, a country that had recently emerged from civil war, ratified a record eighty-three treaties in a single day.

The action received high praise from the international community. The special representative of the secretary-general for Liberia hailed the move as "a critical and positive step forward in Liberia's transition from conflict to peace, security and democratic governance." However, the ratifications necessitated significant domestic law reform measures at a difficult time: there was no complete set of domestic laws available in the country, many laws passed by various interim governments throughout the years of conflict duplicated and conflicted with one another, and there was a shortage of legal professionals in the country.

Sources: Reliefweb, "UN Special Representative of the Secretary-General Hails Liberia's Adoption of 103 International Treaties" (September 19, 2005), http://reliefweb.int/report/liberia/un-special-representative-secretary-general-hails-liberias-adoption-103-international; United Nations, "Treaty Event during United Nations Summit Receives Record Number of Treaty Actions" (press release, September 21, 2005), http://www.un.org/press/en/2005/lt4391.doc.htm;

UN Office for the Coordination of Humanitarian Affairs Liberia, "Interview with President Ellen Johnson-Sirleaf" (press release, June 29, 2006), http://www.irinnews.org/report/59516/liberia-interview-with-president-ellen-johnson-sirleaf.

This chapter explores the challenge of translating international obligations into domestic laws and practice. It encourages the use of a process approach to law reform, which aims at ensuring effective implementation of international obligations and realizing a strengthened rule of law culture.

This chapter is not intended to provide a comprehensive lesson in international law.

Parts 2 and 3 of the chapter provide a concise overview of the key bodies of public international law as they pertain to the relationship between the state and the people over which it has jurisdiction.

Parts 4 and 5 are practice - focused; they examine the challenges of translating international law obligations into domestic law and propose good practices for undertaking law reform.

Part 6 highlights the relationship between rule of law, international law, and counterterrorism. A sample of available online international law courses for readers interested in developing or refreshing their international law knowledge follows part 6.

Part 2 | An Overview of International Law

WHAT IS INTERNATIONAL LAW?

International law is the body of norms that regulates the relations between states, the relations between states and international organizations, and the relations between international organizations. Increasingly, international law also regulates relations between states and individuals, including obligations on states concerning the treatment of persons under their jurisdiction or effective control.

International law consists of binding ("hard") and nonbinding ("soft") sources of law. Binding law refers to rules that are legally binding and that states must therefore apply, such as treaty law (i.e., conventions, agreements, and protocols), as well as international customary law and *jus cogens* (principles of international law from which no derogation or exemption is permitted). Nonbinding law refers to standards, principles, resolutions, declarations, guidelines, or statements that are not legally binding on states but that nevertheless represent broad consensus by states and have strong moral and persuasive value. Some resolutions may be legally binding on states (e.g., Security Council resolutions adopted under Chapter VII of the UN Charter).

Article 38(1) of the Statute of the International Court of Justice is generally accepted as the complete statement of the sources of international law, namely,

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

BINDING LAW

International Conventions and Treaties

Under the Vienna Convention on the Law of Treaties, a treaty is defined as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Treaties may also be concluded between states and international organizations whose members are sovereign states, e.g. the World Trade Organization and the European Union, or between international organizations.

Treaties ultimately become binding through a process in which two or more states create the treaty and thereafter accept the obligations created in the treaty. As shown in figure 3.1, the main steps in the treaty-making process are treaty negotiation, adoption, and signature, followed by ratification, acceptance, approval, or accession. After a negotiation phase and adoption of a text, states can sign and then express their consent to be bound in accordance with the final clauses of the treaty.

FIGURE 3.1

The treaty process

DRAFTING
The content of a treaty is negotiated and agreed by government representatives

ADOPTION
The text of the draft treaty is adopted by the UN General Assembly

ACCEPTANCE BY STATES
Each governmnet decides whether the treaty will be law in that state by either:
SIGNATURE
RATIFICATION or ACCESSION or SUCCESSION

ENTRY INTO FORCE
After a certain number of states have completed this process the treaty becomes law in those states

STATES PARTIES
A state which is legally bound by a treaty is called a State Party

Source: Minority Rights Group International, "Introduction to Minority Rights, Regional Human Rights Mechanisms, and Minority Rights Advocacy" (online course), https://www.minorityrightscourse.org/mod/page/view.php?id=1651.

Simple signature does not mean that a treaty is immediately binding on the state; however, the state should refrain from acts that would defeat the object and purpose of the treaty.

Following signature, treaties are subject to *ratification*. States that have signed may become parties by depositing an instrument of ratification, provided that the conditions for entry into force are fulfilled. States that have not signed the treaty during the provided time frame (if such a time frame is provided by the treaty) may become a party to it by depositing an instrument of *accession*, which indicates the state's consent to be bound by the treaty at the international level. Treaties may indicate the specific ratification procedure to be followed.

Treaty formalities (e.g., signature, ratification) are undertaken with the depositary, which, in the case of multilateral treaties concluded under the auspices of the United Nations, is the UN secretary-general. A state that has deposited its instrument of consent to be bound by a treaty is considered a "state party" once the requirements for entry into force established in the treaty have been fulfilled.

Provided that making *reservations* is not prohibited by a treaty, a state can do so to its provisions, if such reservations are not against the object and purpose of the treaty. Reservations are also deposited with the depositary, at the time the state expresses its consent to be bound.

Many countries have made reservations to the Convention on the Elimination of All Forms of Discrimination against Women. Many of those reservations are made on religious grounds. Israel and Bahrain, for example, have expressed their reservations thus:

> *Article 7: States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:*
> *. . .*
> *(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; . . .*
>
> **Israel:** The State of Israel hereby expresses its reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel.
>
> *Article 16: 1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
> *. . .*
> *(c) The same rights and responsibilities during marriage and at its dissolution; . . .*
>
> **Bahrain:** The Kingdom of Bahrain makes reservations with respect to the following provisions of the Convention: Article 16, insofar as it is incompatible with the provisions of the Islamic sharia.

Succession refers to the transfer of rights, obligations, and/or property from a previously well-established prior state (the predecessor state) to the new one (the successor state).

Multilateral treaties provide, as one of the requirements for their entry into force, that a certain number of states deposit their instruments of consent to be bound. Multilateral treaties also normally stipulate that a certain period of time must elapse between the date on which the required number of instruments is deposited and the date of entry into force (e.g., the Rome Statute of the International Criminal Court provides that it "shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations" (Article 126(1)). Once the treaty has entered into force, it is binding on the parties to it and must be implemented by them in good faith.

Major International and Regional Human Rights Treaties and Standards

International and Regional Human Rights Treaties

International Treaties (General)
- United Nations International Covenant on Civil and Political Rights, two additional protocols
- United Nations Convention on Economic, Social and Cultural Rights

Regional Treaties (General)
- African Charter on Human and Peoples' Rights
- American Convention on Human Rights
- American Declaration on the Rights and Duties of Man
- Arab Charter on Human Rights
- European Charter of Fundamental Rights
- European Convention for the Protection of Human Rights and Fundamental Freedoms, fourteen additional protocols
- Universal Islamic Declaration of Human Rights

International Treaties Addressing Specific Human Rights Issues
- United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination
- United Nations International Convention on the Protection of All Persons from Enforced Disappearances

Regional Treaties Addressing Specific Human Rights Issues
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention to Prevent and Punish Torture
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

International Treaties Addressing the Rights of Women and Children
- United Nations Convention on the Elimination of All Forms of Discrimination against Women
- United Nations Convention on the Rights of the Child

Regional Treaties Addressing the Rights of Women and Children
- African Charter on the Rights and Welfare of the Child
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Nonbinding International and Regional Human Rights Standards/Declarations

International Human Rights Standards/Declarations
- United Nations Basic Principles on the Independence of the Judiciary
- United Nations Basic Principles on the Role of Lawyers
- United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- United Nations Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment
- United Nations Code of Conduct for Law Enforcement Officials
- United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- United Nations Declaration on the Elimination of Violence against Women
- United Nations Declaration of Human Rights of Individuals who are not Nationals of the Country in which they Live
- United Nations Declaration on the Protection of All Persons from Enforced Disappearances
- United Nations Declaration on the Rights of the Child
- United Nations Draft Declaration on the Right to a Fair Trial and a Remedy
- United Nations Guidelines for the Prevention of Juvenile Delinquency
- United Nations Guidelines on the Role of Prosecutors
- United Nations Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
- United Nations Procedures for the Effective Implementation of the Basic Principles on the Judiciary
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice
- United Nations Standard Minimum Rules for Noncustodial Measures
- United Nations Standard Minimum Rules for the Treatment of Prisoners

Regional Human Rights Standards/Declarations
- Cairo Declaration of Human Rights in Islam
- Universal Islamic Declaration of Human Rights
- African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
- Bangalore Principles of Judicial Conduct
- Suva Statement on the Principles of Judicial Independence and Access to Justice

International Customary Law

Like treaties, international customary law is also considered binding, or hard, law. Customary law is defined as "general practice accepted as law" and binds states even without their express consent. For customary international law to be created, two requirements (called "elements") must be met: the first element requires a sufficient number of states to pursue conduct in a general and consistent manner, and the second element (also referred to as *opinio juris*) requires states to follow the rule because of a sense of legal obligation. Frequently, however, there is no easy way to measure whether a standard has reached the status of an international custom, or whether it is accepted by states, especially in view of their resistance to becoming legally bound to follow a certain conduct.

Customary law plays a particularly important role in ensuring the universal applicability of some international human rights standards when some states are not party to human rights instruments.

Customary law also plays a particularly important role in ensuring the universal applicability of certain international human rights norms that have been recognized as having attained the status of customary law. Such norms include: the prohibition of genocide; the prohibition of enforced disappearance; the prohibition of torture and other cruel, inhuman, or degrading treatment; the prohibition of prolonged arbitrary detention; the prohibition of discrimination; and the prohibition of war crimes, crimes against humanity, and gross violations of human rights.

States are bound by these norms even in the absence of treaties or even if they are not parties to treaties that incorporate such norms. Furthermore, some customary norms have reached the status of a peremptory norm (*jus cogens*). It is generally accepted that *jus cogens* crimes include genocide, crimes against humanity, war crimes, piracy, slavery, and torture.

NONBINDING LAW

By definition, nonbinding (soft) law is not legally binding. Nonbinding law includes declarations (e.g., the Declaration on the Elimination of Violence against Women), principles (e.g., the Basic Principles on the Role of Lawyers), and "minimum standards" (e.g., the Standard Minimum Rules for the Treatment of Prisoners). Many nonbinding instruments have been adopted by UN legislative bodies, such as the General Assembly and the Economic and Social Council. Because such instruments usually represent broad consensus by states, they have strong moral and persuasive force.[1]

Nonbinding law can develop and become binding law. This is usually done by turning the nonbinding legal standards into a treaty. For example, the Declaration on the Protection of All Persons from Enforced Disappearances later became the basis for the International Convention for the Protection of All Persons from Enforced Disappearance. Norms contained in nonbinding instruments can also be recognized as rules of customary international law.

Resolutions

A number of UN bodies have the authority to pass resolutions.

The General Assembly is the main deliberative, policy-making, and representative organ of the United Nations established under the UN Charter. The General Assembly is composed of representatives of all member states, each with one vote. It plays a significant role in the process of standard setting and the codification of international law, and assists in the realization of human rights and fundamental freedoms.

The Security Council is composed of five permanent members (China, France, Russia, the United Kingdom, and the United States) and ten nonpermanent members elected for two years by the General Assembly. Each member has a vote and each permanent member can veto any proposed resolution. Decisions need the affirmative votes of nine members. The Security Council is primarily responsible for the maintenance of international peace and security, and the investigation of any dispute or situation that might lead to international friction or give rise to a dispute, to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security. The mandates of United Nations peacekeeping operations are determined by the Security Council (though the General Assembly also has the authority to do this, invoked only once in UN peacekeeping history). Subsidiary bodies of the Security Council include the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

The Economic and Social Council (ESC) coordinates the economic, social, and related work of the United Nations, including specialized agencies and functional and regional commissions. The ESC serves as the central forum for discussing these issues, and for formulating policy recommendations addressed to member states and the UN system. It is responsible for 1) promoting higher standards of living, full employment, and economic and social progress; 2) identifying solutions to international economic, social, and health problems; 3) facilitating international cultural and educational cooperation; and 4) encouraging universal respect for human rights and fundamental freedoms. It is also empowered to call international conferences and prepare draft conventions for submission to the General Assembly on matters falling within its competence. Like the General Assembly, the ESC can pass resolutions and adopt nonbinding principles, including on matters relating to criminal justice (e.g., Procedures for the Effective Implementation of the Standard Minimum Rules for the Treatment of Prisoners). The ESC also has a number of subsidiary bodies, including the Commission on Crime Prevention and Criminal Justice, the Commission on the Status of Women, and the Commission on Narcotic Drugs.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. The ICJ's role is to settle, in accordance with international law, legal disputes submitted to the ICJ by states and to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. The ICJ's cases cover a wide range of issues of international law, including territorial and maritime delimitation, environmental concerns, immunities of states, human rights violations, nonuse of force, noninterference in the internal affairs of states, consular relations, diplomatic relations, hostage-taking, and the right of asylum, nationality, and economic rights. The ICJ is an indispensable element

of the system of peaceful settlement of disputes established by the UN Charter. The ICJ also has considerable influence on the development of international law. The Statute of the ICJ is annexed to the UN Charter.

REGIONAL FRAMEWORKS

In addition to international legal frameworks, there are also regional legal frameworks that may include regional treaties and regional institutions. Three examples are discussed here.

The African System for the Protection of Human Rights

The African Charter on Human and Peoples' Rights (ACHPR, also known as the Banjul Charter) was concluded under the aegis of the Organization of African Unity (now the African Union) and entered into force in 1986. The distinguishing features of the Banjul Charter are the prominent place it attributes to individuals' and peoples' rights, on the one hand (articles 19–24), and individuals' duties, on the other (articles 27–29).

The Banjul Charter establishes the African Commission on Human and Peoples' Rights. The commission can receive individual communications alleging human rights violations. If a complaint is admissible, the commission issues its views as to whether a violation has occurred and, if so, recommends reparation. In addition, the commission considers and reports on thematic human rights issues as well as on the human rights situation in specific countries.

In 2004, a Protocol to the Banjul Charter established the African Court of Human and Peoples' Rights (African Court). Cases may be brought before the African Court by the commission, by states, or by individuals (but only in respect of states that have ratified the protocol and thereby permitted individual petition). At the time of writing, around twenty-five African states had accepted the jurisdiction of the African Court to hear disputes brought before it by the commission or by other states; five states had been granted the right of individual petition to the African Court, which had a small but growing number of cases.

Several innovative features set the African Court apart from its American and European counterparts: the Protocol to the Banjul Charter provides that the African Court may apply not only the ACHPR but also other international human rights treaties that have been ratified by the state party in question. Moreover, NGOs recognized by the African Union can apply to the African Court for advisory opinions.

The Arab Charter on Human Rights

The Arab Charter on Human Rights (ACHR) was adopted by the Council of the League of Arab States in 1994. A revised version was adopted in 2004 and entered into force (for the states that had ratified it) in 2008. As of October 2015, the ACHR has been ratified by Algeria, Bahrain, Iraq, Jordan, Kuwait, Lebanon, Libya, Palestine, Qatar, Saudi Arabia, Syria, the United Arab Emirates, and Yemen.

The treaty body established to supervise the ACHR's implementation is the Arab Human Rights Committee. In accordance with article 48, state parties submit reports on the measures they have taken to give effect to the rights and freedoms recognized in the ACHR and on the progress made toward their enjoyment. The committee considers the reports in the presence and with the participation of the state party in question. The committee may request additional information relating to the implementation of the ACHR. Having considered the report, the committee will issue final comments and recommendations, which are included in the annual report to the Council of the League of Arab States. There is no individual right to petition the committee.

The Cairo Declaration on Human Rights in Islam

The Cairo Declaration on Human Rights in Islam (August 5, 1990) is nonbinding but is the single most universal comprehensive statement about rights in the contemporary Islamic world. The declaration was adopted in 1990 by fifty-six nations of the Organization of the Islamic Conference. The declaration marked the first time Islamic states and contemporary scholars had to put into a coherent form the concept of individual rights in Islamic law in the contemporary era. The Cairo Declaration represents an important measured effort by a variety of Muslim states to assert and protect an array of rights that, taken collectively, form a distinctly Islamic view of individual human rights. The Cairo Declaration contains six categories of freedoms: nondiscrimination, expression and speech (grouped into a single category), due process, international humanitarian law, family law, and the rights of women. The extent and breadth of the Cairo Declaration's application remains the province of individual states.

CHAPTER 3 Part 2 ENDNOTES

1   UN Development Programme (UNDP), *Programming for Justice: Access for All* (New York: UNDP, 2005), 50.

Part 3 | The Public International Law Framework

As stated in the 2004 report of the secretary-general, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,*[2] the "four pillars of the modern international system" that are fundamental to the advancement of rule of law are international human rights law (IHRL), international humanitarian law (IHL), international criminal law (ICL), and international refugee law. Other bodies of international law that are not addressed in this module include international trade law and the law of the sea. An overview of each of the four pillars is provided below.

The overviews have been taken from "International Law," chapter 3, of the *Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations*, produced by the UN Department of Peacekeeping Operations in June 2013 (http://www.un.org/en/peacekeeping/publications/cljas/handbook_jao.pdf).

OVERVIEW OF INTERNATIONAL HUMAN RIGHTS LAW

Definition: It is important to make a distinction between the concept of human rights and international human rights law (IHRL). Human rights are rights that are inherent in each human being. IHRL gives a positive legal expression to the broader concept of human rights. A series of international human rights treaties and other instruments have emerged since 1945 conferring legal form on inherent human rights.

History: Human rights are based on the concept that each human being by reason only of being human has certain inherent and inalienable rights. Human rights are discussed in ancient texts and religions (e.g., the Hindu Vedas, the Bible, the Code of Hammurabi, the Qur'an). Later philosophers like Grotius, Hobbes, Locke and Kant wrote about the concept of rights and "natural" rights. The drafting of the Magna Carta in England (giving rights to citizens), the American Declaration of Independence and the Declaration of the Rights of Man and Citizens in France all gave credence to this concept of rights, albeit in a domestic context. In 1919, the Treaty of Versailles contained provisions on labour and minority rights. It also created the League of Nations (the predecessor organization of the United Nations).

The real catalyst for IHRL, an international system devised between States to protect its citizens, was World War II. Respect and promotion of IHRL are one of the principles of the United Nations contained in the Charter. The Economic and Social Council, under Article 68 of the United Nations Charter, established the Commission on Human Rights "for the promotion of human rights". Under Eleanor Roosevelt, the Commission drafted the Universal Declaration on Human Rights in 1948 which was subsequently adopted by the United Nations General Assembly.

Sources: Two major treaties—the ICCPR (and two optional protocols) and the ICESCR (and optional protocol)—are the foundation of binding law on human rights. Other treaties that are more detailed and deal with specific human rights issues and specific groups can be found in the list of Major International and Regional Human Rights Treaties and Standards above.

Positive and negative obligations: In implementing human rights, States have positive and negative obligations. In relation to positive obligations, States should take measures to ensure that a right is protected and should take measures against those who violate the rights of others. States may also have obligations to take action to fulfil certain rights, which is different conceptually from protecting rights. States also have negative obligations, namely obligations not to do something. For example, neither a State nor its employees should torture a citizen. However, if a citizen is tortured, the State also has some positive obligations. The State should have legal mechanisms to, for example, prevent and punish acts of torture and should investigate, prosecute and provide redress for the harm committed by the person. Other ways in which the State can positively comply are by adopting legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations.

Reservations: States can opt out of certain treaty provisions by making a formal reservation at the time that they express their consent to be bound by a treaty. A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". If the reservation is permitted by the treaty, and is compatible with the object and purpose of the treaty, the state is not required to apply the part of the treaty to which it has made a reservation (unless this part is part of customary international law and therefore applies irrespective of there being a treaty or not).

Derogations: The other situation where a State does not need to comply with a human right is when it has invoked derogation with respect to that right, as provided for in Article 4 of the ICCPR. There is no blanket right to derogate under international law, and derogations are strictly limited as follows:

a. In order to invoke derogation, Article 4 of the ICCPR requires that two fundamental conditions are met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. Article 4 further limits derogation "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".
b. The Siracusa Principles on the Limitation and Derogation Provisions of the ICCPR state that a public emergency is an "exceptional and actual or imminent danger which threatens the life of a nation". Thus, not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation. The ICCPR requires that even during an armed conflict, measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation.

c. The State must "inform the other States Parties to the ICCPR, through the interme-diary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. Further communications shall be made, through the same intermediary, on the date on which it terminates such derogation."

Derogations are never permitted for some rights. These are set out in Article 4.2 of the ICCPR as: the right to life; freedom from torture, cruel, inhuman and degrading treatment or punishment; freedom from slavery and servitude; imprisonment for the inability to fulfil a contract; retroactivity of criminal law; the right to recognition as a person; and freedom of thought, conscience and religion. The Human Rights Committee has also stated that action conducted under the authority of a State that constitutes a basis for individual criminal responsibility for a crime against humanity by the persons involved in that action cannot be used as a justification for a state of emergency. It has further stated that some core fair trial rights in Article 14 of the ICCPR are non-derogable even though the ICCPR does not expressly say so because some of these fair trial rights are guaranteed under IHL and a State is not allowed to derogate from other obligations under international law, including IHL.

Non-binding law: Non-binding legal standards are also part of IHRL. Many of these standards relate to criminal justice and are highly relevant to the work of the judicial affairs officers. These standards concern a range of matters (e.g., integrity and independence of the judicial profession; detention; rights of victims; crime prevention; law enforcement; juvenile justice; restorative justice; and legal, institutional and practical arrangements for international cooperation).

Treaty bodies: Monitoring mechanisms ("treaty bodies") established pursuant to various human rights treaties include the Human Rights Committee under the ICCPR and the Committee on Economic, Social and Cultural Rights under the ICESCR. Additional treaty bodies set up under various multilateral treaties, include the following:

a. Committee on the Elimination of Racial Discrimination, under the International Convention on the Elimination of All Forms of Racial Discrimination;
b. Committee against Torture, under the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment;
c. Committee on Enforced Disappearances, under the International Convention for the Protection of all Persons from Enforced Disappearance;
d. Committee on the Elimination of All Forms of Discrimination against Women, under the Convention on the Elimination of all Forms of Discrimination against Women;
e. Committee on the Rights of the Child, under the Convention on the Rights of the Child;
f. Committee on Migrant Workers, under the International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families; and
g. Committee on the Rights of Persons with Disabilities, under the Convention on the Rights of Persons with Disabilities.

These treaty bodies play a number of roles, including:

a. Setting up reporting systems that require States to report on their compliance with their treaty obligations: The committees review the reports of State parties and assesses the positive and negative aspects of the State's compliance. The "concluding observations" of treaty bodies can provide judicial affairs officers with valuable information on how the State is complying or not with international human rights law (another important source are the reports of national non-governmental organizations called "shadow reports" to the various treaty bodies).

b. Issuing "General Comments" or "General Recommendations" that elaborate on treaty obligations: Judicial affairs officers should be particularly aware of the existence of General Comments of the Human Rights Committee on fair trial rights as these provide much needed additional information on the implementation of international fair trial rights. Treaty bodies serve as the most authoritative source of interpretation of the human rights treaties that they monitor.

c. Examining complaints from individuals regarding alleged human rights violations committed by States: Whether individual complaints can be made depends on the provisions of the relevant treaty and whether a State has accepted jurisdiction of this body when expressing its consent to be bound by the relevant treaty or protocol to the treaty (e.g., Protocol I to the ICCPR establishing a complaints procedure for the Human Rights Committee). Although committees are not "courts", they can have quasi-judicial functions by making findings of compliance or non-compliance with the treaty concerned.

The Human Rights Council: The Human Rights Council, which was created by the General Assembly, can promote compliance with IHRL through its monitoring functions. It can establish monitoring mechanisms (either one person—serving as a Special Rapporteur—or a group) to monitor an issue or a country. There are currently 30 thematic and 8 country mandates. Certain States (e.g., Haiti) are on the list of country mandates. Certain areas of interest to judicial affairs officers (e.g., arbitrary detention or independence of judges and lawyers) are on the list of thematic mandates. These reports can be useful to judicial affairs officers in understanding the human rights situation in a State and determining whether the State is complying with specific treaty obligations (the reports also contains recommendations for how to comply with the obligations which can be useful in providing advice to national counterparts). The Human Rights Council also conducts a Universal Periodic Review of each State's compliance with international human rights law. The reports are a good source on how a post-conflict State is complying or not with its obligations and can also be a useful resource for judicial affairs officers in their work.

Regional human rights bodies, courts and commissions: IHRL also draws on the work of regional human rights bodies that have drafted regional human rights treaties and also have regional monitoring mechanisms.

Europe:

In Europe, the Council of Europe is responsible for the adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms to which all member States of the Council of Europe are a party. The Convention has 12 additional protocols and is monitored by the European Court of Human Rights. There is also a European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and a Framework Convention for the Protection on National Minorities. Individuals from Council of Europe member States can submit cases against their country before the Court on the basis of alleged violations of human rights. States can also bring a case or initiate proceedings against other States before the court for alleged violations of human rights, although this is rare (e.g., Ireland filed a claim against the UK before the court on the basis of alleged human rights violations taking place in the UK and Northern Ireland). The Organization for Security and Cooperation in Europe (OSCE) also deals with human rights issues (although it has no treaties). The OSCE established a High Commissioner for National Minorities (based in The Hague) that seeks to protect the human rights of minorities and the Organization for Democratic Institutions and Human Rights (ODIHR, based in Warsaw) is a specialized institution of the OSCE dealing with human rights. ODIHR assists States in implementing the human rights commitments (called "human dimension" commitments as they are not legally binding) to the OSCE and other international obligations by providing expertise and support. The OSCE has also played a human rights monitoring function in some post-conflict States (e.g., Kosovo). The European Union adopted the Charter of Fundamental Rights of the European Union (2000), setting out applicable human rights standards (civil, political, social and economic). With the entry into force of the Lisbon Treaty, the Charter now has binding legal force and can be adjudicated upon by the European Court of Justice.

The Americas:

In the Americas, the Organization for American States (OAS) has adopted a number of human rights treaties and also has established human rights monitoring mechanisms. The American Convention on Human Rights is the equivalent of the ICCPR in that it is a general human rights convention. Additionally, more specific treaties have been adopted, including the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearances of Persons. There is also an Inter-American Commission on Human Rights and an Inter-American Court on Human Rights. The Commission came out of the Inter-American Declaration on Human Rights (the equivalent of the Universal Declaration of Human Rights). The Commission receives individual complaints and looks into allegations of human rights violations. It also monitors the human rights situation in OAS countries and has special rapporteurs on different topics (e.g., on the rights of women, the rights of children). The mandate of the Inter-American Court is the application and interpretation of the American Convention on Human Rights. The Court thus has an adjudicatory and an advisory function. Under the adjudicatory function, a State or citizen can bring a case against a State party for violating

the Convention. Under its advisory role, organs of the OAS or States can ask for the advice of the Court on the application of the Convention.

Africa:

In Africa, the African Union (AU) adopted the African Charter on Human and Peoples' Rights (Banjul Charter). It is unique among international human rights instruments because it gives prominent credence to group rights as well as individual rights, based on the communitarian culture of Africa. In addition to the Charter, other AU conventions have been drafted, including the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa. The African Commission on Human and Peoples Rights was established under the African Charter to promote and protect human rights and to interpret the Charter. The Commission has a number of special rapporteurs on topics such as extra-judicial, summary or arbitrary executions, refugees, asylum seekers, IDPs and migrants and the rights of women. All AU States must report to the Commission on their compliance with the African Charter. The African Court on Human and Peoples' Rights was established in 2004 pursuant to a protocol to the African Charter. The first judges of the court were elected in 2006. The Economic Community of West African States (ECOWAS) also has a Community Court of Justice which has adjudicated rule of law issues.

Asia:

In Asia, the Association of Southeast Asian Nations (ASEAN) Intergovernmental Commission on Human Rights was established and held its first meeting in 2010. The Commission is still in the process of developing its roadmap of programmes and activities to be undertaken by the organization. The newly established Commission covers only the ASEAN Member States.

OVERVIEW OF INTERNATIONAL HUMANITARIAN LAW

Definition: According to the International Committee for the Red Cross (ICRC),

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"International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare.

International humanitarian law is also known as the law of war or the law of armed conflict. International humanitarian law is part of international law, which is the body of rules governing relations between States.

International humanitarian law applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter."[3]

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The essential rules of international humanitarian law (IHL)

- The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property.
- Neither the civilian population as a whole nor individual civilians may be attacked. Attacks may be made solely against military objectives.
- People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavorable distinction whatever.
- It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.
- Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare.
- It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.
- The wounded and sick must be collected and cared for by the party to the conflict which has them in its power.
- Medical personnel and medical establishments, transports and equipment must be spared. The red cross or red crescent on a white background is the distinctive sign indicating that such persons and objects must be respected.
- Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights and their political, religious and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

Source: ICRC, International Humanitarian Law: Answers to your Questions, October 2002, http://www.redcross.org/images/MEDIA_CustomProductCatalog/m22303661_IHL-FAQ.pdf

Sources: The main IHL treaties are the Geneva Conventions of 1949 and their additional protocols. Other IHL treaties include the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954) and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and Their Destruction (1997).

The Geneva Conventions have received universal ratification. Further, many elements of the Geneva Conventions and the Additional Protocols have reached the status of customary law. The first Geneva Convention regulates the protection of the wounded and sick in armed forces in the field. The second Geneva Convention regulates the protection of the wounded, sick and shipwrecked members of armed forces at sea. The third Geneva Convention regulates the protection of prisoners of war—primarily members of armed forces and affiliated forces. The fourth Geneva Convention covers the protection of civilians in times of war (including in times of occupation).

The four Geneva Conventions only cover situations of international armed conflict, with the exception of common Article 3, which provides basic standards for conflicts of a non-international character. Additional rules applicable to non-international conflict are contained in Additional Protocol II of 1977.

Implementation and enforcement: The primary responsibility for implementing and enforcing IHL lies with States. Accordingly, States must train their armed forces on IHL. States must also enact laws that punish the most serious violations of the Geneva Conventions and the Additional Protocols, which constitute war crimes. International and hybrid criminal tribunals (such as the International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone) have also contributed to ensuring accountability for IHL violations, as covered in Chapter 16 on transitional justice. Finally, Additional Protocol I established the International Fact-Finding Commission, while various provisions of the Geneva Conventions and the Additional Protocols authorize the "Protecting Powers" and the International Committee of the Red Cross (ICRC) to monitor the implementation of these treaties.

The ICRC is involved in the implementation of IHL. Its role as an impartial, neutral and independent organization is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. It also visits prisoners, organizes relief operations, re-unites separated families and carries other humanitarian activities in international and non-international armed conflict.

OVERVIEW OF INTERNATIONAL CRIMINAL LAW

Definition: International criminal law (ICL) is the body of law designed to: 1) proscribe international crimes; 2) impose upon States the obligation to prosecute and punish those crimes; and 3) regulate international proceedings for prosecuting and trying persons accused of such crimes.

International crimes include war crimes, crimes against humanity, genocide, torture, piracy, terrorism and aggression. International crimes are distinguished from transnational crimes, such as drugs trafficking, human trafficking, arms trafficking and money laundering.

Sources: The sources of ICL include both treaty law (such as the Rome Statute of the International Criminal Court, the Geneva Conventions of 1949, the Convention on the Prevention and Punishment of Genocide and the Convention against Torture) and customary law. Customary international law has evolved to include the holding of perpetrators of war crimes, crimes against humanity, genocide and torture directly and individually accountable.

Implementation and Enforcement of International Criminal Law: ICL is implemented by international, mixed ("hybrid") and national courts such as the International Criminal Tribunal for the Former Yugoslavia, ICTY and the International Criminal Tribunal for Rwanda, ICTR. In 2002, the International Criminal Court (ICC) became the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community.

OVERVIEW OF INTERNATIONAL REFUGEE LAW

Definition: Under the 1951 Convention relating to the Status of Refugees, a "refugee" is defined as a person who: (a) has a well-founded fear of persecution because of his or her race, religion, nationality, membership in a particular social group or political opinion; (b) is outside his or her country of origin; and (c) is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution.

Internally displaced persons (IDPs) are often incorrectly referred to as refugees. Unlike refugees, IDPs have not crossed an international border to find sanctuary but have remained inside their home countries. IDPs have often fled for reasons similar to refugees (e.g., armed conflict, generalized violence, human rights violations). As they have not crossed an internationally recognized State border, IDPs legally remain under the protection of their own government—even though that government may have been the cause of their flight. As citizens, they retain all of their rights and protection under both human rights and international humanitarian law.

Sources: In addition to providing a definition of "refugee", the Convention also provides for the following:

Principle of "non-refoulement": The Convention prohibits the expulsion or return ("refoulement") of a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. This principle does not apply however to refugees for whom there are reasonable grounds to believe may pose a danger to the security of the country in which he is present, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Refugee protections: The Convention sets out minimum standards for the treatment of refugees and certain rights that they must be afforded, including the right to access to courts. Part of the impetus of laying out these rights is to prevent the argument that refugees are not entitled to the more general human rights set out in other treaties because they are not citizens of the state in question.

The Guiding Principles on Internal Displacement: These principles are non-binding standards aimed to protect the specific rights of IDPs, but are based on and consistent with international human rights law, international humanitarian law and international refugee law. IDPs enjoy the same rights and freedoms as other persons in the country and they should not be discriminated against because they are internally displaced. National authorities have the primary responsibility for providing protection and humanitarian assistance to IDPs and in particular their right to life must be protected from genocide, murder, summary executions, etc.

Implementation: Protection is first and foremost the responsibility of States. Each State is responsible for respecting, protecting and fulfilling the rights of its citizens, including in situations of internal displacement and return. International protection is only needed when national protection is denied or is otherwise unavailable.

UNHCR was established by the General Assembly in the aftermath of World War II to protect and find durable solutions for refugees. The Convention relating to the Status of Refugees sets out obligations on States to cooperate with UNHCR in the exercises of its functions.

UNHCR's original mandate does not specifically cover IDPs, but because of the agency's expertise on displacement, it has for many years been assisting millions of IDPs, more recently through the "cluster approach". This approach aims to ensure greater leadership and accountability in key sectors where gaps in humanitarian response have been identified and to enhance partnerships among humanitarian, human rights and development actors, including the United Nations. Under this approach, UNHCR has the lead role in overseeing the protection and shelter needs of "conflict induced" IDPs as well as the coordination and management of camps.

National authorities are responsible for ensuring that an appropriate legal framework or standard is in place to address internal displacement. The "Framework for National Responsibility" is a key document which sets out key steps for governments to take to ensure IDP protection.

The International Organization for Migration (IOM) is the leading inter-governmental organization in the field of migration. IOM includes 127 member States and has offices in over 100 countries. It works to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems and to provide humanitarian assistance to migrants in need, including refugees and internally displaced people.

RELATIONSHIPS BETWEEN THE FOUR PILLARS OF PUBLIC INTERNATIONAL LAW

International humanitarian law and international human rights law.

IHL and IHRL are complementary and strive to protect the lives, health, and dignity of individuals. IHRL applies at all times, while IHL only applies in armed conflict. It is possible to derogate from IHRL but not from IHL (and IHRL specifically says that there is no derogation from IHL). IHRL applies to governments, although there is a growing body of opinion that holds that IHRL also applies to nonstate actors (particularly if they exercise government-like functions). IHL is applicable to both state and nonstate actors in an armed conflict.

International humanitarian law and international criminal law.

International criminal law holds persons individually criminally responsible for certain violations of humanitarian law, for genocide, and for gross violations of human rights amounting to crimes against humanity. Thus, ICL adds greatly to the enforcement of IHL and IHRL.

International refugee law, international humanitarian law, and international human rights law.

Because refugees often find themselves in the midst of international armed conflict, refugee law is often linked to IHL. The fourth Geneva Convention includes a provision that deals specifically with refugees and displaced persons (article 44), and Additional Protocol I (article 73) also provides that refugees and stateless persons are to be protected under the provisions of Parts I and III of the fourth Geneva Convention. IHL stops applying to asylum seekers once they flee the country where the conflict has taken place. International refugee law is part of the larger mosaic of international human rights law, and human rights law is the broad framework within which refugee law provisions should be seen. Refugees are entitled to general human rights and rights specific to refugees, as set out in the Refugee Convention. In addition, the Convention against Torture (article 3) and the Convention on the Rights of the Child (article 22) provide specific provisions on preventing return, or *refoulement,* to a home state where torture is likely, and on special protections to child refugees.

CHAPTER 3 Part 3 ENDNOTES

2   UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, S/2004/616, Aug. 23, 2004, http://www.refworld.org/docid/45069c434.html.

3   International Committee of the Red Cross, "What Is International Humanitarian Law?" (July 2004), https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

Part 4 | Translating International Norms and Standards into Domestic Law and Practice

When a state ratifies a treaty, the state is then bound to the provisions of that treaty. Some international and regional treaties concerning various types of criminal activity include states' obligations to criminalize certain conduct and to implement domestic law provisions relating to criminal procedure, extradition, and mutual legal assistance, for example. These treaties address activities such as drug trafficking and production, terrorist acts, organized crime, trafficking in persons, smuggling of migrants, trafficking in firearms, corruption, money laundering, and cybercrime.

How do these treaty obligations become part of domestic law and practice?

MONIST AND DUALIST SYSTEMS

In theory, there are two main approaches to incorporating international law into a state's domestic legal framework. These are called monism and dualism. Broadly speaking, most countries that have adopted a civil law model are monist, and most countries that have adopted a common law model are dualist.

In reality, legal systems are far more complex than this, and many adopt a mixed approach. In the legal systems in the common law tradition, for instance, rules of international customary law are often regarded, in principle, as forming part of the common law (the monist approach). Treaties, however, must be incorporated by an act of Parliament (the dualist approach). International law does not dictate which system, monist or dualist, is to be preferred. Each state must decide for itself, according to its legal traditions.[4]

In monist countries, international law and domestic law are seen as forming a unified system of law. Given that international and domestic law are part of the same system of law, international law is meant to be applicable at the national level once a monist state has become a party to a treaty. This application is relatively straightforward when the treaty is sufficiently specific. In such cases, treaties can be directly applied once states become parties without further legislative action; that is, rights and obligations can be relied on by individuals and courts. However, if the nature of the provision is not self-executing in character (e.g., the adoption of criminal laws may be required to implement a treaty provision), then implementing legislation is required. Implementing legislation—even where not necessary because a provision is self-executing in character—is often passed to give full domestic effect to a treaty in monist states. Note: In some monist states, international

law is viewed as ranking above domestic law on the hierarchical scale of law, thus overriding conflicting domestic norms. In other monist states, international law is at the same level as the constitution, and in yet other monist states, it is on the same level as domestic law.

Dualist countries treat international law and domestic law as separate legal frameworks based on their different origins and usually require some act of legislation to import international law into national law. This core belief in the distinctiveness of international law and domestic law means that, in theory, there should be no conflict between the two systems. Therefore, domestic law is supreme in the domestic setting, and international law is supreme between states in the international setting. International law obligations need to be implemented through domestic legislation. This process of legitimization is known as "transformation" and occurs in accordance with the mechanisms of the domestic constitutional machinery.

In theory, domestic courts should apply international customary law, irrespective of any treaty that the state has ratified.

In practice, the process of incorporating international norms and standards into domestic law is not always straightforward.

EXAMPLE

Counter-terrorism Legislation

Whether monist or dualist, all states parties to the counterterrorism treaties must adopt implementing legislation to criminalize certain offenses. None of the terrorism-related instruments specify a penalty or even a range of penalties for the offenses defined. For example, article 4 of the International Convention for the Suppression of the Financing of Terrorism states that:

Each State party shall adopt such measures as may be necessary:

a. To establish as criminal offences under its domestic law the offences as set forth in article 2;
b. To make those offences punishable by appropriate penalties which take into account the grave nature of the offences. Even if a country's legal tradition allows for a criminal charge for committing an offence defined only in an international treaty to which it is a party and not in domestic legislation, that offence remains a crime without punishment until domestic legislation defines the penalty.

Consequently, even countries that have monist systems (i.e., they automatically incorporate offenses into their domestic laws upon adoption of a treaty) must take legislative action to provide penalties for those offenses and to implement any other provisions that are not self-executing.

Reader Exercise

Defining the Term "Promptly"

Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) requires that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power."

Imagine that you are a member of a team of legislative drafters who have been asked to advise the Parliamentary Law Reform Committee on this obligation. The chair of the committee has asked you to advise the committee on what the term "promptly" means, and what time limit for bringing an accused before a judge should be included in the law.

CONSIDER

What sources would you turn to for guidance? *Examples could include:*

- The International Covenant on Civil and Political Rights
- The Human Rights Committee draft General Comment 35 on article 9 of the ICCPR
- Decisions of the Human Rights Committee
- Decisions of the European Court of Human Rights
- Guidance notes and other materials from rights-based organizations, such as Amnesty International, UN agencies, or the International Bar Association

In general, sources suggest that "promptly" should be interpreted as being forty-eight hours (see para. 33 of the Human Rights Committee draft General Comment 35).

CONSIDER

- **What is the time limit in your country?**

- **Is forty-eight hours a reasonable and realistic timeframe in your context? What might be some competing considerations?** (e.g., a lack of resources or vast geographical distances between courts)

- **Why does the right exist in the first place?**

- **If the person arrested or detained was suspected of committing a terrorist act, would you recommend that the time frame be the same or different? Why?**

The special rapporteur on human rights and counter-terrorism has stated that everyone held in detention must have access to a judicial hearing about the lawfulness of their detention within forty-eight hours.[5]

CONSIDER

What is the rationale behind the special rapporteur's recommendation of a forty-eight-hour time limit?

Chapter 3, Part 6: Rule of Law and Counterterrorism

CHAPTER 3 Part 4 ENDNOTES

4   Rausch, *Combating Serious Crimes*, 46.

5   UN General Assembly, "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Note by the Secretary-General," A/63/223 para. 45(a), August 6, 2008.

Part 5 | A Process Approach to Law Reform

The process by which a law is drafted or amended is as important as the content of the law itself for ensuring its effectiveness in terms of not only being passed but also being successfully implemented and accepted by a society.

This part of the chapter details a general process that can guide effective law reform activities, whether they take place during a comprehensive review of legislation, during a transition phase, during the amendment or development of new legislation to address a new threat such as piracy or terrorism, or under other circumstances.

The following text draws on lessons learned and good practice to offer key recommendations for how to carry out an effective law reform process. In particular, the text draws from the following sources:	• Colette Rausch, ed., *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners*, chap. 3 (Washington, DC: USIP, 2006). • USIP and US Army Peacekeeping and Stability Operations Institute (USAPSOI), "Rule of Law," Sec. 7 in *Guiding Principles for Stabilization and Reconstruction* (Washington, DC: USIP; Carlisle, PA: USPSOI, 2009), http://www.usip.org/publications/guiding-principles-stabilization-and-reconstruction. • UN Office on Drugs and Crime (UNODC) and USIP, *Criminal Justice Reform in Post-conflict States: A Guide for Practitioners,* chap. 8 (New York: UNODC; Washington, DC: USIP, 2011), https://www.unodc.org/documents/justice-and-prison-reform/11-83015_Ebook.pdf.

Assessment: Understanding the existing legal framework is key to determining whether the framework is fair and just, and is necessary for identifying what changes need to occur to create an effective justice system.

Chapter 2, Part 2: Understanding the Domestic Legal System

A thorough review of the existing laws (consider the various systems, including the formal and customary systems, as well as the hierarchy of laws) should be conducted by qualified persons (both local and possibly international) in order to do the following:

a. determine what provisions or elements of the existing laws to keep and which need to be removed or reformed;
b. establish whether the existing laws comply with international human rights norms and standards and other treaty obligations;
c. identify what is not already included in the law and suggest what should be added; and
d. determine whether the laws are up to date and reflective of the reality of the society today.

This assessment process should include obtaining input from all affected stakeholders such as legal professionals, civil society, and the public.

A thorough assessment will take time. Make sure adequate time and resources have been allocated for this part of the process.

Any proposal for changes to the law should be accompanied by a thorough analysis of the potential impact the new law will have not only on other laws but also on other parts of the justice system and society.

Chapter 2, Part 1: An Effective Justice System, &
Chapter 3, Reader Exercise: Assessing the Potential Impact of a New Anti-Torture Law

For example, what negative and positive impacts on the justice system will a proposed reform to the law to allow for alternative sentencing, such as suspended sentences, have on prisons (could this assist with prison overcrowding?), judges (are they willing to implement this new proposal?), law schools (will the curriculum need to be changed?), or the community (will the community understand and accept this new idea?).

Chapter 4, Part 1, A Guide to the Plan Phase, &
Chapter 5, Part 1: Creating Change

Achieving political buy-in: It is crucial to ensure that there is significant political will for the proposed law reform and that there are "change agents" who are championing the process within the executive, legislative, and judiciary, and within society.

Chapter 5, Part 1: Creating Change, "Being an Effective Change Agent"

To support change, people need to understand the change that is being proposed, the vision and desired outcomes of the change, and the roles and responsibilities they will have in the process.

This can be achieved by having a *clear, comprehensible strategy*.

A strategic plan for law reform should consider:
a. who will be involved in preparing a draft;
b. how they will be selected;
c. how political and community consensus will be built;
d. how the law will be adopted;
e. what the timeline will be;
f. how disputes over content will be resolved;
g. how the proposed law reform will impact other laws and reform efforts; and
h. how the new law will be implemented and what other reforms might be necessitated to ensure effective implementation.

Have a realistic time frame. Law reform (from the time a policy is created to the time a law is implemented) can take many years. Consider, for example, the Maldives experience of reforming the penal code (see the example following). It took eight years to draft a new penal code and have it passed into law.

Establish a coordinating body: A coordinating body, such as a legal reform working group, a division of a line ministry (e.g., a Ministry of Justice drafting division), or a law reform commission, should be established to:

a. lead the implementation of the strategy;

b. work with stakeholders within and outside the justice system;

c. lead public education and consultations; and

d. prepare a draft of the law.

Political parties and civil society organizations can play an important role in disseminating information about the role of the coordinating body, providing education about the consultation process and issues, aggregating opinion, and articulating views and recommendations.

A secretariat is vital for the smooth functioning of the coordinating body. The secretariat should provide administrative and logistical support.

EXAMPLE

Participation makes the population more invested in new laws.

Haiti The working group model has been used successfully in Haiti. In the early 2000s, the president appointed a special advisor on law reform, who selected a group of lawyers and experts to draft the new laws. The working group, together with a code reform commission, established by the Ministry of Justice, led much-needed criminal law reform efforts in Haiti.

Source: Hans Joerg Albrecht, Louis Aucoin, and Vivienne O'Connor, "Building the Rule of Law in Haiti: New Laws for a New Era," USIP Peace Briefing (USIP, Washington, DC, August 2009).

Transparency and participation: A rule of law culture approach requires the building of trust between government officials and institutions and members of society. Trust can be built by ensuring that law reform efforts are carried out in a transparent, clear, and participatory manner. The public should know who is drafting the laws, what the content of the proposed laws regards, and what formal mechanisms exist for people interested in or affected by a particular law reform proposal to have their opinions heard by the government. Importantly, government representatives also must respond, and be seen to respond, to the opinions and information they receive, whether they agree with the view or not.

Participation makes the population more invested in new laws, which brings increased acceptability and public legitimacy to those laws.[6]

Mechanisms for engaging the public could include inviting written submissions via letter or e-mail; holding public consultative meetings; convening national conferences; using local media and social media to raise awareness and invite comments; disseminating public surveys, including an independent analysis of public opinion and recommendations; and involving civil society or other interest groups in the coordinating body itself.

EXAMPLE

Kenya's Constitution

In 2009 in Kenya, a committee of experts was appointed to draft a new constitution for the country that would be acceptable to the members of Kenyan society. The committee conducted hearings and public consultations throughout the country. Hearings and meetings were publicized in advance through print, electronic, and community media. The committee also gathered and compiled public submissions regarding the content of the draft constitution.

Source: Committee of Experts on Constitutional Review, "Final Report of the Committee of Experts on Constitutional Review" (Committee of Experts on Constitutional Review, Nairobi, October 1, 2010), http://mlgi.org.za/resources/local-government-database/by-country/kenya/commission-reports/CoE_final_report.pdf.

Vietnam and Economic Law Reform

In 2001, the Vietnamese government undertook significant commercial law reform that involved the major revision or drafting of over 150 laws. The parliament passed a law specifying the various laws that required public notice and comment on proposed reforms. Technical assistance was provided by an international donor to both the public and the private sector to establish the capacity to engage one another productively on matters of law reform.

Source: DAI, "USAID STAR Project Helped Propel Vietnam into the Global Economy," *Developments Online Newsletter,* Summer 2012, http://dai-global-developments.com/articles/usaid-star-project-helped-propel-vietnam-into-the-global-economy/.

Drafting: Drafting a new law requires the expertise of legislative drafters (domestic and/or international) who are familiar with the existing legal framework. Care should be taken to ensure that the law drafted fits the context. Transplanting laws from elsewhere without adapting them to the specific context can result in legislation that is not understood, not supported by government officials or the public, and not responsive to the needs of the society.

International experts can bring a wealth of experience and expertise. It is important to establish a partnership where this expertise is used to support locally led reform efforts, not eclipse them.

EXAMPLE

Albania

During the mid-1990s, the entire Albanian criminal legal code was redrafted by a small number of Albanian lawyers alongside foreigners from Europe and America. The laws, passed in 1995, were heavily based on the Western European model. However, these laws were not applied. Lawyers and judges did not know the new laws, and believed they were European, not Albanian, laws.

Source: Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Washington, DC: Carnegie Endowment for International Peace, 2012), 84.

It may also be necessary and useful to engage a broad range of experts and specialists who may come from other disciplines, such as the social sciences, to contribute to the process of law reform. These experts may provide insight into the possible content of the law and advise on the likely impact of the proposed law.

Guidance can be sought from existing model laws, such as the *USIP Model Codes for Post-conflict Criminal Justice* (see http://www.usip.org/model-codes-post-conflict-justice-/publication-the-model-codes/english-version-volume-1); or the UNODC's model laws and treaties (see http://www.unodc.org/unodc/en/legal-tools/model-treaties-and-laws.html).

Passage into law and implementation: A draft law is submitted to the national legislative body to be *passed into law*. A draft law that is poorly understood by legislators or does not address issues they feel are of more pressing concern could delay or even block the reform. It is critical to engage champions of the proposed law within the legislature throughout the drafting process to ensure there are supporters within the legislature to promote the new law.

The new law must be publicized by a competent authority, usually a parliament. The new law must be *published and be accessible* to the public. It may be necessary to establish a review commission or some other body that is responsible for addressing *implementation issues* and developing subsidiary policies and legislation in order to fully realize the provisions of the law.

It may be necessary to develop a training or *awareness plan* for justice actors, such as police, judiciary, or prison officials, on the new law and its impact. The government may engage civil society groups to assist in post-implementation education efforts with communities.

 Chapter 4, Part 2, "The Role of the State and Civil Society in Strengthening a Rule of Law Culture"

Reader Exercise

Law Reform and the Crime of Piracy

Case Study: Somalia and the Antipiracy Law

This case study explores some of the challenges of drafting and passing legislation.

READ THE FOLLOWING CASE STUDY AND CONSIDER THE FOLLOWING QUESTIONS IN LIGHT OF THE GOOD PRACTICES IN LAW REFORM DESCRIBED IN PART 5:

- **What were the positive aspects about the approach taken to the drafting of the antipiracy law?**

- **What would you have done differently and why?**

BACKGROUND: Piracy off the coast of Somalia began in the early 1990s, said to have grown out of Somali fishing communities acting to defend their coastal waters from foreign fishing boats and illegal toxic waste dumping. With no central government (following the overthrow of the dictator Siad Barre in 1991), piracy flourished. In 2007, piracy attacks against humanitarian ships, including World Food Programme vessels, attracted international attention to this problem. International demands were made for pirates to be brought to justice, but legal challenges hampered the effectiveness of states to prosecute detained suspects. UN Security Council Resolution 1851, which addresses piracy off the coast of Somalia, notes that "the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, has hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice."[7]

Following the overthrow of Siad Barre by armed opposition groups in 1991, Somalia plunged into civil war. Today, Somalia is generally considered to be a failed state. It operates as three separate administrative entities: South Central Somalia, home of the UN-backed Transitional Federal Government (TFG), Somaliland, and Puntland. Somaliland and Puntland declared their autonomy and established their own regional administrations in 1991 and 1998, respectively. Puntland is semiautonomous and Somaliland is a self-declared independent state. Both regions have achieved a measure of stability within the Somali territory, including the establishment of functioning formal judicial systems in both regions. In South Central Somalia, the government is still struggling to rebuild its public institutions.

In March 2010, the UNODC, at the request of the Somali TFG government, hosted a five-day meeting in Djibouti for three delegates each from the TFG, Puntland, and Somaliland. The delegates included chief justices and/or senior justice sector stakeholders.

The purpose of the meeting was to address the gaps in the domestic legislative framework regarding the crime of piracy. There was no crime of piracy in the Somali Penal Code of 1962; the Maritime Law of 1959 failed to address the modern case of piracy or the UN Convention on the Law of the Sea (UNCLOS) definition (Somalia ratified the UNCLOS in 1989); and a 1975 law criminalizing kidnaping was passed during the time of the Siad Barre military regime, and was seen to be excessively harsh and illegitimate because it was introduced during a period of dictatorship.

The delegates reviewed the UNCLOS definition of piracy, and an antipiracy law passed by the Seychelles in early 2010. They raised the point that their communities were concerned not only with the crime of piracy but also with illegal fishing, waste dumping,

and pollution. Indeed, many communities were benefiting significantly from the millions of dollars paid to the pirates in ransom for ships taken hostage. However, ultimately, the delegation agreed to prepare a draft law that addressed only the crime of piracy, given the urgency of the issue and the considerable international pressure. The draft law replicated the Seychelles law, which was seen as being simple, easily understandable, and more lenient than the existing Somali kidnapping law.

The delegates returned home with a copy of the draft law to table in their respective parliaments.

In **South Central Somalia**, the TFG parliament *rejected the draft law* for two main reasons. One was a concern about how to address the issue of repatriation of Somalis who had claimed refugee status after being captured by foreign naval vessels (the principle of *non-refoulement* in international refugee law prevents refugees from being returned or expelled to a place where their lives could be threatened). The second reason was that members of Parliament were angry that the minister presenting the draft had not consulted with their parliamentary committees before tabling the draft law.

In **Puntland**, the draft law was amended by parliamentarians to also address the issue of illegal fishing. The revised law was passed by Parliament; however, the amendments meant the law was now inconsistent with the UNCLOS definition of piracy. After discussions between UN representatives, the Speaker of Parliament, and the government focal point for piracy crimes, the law was repealed. A separate law addressing illegal fishing was drafted and passed, and the draft piracy law was passed in its original form.

In **Somaliland**, parliamentarians were pleased that the draft law was based on the recently adopted Seychelles antipiracy law rather than being a TFG-drafted law, which they would have rejected. *The law was passed* and a piracy committee was established to oversee the Somaliland government's response to the threat of piracy.

The piracy law introduced a new crime of piracy into the Somali legal system, but it did little to address other challenges, such as the failure of foreign naval forces to coordinate with local police and judiciary (pirate suspects are handed over to local authorities without any evidence and ultimately must be released); communities believe the naval forces are protecting illegal fishing boats and are concerned that waste dumping persists and is destroying their fishing zones; and judges are frequent targets of revenge killings. No steps have been taken to provide judges with security or protection when hearing piracy cases. As one Somali expert noted, the main purpose of the draft piracy law was "to fix the problem but not to solve it."

EXAMPLE

A Process Approach to Reforming the Maldives Penal Code

In 2006, the Maldives government announced a "Roadmap for Reform" that included a new constitution and the codification of the penal code. The president of the Maldives approached the United Nations for assistance with reforming the penal code. The United Nations then requested Professor Paul Robinson, a law professor at the University of Pennsylvania, to conduct an assessment of the country's criminal justice system.

The assessment found that the statutes related to criminal law and procedure were scattered and incomplete, and many of the relevant rules, particularly related to criminal procedure and evidence, were not codified. Courts relied on Shari'a principles where the statute law was silent, but these principles were unwritten and not consistently interpreted or applied. The assessment found that there was a need for a penal code that could be uniformly applied (ensuring transparency and predictability in the delivery of justice) and understood by everyone.

The Attorney General's office took responsibility for coordinating the work between the Criminal Law Research Group (CLRG) (comprising Professor Robinson and his students), the Advisory Group (composed of a broad cross-section of criminal justice stakeholders, including the chief justice, the chairman of the Supreme Council of Islamic Affairs, other high-ranking members of the government, opposition ministers, religious scholars, and judges), and the Core Group (composed of local legal experts on Shari'a and the Maldivian legal tradition), which together guided the drafting process.

The CLRG consulted with local judges, prosecutors, defense lawyers, government officials, and ordinary citizens to determine community values and principles. The group consulted with members of the Maldivian legal community and the Attorney General's office in order to map the current judicial practice. Finally, the CLRG consulted criminal codes of other Muslim countries to understand how those countries incorporated Shari'a principles into their respective penal codes.

The drafting of the Draft Maldivian Penal Code took approximately one and a half years. As the CLRG prepared each new draft, the Core Group reviewed it and made suggestions for revisions. These consultations were conducted in person and via conference calls. One key challenge for the drafters was how to merge three sources of legal authority—statutes, Shari'a, and shared Maldivian norms and community values.

In many cases, existing statute law deviated from strict interpretations of Shari'a. For example, the law does not punish theft with amputation of the offender's hand or apostasy with the death penalty. In these cases, the two groups agreed to follow the statute law.

Where there were disagreements between Islamic legal scholars over how to interpret passages of the Qur'an and over which authorities (e.g., hadith, analogies, etc.) to follow, the drafters generally referenced prevailing Maldivian norms, adopting that interpretation that seemed to best reflect the views of current Maldivian society.

EXAMPLE: A Process Approach to Reforming the Maldives Penal Code   *CONTINUED*

The draft penal code bill was prepared and submitted by the CLRG to the government: the People's Majlis. The draft identified for the Maldivian lawmakers a series of issues that required full debate. The draft would in certain cases provide a range of alternative language and would provide arguments for and against each option. This allowed the lawmakers to make a fully informed decision about the issue being debated. The bill was passed by the People's Majlis in April 2014, eight years after the CLRG submitted the final report to the government. As Professor Robinson noted, criminal codes are an enormous task for any legislature, and criminal justice reform anywhere takes many years.

One criticism that Professor Robinson faced was whether a non-Muslim, non-Shari'a expert should lead the drafting process. The Maldivian government, however, believed that they most needed the drafting expertise of the professor. By involving the Core Group and the Advisory Group, which included people with Shari'a expertise, it was assured that the draft penal code would be fully informed by the principles of Shari'a. However, some questioned whether liberal Westerners should involve themselves in drafting a penal code based on Shari'a, given that Shari'a principles can conflict with Western liberal values. Professor Robinson and his team took a highly pragmatic approach, believing that the project was worth engaging in because it could bring greater justice to all Maldivians.

The Maldivian Penal Code is the first Islamic penal code to take advantage of modern penal code drafting forms in the past several decades. It can therefore serve as a model for other Muslim countries that seek to adhere to both Shari'a and international norms.

Source: Paul H. Robinson et al., "Codifying Shari'a: International Norms, Legality, and the Freedom to Invent New Forms," *American Journal of Comparative Law* 2, no. 1 (2007); also available as Public Law Working Paper no. 06-26 (University of Pennsylvania Law School, 2006), http://ssrn.com/abstract=941443; and University of Pennsylvania Law School, "Penal Code Drafted by Prof. Paul Robinson and Students Is Enacted in the Maldives" (press release, May 8, 2014), https://www.law.upenn.edu/live/news/4728-penal-code-drafted-by-prof-paul-robinson-and#.VgLq4SiD-Ci.

Reader Exercise

Assessing the Potential Impact of a New Anti-Torture Law

The following case study allows the reader to explore the potential legislative and nonlegislative actions that may need to be taken to ensure not only that a new law is in line with international obligations but also that it can be effectively implemented.

SCENARIO: The government is concerned that there has been an increase in reports from civil society organizations of torture being carried out by its police force. There is no specific crime of torture in domestic law. Government officials understand that according to international customary law and the UN Convention against Torture (CAT), the government has an obligation to prohibit torture. Parliament has asked your group for recommendations on the necessary action it needs to take.

The CAT requires government to take measures to prevent, investigate, and prosecute acts of torture, and to provide reparations for the victims of torture.

PREVENTION

Article 2:
1. Each State Party shall take effective legislative, administrative, judicial or other measures to *prevent acts of torture* in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

Article 4:
1. Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.
2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.

INVESTIGATION

Article 12:
Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.

Article 13:
Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.

PROSECUTION

Article 7:

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1.

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

REPARATIONS

Article 14:

1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

CONSIDER

For each of the above measures (prevention, investigation, prosecution, and reparations) consider:

1. What legislative actions must be taken to carry out this measure?

2. What other nonlegislative actions are required (e.g., training, resources)?

3. Which stakeholders should be involved in these nonlegislative actions?

4 What financial, human, and other technical resources do these actions require?

public events informing the public that a new bill will be as harsh and restrictive as the one proposed two years ago, and should be rejected by the public.

Members of the Muslim community are particularly upset. They believe they were unfairly targeted by the old bill and are concerned that a new bill will do the same. Religious leaders have expressed concerns that an antiterror bill will limit freedom of religion and expression. Already, some youths have reported being harassed by police when they go to mosque on Fridays, and, following the attack in the capital, police have entered several other mosques and attempted to search them without any warrants.

A renowned counterterrorism expert has undertaken an analysis of the current legislative framework and said in a recent television interview that there is no need for a new bill. He claims that with some relatively small amendments the current criminal legislative framework, including the criminal code and criminal procedure code, could be updated to adequately address acts of terrorism.

The minister of justice is concerned that there will not be enough support for her bill to be passed this time, and she wants to avoid the embarrassment of having yet another bill fail.

The minister has appointed your team to prepare a strategy for successfully drafting and passing the bill through Parliament. The strategy should address the criticisms about the proposed new bill and ensure that the bill receives public support.

CONSIDER

Part One: Preparing a Draft Bill

1. Your group has decided to begin with an assessment into the need for a new antiterror law. What are the key questions that you would ask in your assessment?

2. Which key government/state actors would you consult with during the assessment phase and why?

Part Two: Public Reaction

3. The minister wants to make sure there is strong public support for her bill. What actions would you recommend be taken to ensure this support?

4. Which stakeholders would you involve in these actions and why?

CHAPTER 3 Part 5 ENDNOTES

6   USIP and USAPSOI, "Rule of Law," sec. 7.5.11.

7   See page 2 of the preamble to UN Security Council Resolution 1851 (2008) on the fight against piracy and armed robbery at sea off the coast of Somalia, S/RES/1851, 16 December 2008, http://www.refworld.org/docid/4952044e2.html.

Part 6 | Rule of Law and Counterterrorism

Rule of Law and Counterterrorism

By Tom Parker*

To paraphrase the celebrated Prussian military strategist Carl Von Clausewitz, terrorism is simply the continuation of politics by other means. Most terrorist campaigns are characterized by a clash of ideas, as well as arms, as two competing visions of the future of the state struggle to attract support from the surrounding society.

As such, terrorism poses a genuinely existential threat to society with two warring parties seeking to establish the legitimacy of their claim to govern. Legitimacy comes from many sources—doctrine, faith, ethnicity, security or prosperity—but at its heart, legitimacy is about establishing a coherent narrative that people can have faith in.

A narrative grounded in a vision of democracy and rule of law may not be the only narrative men and women will rally around but it is nevertheless a very powerful one. But this is only likely to be true when the narrative matches the reality—meaning that a population experiences genuine participation in government and enjoys real equality before the law.

Terrorism is also mostly a problem experienced by liberal democratic society. Extremely repressive 'closed' or 'authoritarian' regimes, such as the Brezhnev-era Soviet Union or Nazi Germany, will choke off any opportunity for oppositional groups to engage in any form of collective action, including terrorism.

This was, for example, the experience in 1970s Latin America where military leaders swept aside democratically-elected governments in order to bring the maximum coercive force to bear on would-be Marxist revolutionaries and the Argentine general Luciano Menéndez could declare himself prepared to kill 50,000 people—25,000 subversives, 20,000 sympathizers and 5,000 unfortunate innocents—to defeat the People's Revolutionary Army and the Montañeros.

The introduction of such 'extremely repressive' measures is simply not an option open to democratic states characterized as they are by such principles as rule of law, an independent judiciary and a foundation of basic civil rights.

Thus democratic states seeking to clamp down on the kind of political opportunities exploited by terrorist groups often tend to resort to authoritarian half-measures—such as the limited use of preventative detention, coercive interrogation techniques and the

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occasional use of lethal force – creating an environment in which the regime's legitimacy is damaged in the eyes of supporters and opponents alike.

This approach tends to have one of two outcomes. Either the coercive measures introduced fail to make the cost of collective action sufficiently prohibitive while also radicalizing new opponents of the regime, as happened with the British in Northern Ireland in the early 1970s, or the authoritarian approach adopted may prove harsh enough to inflict a major defeat on terrorist opponents but at the expense of undermining the democratic governance of the state itself, as happened in Sri Lanka with the Tamil Tigers in the 2000s.

Neither of these alternatives is particularly desirable. Instead, democratic and democratizing states should have more faith in the values that they and their citizens have already embraced. Stability, equality, respect for individual rights, and the rule of law are immensely attractive. Immigrants travel halfway around the world, enduring great hardship and uncertainty, just for the opportunity of participating in such societies. As John F. Kennedy famously observed speaking in front of the Berlin Wall, democratic states have never had to put a wall up to keep their people in.

One of the founders of the German Red Army Faction (RAF), Horst Mahler, reflecting in 1980 on the failure of his group to attract greater public support lamented: "[The RAF] were mistaken if they expected to find a decayed population looking at their government as a burden. [Instead] they met people who were prepared to defend the existing social order and its laws in spite of their discontent and their loud complaints… a people who identify with the state and its political organizations in its battle against the terror commandos."

The vast majority of the West German population ultimately saw their government as being both more attractive and legitimate than the alternative offered by the RAF, and stood by it. In consequence, the RAF was defeated.

The recent events of Arab Spring have demonstrated both the appeal of the democratic vision and also the importance of promoting rule of law, because genuine democracy is not a zero-sum game. Democracy only works when the winners of a popular mandate also respect the basic rights of the losing side. Democracy cannot function effectively without the concomitant rule of law.

Furthermore, hypocrisy is toxic and there are very few narratives more toxic than one that claims to be open and democratic, to adhere to rule of law, but actually hides a well-known reality to the contrary. When a state fails to live up to the values it espouses—the "say-do" gap - it opens itself up to powerful counter-narratives.

It is a lesson terrorist groups have always understood. The Brazilian communist Carlos Marighella wrote in his influential 1969 pamphlet, The Minimanual of the Urban Guerrilla: "One of the permanent concerns of the urban guerrilla is his identification with popular causes to win public support. Where government actions become inept and corrupt, the urban guerrilla should not hesitate to step in to show that he opposes the government and to gain mass sympathy."

The U.S. use of 'enhanced interrogation techniques' and the harsh detention regime in Guantanamo were mentioned 32 times in Al Qaeda propaganda messages between 2003 and 2010, and by affiliate groups 26 times. As the US General David Petraeus observed in an interview in 2010, "Abu Ghraib and other situations like that are non-biodegradable. They don't go away. The enemy continues to beat you with them l ike a stick."

In short it is not enough to proclaim your values—you also have to live by them. Rule of law prevents democratic states from making the kind of mistakes that terrorist groups can exploit. However, this also highlights the need for genuine accountability. Rule of law is meaningless without enforcement.

There are two aspects to accountability. First, the state has an obligation to the victims of terrorism to seek to bring the perpetrators of terrorist violence to justice. Citizens need to see the law working for them. Second, when agents of the state break the law they too must be held to account.

Both oversight and truth telling are important but, in and of themselves, they are not enough. Abuses must be investigated and, where the evidence exists to do so, prosecuted.

Legitimacy is coin of the realm in counterterrorism and upholding rule of law – which means protecting fundamental human rights, preventing discrimination, and ensuring the equality of every citizen before the courts – is the cornerstone of any effective counter-terrorism policy.

THE INTERACTION BETWEEN COUNTERTERRORISM, CRIMINAL JUSTICE, AND PROMOTING RULE OF LAW

Faced with the destructive threat and consequences of terrorism, states have a duty to protect individuals under their jurisdiction. They are under the obligation to prevent terrorist acts and to bring those responsible for them to justice. In doing so, however, they must not lose sight of the fact that "effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing."[8]

Respect for human rights and fundamental freedoms is an essential element of any effective counterterrorism strategy. In the report *In Larger Freedom: Towards Development, Security and Human Rights for All*, the UN secretary-general writes:

> "
>
> *Terrorists are accountable to no one. We, on the other hand, must never lose sight of our accountability to citizens all around the world. In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist's objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.*[9]
>
> "

On September 8, 2006, the General Assembly solemnly reaffirmed the centrality of respect for human rights to counterterrorism measures as it voted for Resolution 60/288, adopting the UN Global Counter-Terrorism Strategy. This marked the first time that all member states agreed to a common strategic approach to fight terrorism.

Pillar IV of the UN Global Counter-Terrorism Strategy is titled "Measures to Ensure Respect for Human Rights for All and Rule of Law as Fundamental Basis for Fight against Terrorism."

The key commitments states made under Pillar IV are as follows:
• To ensure all measures taken to combat terrorism are done in compliance with the states' international obligations, particularly under human rights law, refugee law, and international humanitarian law
• To consider becoming parties to core international treaties on human rights law, refugee law, and international humanitarian law, and to implement their obligations under those treaties
• To actively develop and maintain an effective and rule of law–based national criminal justice system that ensures that any person accused of participating in any terrorist act is brought to justice, with due respect for human rights and fundamental freedoms
• To support and strengthen the capacity of multilateral institutions, in particular the United Nations, in promoting human rights and rule of law while undertaking effective and targeted measures to combat terrorism

Figure 3.2 depicts the relationship of rule of law to counterterrorism measures.

Relationship of rule of law and counterterrorism

FIGURE 3.2

Relationship of rule of law and counterterrorism

PROMOTING THE RULE OF LAW / RESPECT FOR RIGHTS

STRENGTHENING CRIMINAL JUSTICE SYSTEMS

SUPPORTING COUNTERTERRORISM INITIATIVES

THE RELATIONSHIP BETWEEN COUNTERTERRORISM AND OTHER INTERNATIONAL LEGAL REGIMES

International human rights law, at the universal and regional levels, coexists alongside other international legal regimes that are also of relevance in the context of counterterrorism. The most notable of these are international humanitarian law, international criminal law, and international refugee law.

International Humanitarian Law

Counterterrorism measures may take place in the context of widespread armed violence. In such situations, questions of compliance with IHL may arise. In general, IHL becomes applicable where violence, involving organized parties, has reached intensity sufficient to amount to an "armed conflict," whether international or noninternational. IHL is also applicable in circumstances of military occupation. IHL sets out rules with regard to matters such as the treatment of civilians in armed conflicts, the conduct of hostilities, the treatment of prisoners of war, and rules relating to the use of weapons and targeting, among other matters. IHL rules on detention, torture, and inhuman or degrading treatment, and on the right to a fair trial, may apply to persons detained in the context of an armed conflict and suspected of acts of terrorism.

It is now well established that international human rights law remains applicable (subject to valid derogations on grounds of public emergency[10]) during armed conflict. The Human Rights Committee has stated that "[w]hile, in respect of certain [rights protected by the ICCPR], more specific rules of international humanitarian law may be especially relevant for the interpretation of Covenant rights, both spheres of law [international human rights and humanitarian law] are complementary, not mutually exclusive."[11]

International Criminal Law

The focus of international criminal law is on the responsibility of individuals rather than on the responsibility of states. Under certain circumstances, an act of terrorism may also constitute a war crime or a crime against humanity. This could, for instance, be the case where an armed group carries out a number of deadly explosives attacks against members of an ethnic or religious minority group with the aim of pushing them to leave their home and flee to a different part of the country or abroad. Counterterrorism measures could also constitute an offense under international criminal law, for instance, torture or summary execution of terrorism suspects apprehended in a situation of armed conflict.

International Refugee Law

International refugee law is the body of law that provides a specific legal framework for the protection of refugees, setting out states' obligations to them and establishing standards for their treatment. There are various aspects of international refugee law that are relevant to counterterrorism. Individuals suspected of terrorism may have acquired refugee status or may be seeking asylum. Conflicts involving terrorist groups may cause individuals fearing persecution by those groups to flee their countries in search of asylum.

EXAMPLE

Mechanisms for Ensuring the Balance between Rights and Security

Maintaining the balance between protecting rights and freedoms and providing for a nation's security in the face of terrorism is not easy for any government. Good practices include having antiterrorism laws reviewed by independent national human rights institutions, such as a national human rights commission or ombudsmen, and subjecting proposed laws to meaningful public debate and consideration.

For example, antiterrorism laws in Canada and Australia include a sunset clause, which is a legislative provision that provides for the expiration of all or part of the legislation at a fixed point in time. The Canadian Anti-Terrorism Act contains provisions for a review every three years of the entire legislation plus a five-year sunset clause on two controversial measures: preventive detention and investigative hearings.

The use of sunset clauses is controversial. Some commentators argue that sunset clauses are appropriate where legislation makes significant inroads into fundamental human rights. Others argue that sunset clauses are just a tool for enabling bad legislation to be passed by the parliament.

Some countries have review mechanisms in place to regularly review counter-terrorism laws and their operation, effectiveness, and implications. For example, in the United Kingdom, the Independent Reviewer of Terrorism Legislation is appointed by statute to review the operation of the United Kingdom's antiterrorism laws and report on them to the home secretary and to Parliament. The reviewer is independent from the government but has access to classified papers and discussions. The reviewer is charged with informing the public and political debate on the law as it relates to terrorism, and his or her recommendations are tabled to Parliament.

Source: Independent Reviewer of Terrorism Legislation, "The Independent Reviewer's Role," https://terrorismlegislationreviewer.independent.gov.uk/.)

ADDITIONAL RESOURCES +

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"International Humanitarian Law and Terrorism: Questions and Answers," International Committee of the Red Cross website, http://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm.

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UNOHCHR, *Human Rights, Terrorism and Counter-terrorism, Fact Sheet No. 32* (UNOHCHR, Vienna, 2008), http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf.

CHAPTER 3 Part 6 ENDNOTES

8   UN General Assembly, "The United Nations Global Counter-Terrorism Strategy," A/RES/60/288, Sept. 20, 2006, section IV.

9   UN General Assembly, "In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General," para. 94, A/59/2005, Mar. 21, 2005.

10   Derogations allow states parties to a treaty "to adjust their obligations temporarily under the treaty in exceptional circumstances, i.e. in times of public emergency threatening the life of nation [sic]. Examples of emergency situation [sic] include, but are not limited to, armed conflicts, civil and violent unrest, environmental and natural disasters." Tahmina Karimova, "Derogation from Human Rights Treaties in Situations of Emergency," (report prepared for the Rule of Law in Armed Conflicts Project, Geneva Academy of International Humanitarian Law and Human Rights), http://www.geneva-academy.ch/RULAC/derogation_from_human_rights_treaties_in_situations_of_emergency.php.

11   UN Human Rights Committee, "General Comment No. 31," para. 11. CCPR/C/21/Rev.1/Add.13, May 26, 2004.

SELECT ONLINE INTERNATIONAL LAW COURSES AND TEACHING MATERIALS

The following is a selection of available online courses and teaching materials in the fields of international human rights, humanitarian, criminal, and refugee law. Courses are available in English and/or French only.

NOTE: *Inclusion in the list that follows does not constitute endorsement or recommendation by the United States Institute of Peace.*

Introduction to International Law

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
International Law	At the end of this course, you will be able to: 1. Explain how and by whom international law is made, by whom it must be respected, and how it is applied; 2. Discuss what happens when binding rules are breached and how is it possible to seek justice in this world. The course will extensively rely on judgments and advisory opinions of the International Court of Justice (ICJ), which is the principal judicial organ of the United Nations (UN).	Université Catholique de Louvain	8 weeks	Free	https://www.edx.org/course/international-law-louvainx-louv5x#.VMe5jGTF_J5 (English)
Introduction to Public International Law	This module situates international humanitarian law within the broader field of public international law. The presenter identifies the scope and sources of international law and discusses how international law generally regulates behavior among states. In addition, the presenter distinguishes IHL from human rights law and refugee law, and examines the role of the UN Charter in regulating the use of force.	Professionals in Humanitarian Assistance and Protection (PHAP) International	Self-paced	€80 Annual membership fee	https://phap.org/training/online-courses/course-video/introduction-public-international-law (English)
e-Learning Course on the Law of Treaties	The overall goal of this e-course is to provide participants with the fundamental theoretical and practical knowledge of the key issues of the International Law of Treaties, as well as a comprehensive understanding of the provisions of the universal conventions as the sources of the International Law of Treaties, and to develop critical skills of analysis and interpretation of cases regarding contemporary practice.	United Nations Institute for Training and Research (UNITAR)	4 weeks	$800.00	https://www.unitar.org/mdp/e-learning-course-law-treaties (English)

Introduction to International Law *continued*

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
International Law and Africa	Bringing together leading academics, legal practitioners, and UN special rapporteurs, the course is intended to present readers around the world with an understanding of how international law works, how it came about, how it is enforced and monitored, how it affects individuals and groups, and how it shapes the world's social, political, and economic dynamics. In particular, the course examines the impacts of international law and its institutional infrastructure in Africa.	University of Glasgow	6 weeks	Free	http://thinkafricapress.com/legal/blog/free-online-course-international-law-and-africa (English)
Right vs. Might in International Relations	Over six weeks, this course will deliver an awareness of the role of international law in disputes transcending national borders. It will center on specific, high-profile disputes, with whose broad contours you are likely to be familiar. The sessions will include case studies on Guantanamo Bay, lethal drone strikes, weapons of mass destruction in the Syrian conflict, counterpiracy operations, international terrorism, and investment disputes. The purpose of this course is to assess whether, and to what extent, international law has been a factor in the resolution of international controversies.	University of Glasgow	6 weeks	Free	https://www.futurelearn.com/courses/right-vs-might (English)

International Human Rights Law

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
International Human Rights Law (Foundation Course)	The course adopts a holistic approach to learning international human rights law, beginning from its normative foundations and emergence as a distinct field of international law to its contemporary status and challenges for the future. Given the introductory nature of this course, emphasis is placed throughout on idealism as well as realism, including an understanding of how international and domestic politics have influenced and continue to influence the field of international human rights law.	Université Catholique de Louvain	8 weeks	Free	https://www.edx.org/course/international-law-louvainx-louv5x#.VMe5jGTF_J5 (English)
International Human Rights: Prospects and Challenges	This course analyzes the international and domestic laws and institutions that protect the fundamental rights of all human beings. The course also describes and evaluates the principal mechanisms and strategies for holding governments accountable for violating those rights.	Duke University	6 weeks	Free	https://www.coursera.org/course/intlhumanrightslaw (English)
Introduction aux droits de l'homme	This course is an introduction to international human rights protection. It provides an overview of the sources, categories, content and limits of rights that may be enforced, as well as the obligations they generate for states. It also explains the principal implementation mechanisms provided both globally and regionally to ensure that rights obligations are complied with.	University of Geneva	8 weeks	Free	https://www.coursera.org/course/droitshomme (French)

International Human Rights Law *continued*

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
International Human Rights	This course relies extensively on comparative material from different jurisdictions to study a wide range of topics including, for instance, religious freedom in multicultural societies, human rights in employment relationships, economic and social rights in development, and human rights in the context of the fight against terrorism.	Université Catholique de Louvain	10 weeks	Free	https://www.edx.org/course/international-human-rights-louvainx-louv2x#. VloALjHF-VM (English)
Rights of the Child	This rapid e-course gives an overview of the institutions and mechanisms that serve to fulfill the rights of children. You will explore particular themes that address how children's rights are being compromised, the efforts being made to stop the violations of children's rights, and how to do your part to help.	Human Rights Education Associates (HREA)	Self-paced	$75.00	http://www.hrea.org/index.php?base_id=846&language_id=1 (English); http:// www.hrea.org/index.php?doc_id=1819 (French)
Gender and Human Rights	This course provides a general introduction to the evolution of concepts of gender equality and women's rights within the international human rights system. It provides a foundational understanding of the centrality of gender equality to human rights discourse generally and how this is addressed within the UN human rights system. Participants will gain an overview of the various legal and normative developments that promote women's rights, address gendered identities, and advance practical approaches to securing gender equality.	Human Rights Education Associates (HREA)	6 weeks	$575.00 (Audit for $215.00)	http://www.hrea.org/index.php?doc_id=2274 (English)

International Humanitarian Law (Law of War)

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
Humanity in War: Introduction to International Humanitarian Law	This rapid e-course gives an overview of the institutions and mechanisms that serve to uphold IHL. The course also examines other mechanisms and special courts that enforce IHL, like the International Criminal Court. Finally, the course looks at the special legal protections afforded to certain groups, including children, refugees, and women.	Human Rights Education Associates (HREA)	Self-paced	$75.00	http://www.hrea.org/index. php?doc_id=1859 (English)
International Humanitarian Law: Contemporary Challenges and New Developments	The course is aimed to provide participants with an advanced knowledge of IHL and to offer an innovative analysis of the legal uncertainties surrounding new-age military capabilities, namely drones and other weaponry systems.	United Nations Institute for Training and Research (UNITAR)	4 weeks	$600.00	https://www.unitar.org/contemporary-challenges-and-new-developments-international-humanitarian-law (English)
Essentials of International Humanitarian Law	This course covers fifteen essential topics in international humanitarian law. Topics covered include: Introduction to Public International Law; Introduction to International Humanitarian Law; Core Principles of International Humanitarian Law; and Protection of Civilians.	Professionals in Humanitarian Assistance and Protection (PHAP) International	Self-paced	€80 Annual member-ship fee	https://phap.org/browse-all-sessions (English)
The Basic Rules and Principles of International Humanitarian Law	This foundation course addresses non-specialized audiences and offers an interactive learning experience based on videos, animations, quizzes, as well as audio recordings. Topics covered include: what is IHL; IHL and human rights law; sources of IHL; application of IHL; basic principles of IHL; protected persons and objects; means and methods of warfare; and international crimes.	International Committee of the Red Cross	Self-paced	Free	https://www.icrc.org/en/about-the-online-training-centre (English, French)

International Criminal Law

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
Introduction to International Criminal Law	This course will educate students about the fundamentals of international criminal law and policy. It explores the contours of international crimes such as genocide, war crimes, terrorism, and piracy. It examines unique modes of international criminal liability and specialized defenses. It also delves into the challenges of obtaining custody of the accused and maintaining control of the courtroom.	Case Western Reserve University	12 weeks	Free	https://www.coursera.org/course/intlcriminallaw (English)
International Criminal Court	This online course on the International Criminal Court (ICC) provides videos, online discussions, and background materials on several issues related to the ICC. Topics include: intersection of politics and the ICC, relationship between the ICC and the United Nations Security Council, the role of the ICC in deterring mass atrocities, and the role of the ICC in advancing peace.	Stanford University	Self-paced	Free	http://shrei.stanford.edu/node/449 (English)
International Criminal Law and Justice	The program provides the option to apply for a Master of International Criminal Law and Justice (MICLJ) and Master of Laws in International Criminal Law and Justice (LL.M.). It is ideal for practicing lawyers, professionals, students, and scholars in diplomatic, criminal justice, military, and law enforcement communities around the world. The program incorporates transnational law courses focused on domestic crimes with international implications that cover issues such as intellectual property crimes, international white-collar crime, and cybercrime.	University of New Hampshire	1–5 years	$245/course	http://law.unh.edu/online-programs/iclj (English)

International Refugee Law

COURSE TITLE	COURSE SUMMARY	TRAINING INSTITUTION	COURSE DURATION	COST	WEBSITE
Rights of Refugees and Internally Displaced Persons	This rapid e-course gives an overview of the institutions and mechanisms that serve to protect refugees and internally displaced persons.	Human Rights Education Associates (HREA)	Self-paced	$75.00	http://www.hrea.org/index.php?doc_id=1327 (English) http://www.hrea.org/index.php?&doc_id=1541 (French)
Protection of Refugees	This course introduces learners to the international and regional systems for protection of refugees. This e-learning course is designed to provide participants with a comprehensive view of what the international system for the protection of refugees is from the international and regional perspectives, what refugees' needs are and available legal protections, who the relevant actors involved in their protection are, and what the challenges facing today's refugees and host countries are.	University for Peace	6 weeks	$600.00 (Audit for $200.00)	http://www.hrc.upeace.org/2015/08/protection-of-refugees-2016/ (English)
Protection of Internally Displaced Persons	This course introduces learners to the various dimensions of human rights protection as it applies to internally displaced persons (IDPs). This course addresses the international legal principles and guidelines for protection of IDPs, and the operational challenges to their protection and durable solutions. The course is designed to provide a contemporary flavor to the topic using recent and emerging crisis situations around the world as case examples.	University for Peace	6 weeks	$600.00 (Audit for $200.00)	http://www.hrc.upeace.org/2014/11/protection-of-internally-displaced-persons-2015/ (English)

A Systematic Approach to Rule of Law

A Systematic Approach to Rule of Law

This chapter introduces the rationale for and the key components of a systematic approach to strengthening rule of law, and explores the mutually supporting roles and responsibilities of the state apparatus and society in promoting a rule of law culture. The chapter also provides a series of analytical tools to support readers in identifying and understanding rule of law challenges in their specific contexts, as well as an overview of some guiding principles for promoters of a rule of law culture.

CHAPTER HIGHLIGHTS:

- Understanding a system and how it operates in a rule of law culture context

- Analytical tools for identifying root causes of problems

- Intervening in a system through processes and framework

- Understanding the role of society in a rule of law culture

- Guiding principles for promoting a strong rule of law

Contents

Part 1 | A Systematic Approach

In this guide, we focus on the justice system and consider how to achieve an effective justice system that contributes to the establishment of a rule of law culture. This chapter explores a systematic approach as a tool for rule of law culture promoters to analyze identified barriers to achieving an effective justice system and to determine potential solutions.

WHAT IS A SYSTEM?

A system is a set of connected parts forming a complex whole.[1] Examples of a system include a computer, a railway system, and a human body. As we saw in chapter 2, justice and security services are delivered through an effective justice system.

There is often a tendency to approach a weak or ineffective justice system as we would a broken computer. We seek out a technical expert, perhaps a lawyer, and demand a technical solution to the problem, perhaps redrafting a law, or implementing a new case management system, or building additional court houses.

Chapter 1, Part 3: Toward a Rule of Law Culture

Unfortunately, a technical response is not always adequate or even necessary to fix a justice system. Why? Because a justice system is made up of people, and in order to create a well-functioning justice system, we need more than just buildings and laws and internal processes. We also need to understand the people engaging with the system—their interests, their desires, and importantly, their motivations.

Chapter 2, Part 1, The Role of People &
Chapter 5, Part 1, Stakeholder Analysis

WHAT IS A SYSTEMATIC APPROACH?

A systematic approach requires us to view the justice system holistically, or in other words, to see "the big picture." The approach also requires looking at a justice system in terms of its many internal and external interrelated connections and interactions, rather than as a group of discrete and independent organizations, institutions, or processes operating in isolation from one another.

Chapter 2, Part 1, Seeing the System as a Whole

Taking a systematic approach to creating a strong rule of law culture requires changing the mind-set, attitudes, and behaviors of and relationships between a wide range of individuals and institutions within a society. Unfortunately, change is difficult and often resisted.

Chapter 5, Part 1: Creating Change

A systematic approach to rule of law begins with a vision of what we want a society based on rule of law to look like.

Chapter 1, Part 2: Defining "Rule of Law"

A systematic approach involves not only legal professionals but also specialists from many other disciplines, such as development, economics, security sector reform, sociology, history, and political analysis.

Chapter 4, Part 1, A Guide to the Plan Phase

A systematic approach requires us to be objective and methodical.

A systematic approach to creating a rule of law culture should involve not only government officials but also ordinary members of society, such as representatives of civil society organizations. Civil society representatives should be involved in all phases of the systematic approach, from diagnosis of the problem, to designing, implementing, monitoring, and evaluating activities, and back to problem analysis and redesign of activities, if necessary.

Chapter 4, Part 2, "The Role of the State and Civil Society in Strengthening a Rule of Law Culture"

A systematic approach can be effectively used by government and nongovernment individuals at all levels of strategizing and planning for change. This may be at a national level, setting out objectives and priorities for national and international expenditures in all sectors; at a state or regional level, establishing a statewide legal aid program; at a sectorial level, developing a plan to transform the justice sector; or at an institutional level, developing a strategic plan for court reform or designing a community policing project.

In undertaking the systematic approach, we move from being purely reactive to situations and developments around us, to being proactively owning and engaging in the process of promoting a rule of law culture.

In the systematic approach, we move from being reactive to proactive.

Taking a systematic approach requires the following considerations:
- Develop a clear sense of direction (identifying a rule of law vision and the challenges to achieving that vision)
- Create a strategic plan with short-, medium-, and long-term goals and activities that aim to address the identified challenges
- Set a realistic time frame for achieving goals
- Formulate a methodical approach
- Establish in-built accountability mechanisms for monitoring and measuring progress, learning, and testing
- Assign responsibilities for implementation clearly

These considerations are discussed in detail in this chapter.

In essence (and as shown in figure 4.1), a systematic approach is a *never-ending cycle of continuous improvement.* It is a dynamic approach that requires constant learning and adaptation in a systematic or methodical fashion.

A systematic approach (applying the "Shewart cycle")
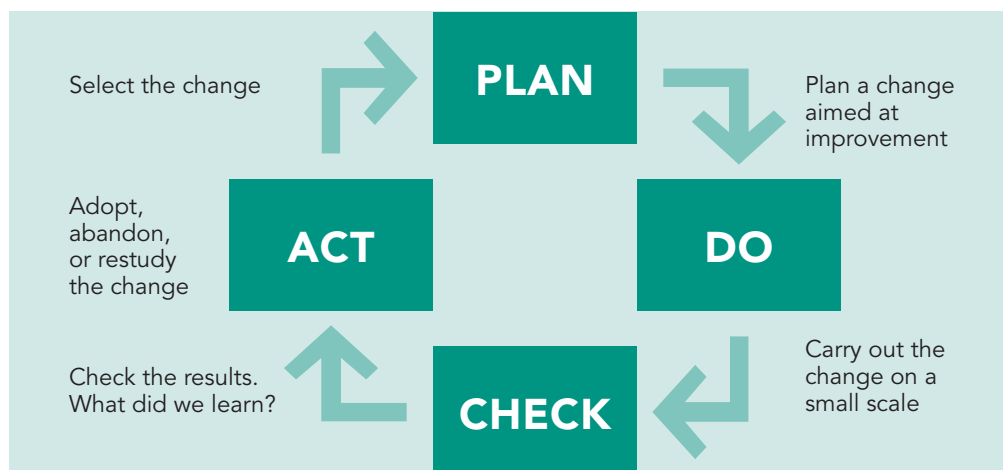
Note: *The above diagram may be referred to as the Deming cycle, the PDCA (Plan-Do-Check-Act) cycle, or the PDSA (Plan-Do-Study-Act) cycle.*

A systematic approach is a never-ending cycle of continuous improvement.

PHASES OF THE SYSTEMATIC APPROACH

PLAN: This phase focuses on analyzing the context; diagnosing the problem; understanding the root causes behind the identified problem; identifying the relevant stakeholders; and designing a plan or strategy for potential interventions that could effectively address the problem, based on logical assumptions that can be measured and tested. This component is the foundation for our action.

DO: The plan or strategy is implemented. It may be wise to start small; for example, with a pilot project in a discrete geographical area, which allows for testing both the assumptions made in the **PLAN** phase and the relevance and effectiveness of the chosen action.

CHECK: Here, **CHECK** is used in the sense of "evaluate," "assess," "investigate," or "test." The word is replaced by **STUDY** in the PDSA cycle. It is important to monitor and evaluate the implementation and progress of the action regularly, considering questions such as: Are we achieving our goal? Is the action contributing to addressing the problem we identified in the **PLAN** phase? Are the outcomes expected? What lessons can we learn from this exercise, and how can we improve the effectiveness of our action?

ACT: If the pilot action is successful, it might be ready to be adopted and expanded into other areas or populations; it might need some amendments or revision; or it might turn out not to produce the expected or desired results, requiring us to go back to the **PLAN** phase, review the project assumptions, and explore different ways of addressing the problem. However, whether we decide to adopt, amend, or abandon, we must return to the **PLAN** phase to consider and design the next move.

This four-phased approach is applicable to any rule of law challenge in any context.

A GUIDE TO THE PLAN PHASE

The **PLAN** phase is the most critical component of the systematic approach, and receives the most attention in this guide. We break **PLAN** down into three elements: diagnosis, stakeholders, and opportunities. Each is connected and overlaps with the others and should be addressed holistically. Each element is discussed in detail in the following pages.

Often, **PLAN** is the phase that people want to rush through or skip by in their hurry to start **DO**. However, if the **PLAN** phase is done accurately and well, determining the best action to implement will be easier and the results more likely to achieve long-term sustainable change. For this reason, this guide pays particular attention to explaining the **PLAN** phase.

The three elements of PLAN

DIAGNOSIS

STAKEHOLDERS

OPPORTUNITIES

DIAGNOSIS

We begin with the diagnosis element, and with an example. Perhaps corruption is a problem within the police force. We know this behavior undermines our vision of a rule of law–based society and we want to know what to do to address the problem.

Diagnosis broadly involves answering the following questions:
- What is the problem that we see?
- What is the context within which the problem exists? (Look at the whole picture.) What are the historical, institutional, political, economic, social, cultural, environmental, or other dynamics?
- What are the root causes of the problem?

Diagnosis takes time because we need to gather as much relevant information as possible. Why? To ensure that we do not jump to conclusions based on too little or inaccurate information.

When a country or community faces a serious threat, such as an act of terrorism, we instinctively feel that we must respond swiftly. However, it is important to undertake the right analysis in order to make the right decisions about what to do and how to do it. If we rush or skip this stage—if we fail to correctly define the problem, its root causes, and its triggers—we may make the problem worse.

CONSIDER

Adam goes to a doctor complaining of a headache. The doctor is in a hurry and without asking him any questions, prescribes Adam some aspirin. Adam takes the aspirin and for a short time his headache goes away. The next day, his headache is back and so Adam returns to the doctor. If the doctor had conducted a thorough examination of Adam, he might have discovered that Adam actually had a brain tumor. If he had asked Adam some questions, perhaps he would have learned that Adam had been having vision problems and really just needed glasses. By failing to diagnose Adam properly the first time, the doctor reached the wrong conclusion about what Adam needed, and so his action—to prescribe aspirin—was ineffective in the long term.

Diagnosis requires an objective and methodical analysis of the entire situation, or in other words, requires looking at the "big picture." In a justice system, this would involve understanding the character of the system, as well as the dynamics and actors within it. Through diagnosis, we can identify the barriers to achieving an effective system and determine the actual changes needed.

It is important to be objective in our diagnosis and to seek multiple perspectives when analyzing a situation, as can be seen in figure 4.3. The challenge that comes with this approach is that it is natural for us to see what we expect, want, or have been trained to see. For example, a security sector specialist might see problems as a security issue, while a development worker would view problems from a development perspective.

FIGURE 4.3

What frame are you looking through and what do you see?
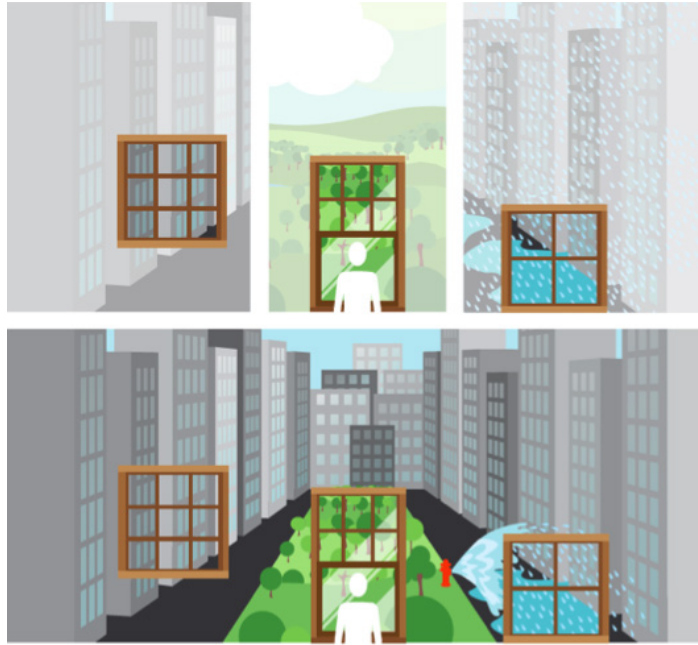
"What we perceive and how we interpret a situation depend on the frame through which we view not only the situation but our world view."

Source: World Bank, *World Development Report 2011: Conflict, Security, and Development* (Washington, DC: World Bank, 2011), 64.

▶ **The Monkey Business Illusion**, https://www.youtube.com/watch?v=IGQmdoK_ZfY.

"Our minds don't work the way we think they do. We think we see ourselves and the world as they really are, but we're actually missing a whole lot." — The Invisible Gorilla, by Christopher Chabris and Daniel Simons (2010), http://www.theinvisiblegorilla.com/overview.html.

Diagnosis involves engaging with as many people as possible. These people can be direct or indirect stakeholders (discussed below).

EXAMPLE

Kenya's Judiciary Transformation Framework Workshops

When the new chief justice of Kenya was appointed in 2011, he set about the task of transforming the Kenyan judiciary. One activity, led by the Judiciary Transformation Secretariat, was a nationwide culture change training program. Thirty-eight workshops were held for all courts across the country, reaching all 4,564 judges, magistrates, and judicial staff who were in service at the time. The workshop's goals were to introduce a culture of equity and equality (e.g., the secretariat deliberately arranged the seating in a random manner that saw staff across all ranks sit next to each other throughout the sessions, something unheard of within the culture of the courts); for the secretariat to understand from employees themselves what their professional needs were (e.g., some people complained about poor pay, others felt they were not treated with dignity or respect, and others emphazised how professional development opportunities were frowned

EXAMPLE: Kenya's Judiciary Transformation Framework Workshops   *CONTINUED*

on and discouraged by peers); to identify actions that could be taken to transform the judiciary (e.g., having judicial staff start court sessions by greeting litigants and other court users, beautifying court premises, and establishing customer care desks); and to identify change champions in every court who would promote local leadership and ownership of the national transformation program.

Source: Republic of Kenya, *State of the Judiciary and the Administration of Justice, Annual Report, 2012–2013*, chap. 5 (Nairobi: Supreme Court of Kenya, 2013), http://www.judiciary.go.ke/.

The diagnosis, however, also needs to involve people with a wide range of perspectives, experiences, and expertise. This is because diagnosing a problem means first understanding the various social, cultural, historical, political, and conflict *dynamics* that are affecting the situation we are analyzing.

We can do this analysis by drawing on multiple disciplines and areas of expertise during our diagnosis. For example, a historian can explain the dynamics and legacies of conflict; a psychologist can advise on the effects of psycho-social trauma during and after conflict, or the ways in which perceptions of legitimacy, credibility, and effectiveness can vary among different actors in society; an anthropologist can explain how different groups in society communicate; and a political analyst can advise on political relationships and different political interests.

This analysis should involve understanding not just the community or local *context* but also the national, regional, and even international context. Consider, for example, how do political dynamics, regional relationships, or global events impact the problem we have identified?

The way in which we frame the questions we ask during our diagnosis also matters. For example, what is the difference between asking, "Why is the police force corrupt?" and asking, "What does it take to have an effective police service?" The second question is broader and allows us the opportunity to identify other issues that we might have missed if we had narrowed the focus of our diagnosis too soon. These other issues could lead us to underlying critical root causes of the initial problem we saw—corruption—or to identify problems we did not know existed.

An accurate diagnosis requires an accurate analysis of the root causes of a particular problem. For example, the problem we see is that police officers regularly accept bribes from members of the community, contributing to a culture of corruption and impunity within society. To understand how best to address the problem, it is crucial to first understand why police officers accept bribes in the first place.

CONSIDER

What are some reasons that a police officer might accept a bribe?

We need to dig deeply into the reasons for their actions. Asking "why?" only once is rarely adequate to get to the heart of the issue.

The 5-Why Technique

The primary goal of this technique is to determine the root cause of a problem by repeatedly asking the question "Why?"

Each question forms the basis of the next question. The "5" in the name derives from an empirical observation on the number of "why" questions typically required to resolve the problem.

This technique was originally developed by Sakichi Toyoda, and was used within the Toyota Motor Corporation during the evolution of its manufacturing methodologies.

Toyoda used the example of a welding robot stopping in the middle of its operation to demonstrate the usefulness of his method, finally arriving at the root cause of the problem through persistent enquiry:

1. "Why did the robot stop?"
   The circuit has overloaded, causing a fuse to blow.
2. "Why is the circuit overloaded?"
   There was insufficient lubrication on the bearings, so they locked up.
3. "Why was there insufficient lubrication on the bearings?"
   The oil pump on the robot is not circulating sufficient oil.
4. "Why is the pump not circulating sufficient oil?"
   The pump intake is clogged with metal shavings.
5. "Why is the intake clogged with metal shavings?"
   Because there is no filter on the pump." [2]

One may need to continue beyond the fifth why; however, by this point one is likely to be able to identify the most relevant solution to the problem.

Apply the 5-why technique to the challenge of why police officers regularly accept bribes from community members. The whys could look like this:

- Why?   The officers have not been paid for six months and need money to survive.
- Why?   The Ministry of Finance is withholding the national police budget.
- Why?   The chief of police is being investigated for corruption charges.
- Why?   He has been allowed to act with impunity in his role.
- Why?   There are no adequate internal accountability mechanisms to regulate the actions of senior police officers.

Diagnosis requires gathering and analyzing information. Obtaining information about the justice system can be done in a variety of ways. The following are some examples of information sources:

- *Official statistics* gathered from relevant justice institutions. These could pertain to the number of detainees in prison, the number of persons in pretrial detention, or the number of persons convicted, for example.
- *Public surveys* can provide insight into the impact of policies and practices at a local level, and can be a tool for cross-checking the accuracy of government statistics. These can include national poll analyses of public opinion, focus group, observations (such as time and motion studies), and informal, semistructured, or formal interviews.
- *Expert surveys* targeting people working within the system can help in understanding the dynamics and character of an institution or system. Experts may include criminal justice practitioners, government officials, academics, and nongovernmental organization (NGO) representatives.[3]
- *Legislation, codes of conduct, regulations, and other documentary evidence* explain the mandates, power dynamics, and official roles and responsibilities of those who run justice and security institutions. They provide a critical understanding of the legal foundations of the justice and security system.

In conflict-affected countries, there may be a scarcity of official information, either because institutions did not maintain records or analyze available data, or because the data was destroyed during the conflict. The government and justice institutions may need local or international financial and technical support to conduct research and analysis of this data.

EXAMPLE

The Justice Audit

The "justice audit" takes a "snapshot" of a country's justice system, illustrating how the system works, the challenges that confront it, and the opportunities for addressing those challenges. The audit looks at the criminal justice system from the ordinary user's point of view, from the moment a person comes into contact with the system to the disposal of the matter. The justice audit triangulates a) administrative data from the justice institutions, with b) results from structured interviews with criminal justice practitioners, and with c) citizen and practitioner surveys (which may include police, lawyers, NGO professionals, prosecutors, judges, magistrates, court clerks, court users, and prison officers). The data captured by the justice audit allows change policies to be designed based on reliable data about how the system is currently operating, and provides a baseline that will permit the monitoring and measuring of the results of all change initiatives.

Source: Governance and Justice Group, "The Justice Audit-Delivering an Evidence Base for Policy Making," http://www.governancejustice.org/justice-audit/.

A further challenge can be the act of identifying the relevant laws in place. The existence of multiple systems of laws, including those that emerged during the conflict, can create a complex, legally pluralistic setting.

Chapter 2, Part 2: Understanding the Domestic Legal System

It may be difficult to locate a full set of laws, or to reconcile the laws passed by various governments before, during, and after the conflict, often with little regard for existing laws.[4]

EXAMPLE

Liberia

In an interview, the president of Liberia noted that the successive interim governments following the end of the civil war "passed so many laws, that some of them are duplicating each other, while others are contradicting each other."

Source: UN Office for the Coordination of Humanitarian Affairs, "Liberia: Interview with President Ellen Johnson-Sirleaf" (press release, June 29, 2006), http://www.irinnews.org/report/59516/liberia-interview-with-president-ellen-johnson-sirleaf.

Problem Tree Analytical Tool

A problem tree, as depicted in figure 4.4, is a tool that provides an overview of all the known causes and effects of an identified problem. It is a useful diagnosis tool that helps to explore the root causes of a problem. It assists in breaking a problem down into manageable parts so that the problem seems less overwhelming.

How to Use the Problem Tree

1. With a group of your colleagues, identify a problem, for example, a police officer accepting bribes from members of the community. Write your problem in the central black box of figure 4.4.

2. Identify as many root causes of the problem as you can, and put each cause in one of the boxes below the central box.

3. Consider the effects of the problem on the community/society, then write these effects in the boxes above the central box.

See the example in figure 4.5.

The problem tree tool has a number of advantages:

- It helps us see the problem in more manageable parts.
- It helps us gain a deeper understanding of the problem and its causes. This is the first step in finding appropriate solutions.
- It helps us identify the individuals and institutions that are contributing to or affected by the problem.
- It guides us to see what additional information or data we need to address the problem.
- It requires us to address the current reality, not to base our assumptions on the past or the future.
- It is a tool that allows for a group of people to work together to understand a problem and determine what action to take.
- It begins the process of building a network of change agents.

FIGURE 4.4

Blank problem tree tool

[THE PROBLEM]

[EFFECT]

[ROOT CAUSE]

FIGURE 4.5

Sample problem tree analysis

The problem: corruption (taking brides) is pervasive within the police

- Corrupt officers may be admired by friends and family for their skills in outwitting authority
- ??
- Every other officer does it, so why shouldn't I? Police culture of corruption
- Personal concern amongst citizens about "losing face" if a bribe is not offered
- National culture that a bribe must be paid for any government service

- Lack of internal accountability mechanisms/ procedures
- ??
- Low salaries do not match inflation— officers need extra to maintain their standard of living
- Lack of institutional accountability— superiors turn a blind eye or engage in corruption themselves
- Inadequate human and financial resources to investigate reported crimes—those who pay a bribe will have their claim investigated

STAKEHOLDERS

The diagnosis element involves identifying who is affected directly and indirectly by the problem we have identified. This identification then guides us to understand who we need to involve directly in the implementation of the solution.

Who is a stakeholder?

"The rule of law is not the rule of lawyers and judges; all elements of society are stakeholders."

Source: World Justice Project: Rule of Law Index (Washington, DC: World Justice Project, 2014), 1.

Stakeholders can be individuals or groups who have a direct or indirect interest in the problem being explored.

They may be directly or indirectly impacted by the problem.

They may have the power to contribute to, or be impacted by, any efforts taken to address the problem.

The systematic approach seeks to ensure that we identify the right *stakeholders* to focus our attention on.

Stakeholders could be people working within the justice system, such as judges, prison officials, or ministerial staff. They could be friends with whom you went to law school or the police academy! A stakeholder could be both a government official and a nongovernment representative, such as a tribal elder or a religious leader. They could be members of the international community.

Chapter 1, Part 5, International Rule of Law Assistance Actors, &
Chapter 2, Part 1, Institutions and Actors within the Justice System

In the corruption example discussed above, it is possible to identify many actors who may have a role to play, including the executive branch, to review and authorize the policing budget; the legislature, to make sure the right anticorruption laws are in place; the police, to implement internal discipline mechanisms for officials who participate in corruption;, and the citizens, who need to be educated about their rights and the anticorruption laws, which could be done by civil society as well as other actors.

It is not enough merely to make a list of the stakeholders who are directly and indirectly affected by or involved in a problem. We must also understand the *stakeholder dynamics*. For example:
- What are the interests, goals, desires, positions, capacities, and relationships of the people engaged in or being affected by the challenge?
- Which stakeholders have the most influence or power in this situation?
- How likely are they to respond to efforts to address the problem we see?
- Which relationships may need to be transformed?
- What capacities do people have to support solutions to the identified problem?

In any context, there are people or institutions that wield influence and control the power dynamics of a society, such as religious leaders, politicians, or business leaders. Even if all the justice and security actors we identified in chapter 2 were working together, these other power holders may in fact control how effective the system ultimately is. It is crucial to identify the power holders as some of many stakeholders that will need to be engaged to identify and rectify challenges to rule of law.

EXAMPLE

The *Hawaladars* of Afghanistan

Informal money service providers (*hawaladars*) have historically been an important informal institution—as key economic agents—in Afghanistan. They fully replaced the formal banking system during decades of conflicts, and especially under the Taliban, and provided the only vehicle to transfer money in and out of the country. International donors did not want to engage with an informal banking system and did not understand the importance of the system. In fact, they sought to disband it and reinstitute a formal system. This led the international community to miss opportunities to engage with the *hawaladars,* who were central to building peace and restoring normalcy for communities in the wake of conflict.

Source: S. Herbert, *Sequencing Reforms in Fragile States: Topic Guide* (Birmingham, UK: GSDRC, University of Birmingham, 2014), 5.

A systematic approach should aim to bring together all the various stakeholders—whether they be local- or provincial-level parliamentarians, high-ranking police officers, judges, members of civil society organizations, or neighborhood groups—to understand their differing needs, perspectives, and experiences of the problem being investigated.

Broad consultations and discussions with various stakeholders aid the effectiveness of the diagnosis process and make possible solutions to the identified problem easier to define. Mechanisms for engaging stakeholders could include public meetings, bilateral meetings, focus groups, and public perception surveys.

EXAMPLE

The Needs of the Malians for Justice

In 2013, the Hague Institute for the Internationalisation of Law (HiiL) was contracted by the Dutch Embassy in Bamako, Mali, to conduct a large scale study of the justice needs in Mali. In all, 8300 people across eight regions of Mali participated in the survey. Respondents were asked about their justice needs and experiences on both formal and informal paths to justice. The survey highlighted 91 different justice problems, the top four being land, crime, employment and family matters. Through the survey results, coupled with focus groups and stakeholder workshops held to validate the survey findings, HiiL was able to explore what works and what does not work in Mali's justice systems, and identify the justice needs, concerns and experiences of Malian people.

Source: HiiL, The needs of the Malians for justice: towards more fairness (title in italics), http://www.hiil.org/data/sitemanagement/media/Mali%20Report_HiiL_Final%20English_low_resolution.pdf.

During the diagnosis, you may identify a wide range of problems and issues. Addressing all of those problems at once is virtually impossible. There is a need to *prioritize*. The prioritization process should involve as many stakeholders as possible, including decision makers (government officials) and civil society representatives. All sides need to recognize, however, that their differing needs may not always be reconcilable.

Assessing the existing capacity, functions, mandate, structure, and resources available is necessary to identify feasible actions for change.

EXAMPLE

Considering Capacity

A sustainable justice and security program in East Timor would have had to have faced the fact that there were only nine lawyers in the territory after the independence referendum in 2002.

In 2000 in Haiti, only one third of the judges had any formal legal training. Such capacity weaknesses would need to be addressed before large-scale changes could be made to improve the functionality of the justice system, including introducing case management systems to address case backlog issues and establishing specialist courts to address serious crimes.

Source: Organisation for Economic Co-operation and Development (OECD), *Enhancing the Delivery of Justice and Security: Governance, Peace and Security* (Paris: OECD, 2007), 12, http://www.oecd.org/dac/governance-peace/conflictandfragility/docs/38434642.pdf.

The process of identifying the priority needs within a system and mapping existing capacity and resources also places government officials in a stronger position to make more-informed requests for international donor support and resources.

OPPORTUNITIES

The process of understanding the context and identifying the problem, undertaking root cause and stakeholder analysis, identifying the priority needs of both the end users of the system and the institutions involved, and identifying the available human, financial and technical resources leads us to identifying potential *opportunities*, or entry points, for addressing the problem (see figure 4.6).

Elements needed to identify opportunities for action
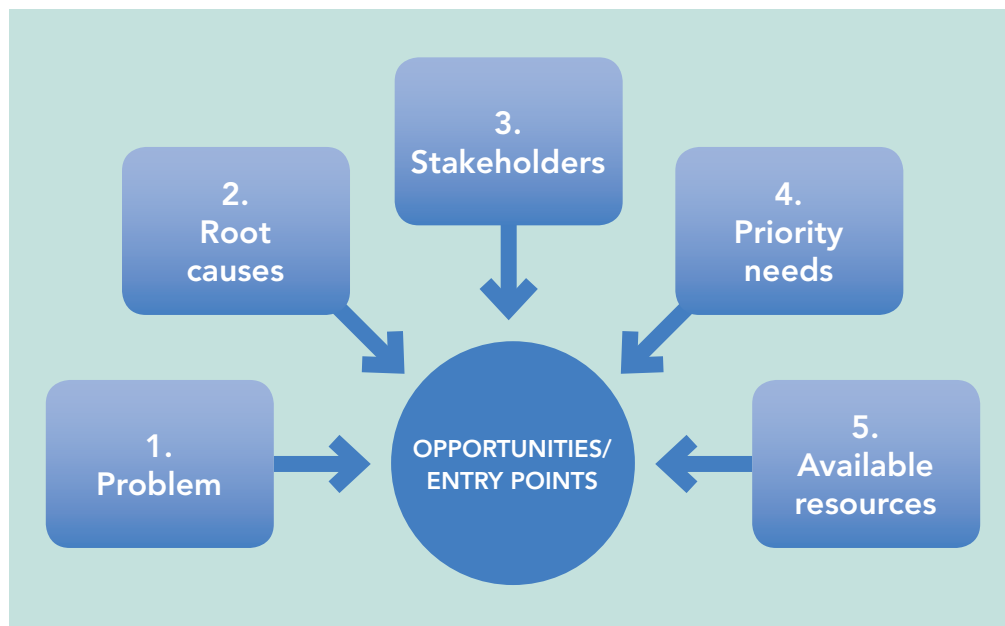
Creative and innovative solutions are encouraged, but the most important thing to remember is that the proposed solutions are relevant to the context, responsive to the actual needs of the affected community or group, and feasible—based on available resources, capacities, institutional mandates, and, of course, politics.

There are many examples and lessons we can learn from other contexts. However, literally transposing an idea from one context to another (also known as copy and pasting, or the "cookie cutter" approach) is unlikely to produce long-term, sustainable change.

Every context is unique. Sometimes we can learn valuable lessons and get great ideas from other contexts. But we must modify or adapt those ideas to suit the specific context and specific problem we are facing. Our solution might look different; it might even seem a bit odd to outsiders, but remember that the key is not what it looks like (the form) but what it aims to achieve (the function).

Chapter 5, Part 2: Practical Actions to Promote Rule of Law

CONSIDER

A horse might be a good animal to use to travel long distances across the countryside, but if you want to travel through the desert would you choose a horse or a camel? The horse looks faster and more impressive than the slow, odd-looking camel, but consider the context.[5] Which animal is better suited to survive in the desert environment? The camel, of course!

Creating sustainable, effective change requires a plan, or strategy. The strategy for action should include the following components:

- A theory of change—to consider how the action will effectively contribute to the achievement of our long-term rule of law vision
- Short-, medium-, and long-term goals
- Clear and precise activities that aim to achieve the goals
- A realistic time frame for achieving our goals
- A communications plan—to formulate how we will communicate the aim and outcomes of the project to different stakeholders
- Assessment of potential challenges in implementation and, if necessary, contingency plans to address those challenges
- In-built accountability mechanisms to monitor and check our progress
- Clear assignment of responsibilities for implementation
- Assessment of resource needs—financial, technical, and human

EXAMPLE

South Africa

In South Africa, to resolve a burdensome pretrial detention issue, a new bail regime was established. Although the number of incarcerated persons declined, many of the released accused persons were murdered on release from jail. Some people in the local communities did not understand the new regime and, believing the released detainees to be guilty, did not want them living in their neighborhoods.

Source: OECD, *Enhancing the Delivery of Justice and Security*, 21, http://www.oecd.org/dac/governance-peace/conflictandfragility/docs/38434642.pdf.

Rule of Law Reform in East Timor

UNTAET, the UN Transitional Administration for East Timor, was established in 1999 to administer the territory in its transition to independence. One of its responsibilities was to create structures for sustainable governance and rule of law. UNTAET did not develop a coherent and sustainable strategy for the administration of justice. No comprehensive assessment of the legal and judicial situation was undertaken before actions were initiated. The focus was almost entirely on issues of criminal law, rather than on the development of the areas of law associated with longer-term, day-to-day governance. Inexperienced and poorly trained judges were appointed before agreement was reached on the court structure and legal regime. There was no serious planning made for the training of future lawyers and little serious capacity building. Court cases piled up. The failure of UNTAET to undertake coherent strategic planning regarding reform contributed to falling public confidence in the justice sector, making future reforms even more challenging.

Source: Kristi Samuels, "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt," Social Development Paper no. 37 (Washington, DC: World Bank, October 2006), 16.

Nigeria

A program was designed to introduce digital court recording into select courts in Nigeria. Digital reporting involves the use of high-quality digital stenography equipment. Digital court reporters were trained in how to operate and maintain this equipment. The equipment was purchased and introduced into the target courts. There was, however, little or no buy-in by the judges. In one court location, no secure place was made available in the courthouse to store the expensive machine. Every evening, the court

reporter would take the equipment home and return with it to work the next day. One morning, the court reporter was walking to the court when he was attacked by armed thieves, who shot him dead and stole the equipment. Without judicial buy-in and with a focus on replacing technology rather than engaging key stakeholders, basic issues such as storage of equipment and staff safety were not given the support required. In addition, the wider consequences of adopting a digital court recording system were not considered by the program designers. Judges and lawyers were skeptical and without their understanding and support, court reporters could not control, protect, or handle the confidentiality of the recordings. The treatment of digital court recordings as a purely administrative issue not only led to the death of one man but to a raft of legal uncertainties regarding court proceedings.

Source: Interview with Adewale Ajadi, Nigerian barrister, Valletta, Malta, June 2014.

We also need to revisit our stakeholders. Consider:

- Who do we need to implement the action?
- Who else do we need to support the action?
- Who will resist the action and how can we address this resistance?
- Is there political will to support this action? How can we incentivize politicians at a local or national level to support our plans for change?

As we will see in chapter 5, change primarily takes root when it involves *broad sets of agents* engaged together in designing and implementing locally relevant solutions to local problems (also called "local ownership"). The more people we engage at the beginning of the systematic approach, especially those we will need to implement the proposed solutions, the more likely our change will have success.[6]

Chapter 5, Part 1: Creating Change

Finally, it is important to establish our starting point, or the baseline data. This is the data against which we will measure our progress toward our goals. At the end of the project period, the baseline data is compared against the data attained at the end of the project. Deciding what data needs to be gathered depends on the project goals and objectives and the project indicators. An indicator is "a measure that helps answer the question of how much, or whether, progress is being made towards a certain objective."[7]

We will return to the use of indicators in the **CHECK** stage discussed below.

In some contexts, problems and their potential solutions may be apparent, but to act and effect sustainable change at that precise moment might not be viable. Perhaps there is no political support for the action; perhaps conflict or other events make safely or effectively carrying out the action impossible.

The **PLAN** phase allows rule of law culture promoters to prepare themselves for the moment when a window of opportunity opens. The phase allows promoters to think through the context, to consider potential scenarios, to plan out possible interventions and contingencies, and to support and guide others who may be in stronger positions of influence.

PUTTING THE PLAN INTO ACTION—TIME TO DO

Sometimes, the time is not right for action; but when a window of opportunity opens, it's time to **DO**.

Good practice suggest starting small, for example, piloting an action in a specific geographical area or with a specific group or community.

There are a number of advantages to a pilot project approach:
- It requires less resources than actions that address the entire system
- If the project does not work, the loss of resources is limited
- It can be implemented more quickly in the short term than a larger, nationwide project
- If successful at the pilot stage, it can provide necessary evidence for change resistors that change is possible and can work
- It allows for testing the assumptions made in the **PLAN** phase and determines the relevance and effectiveness of the chosen action

Unfortunately, we sometimes rush the **DO** stage. For example, there may be internal or external pressure to show that allocated funds have been spent, a desire to be able to report impact and outcomes quickly, or a push to meet donor deadlines. One of the biggest challenges to creating positive rule of law change is recognizing that sustainable, locally owned, effective change takes time.

Chapter 4, Part 3: Some Guiding Principles for Promoting a Rule of Law Culture

The **DO** stage often includes a need for training and education or awareness-raising components for both those who are implementing the action and those who are affected by the action. Building the capacity of those people and institutions involved in implementing change is often overlooked but should be seen as a critical element of ensuring long-term sustainability of the change.

Chapter 1, Part 5, Reflections on Moving Beyond a Rule of Law Orthodoxy Approach

The **DO** stage also often needs to focus on BUILDING TRUST between different groups, such as of government officials or communities. BUILDING TRUST often begins with talking, or bringing people together to better understand one another. This may have begun during the **PLAN** stage.

EXAMPLE

The United States Institute of Peace's Justice and Security Dialogues

Bridging the gap between communities and law enforcement actors, dispelling mistrust, and building cooperation is key to the promotion of respect for and adherence to rule of law, the reduction of levels of crime and violence in communities, and the protection of the basic rights of the disadvantaged. Dialogue can also be part of advocacy efforts, and civil society and the police—working together—can address rule of law challenges at the local level, and solve them. The United States Institute of Peace has piloted projects via its Justice and Security Dialogue (JSD) program in a number of countries as one way of achieving this. JSD revolves around a series of facilitated dialogues at which police officers, other relevant government representatives, civil society representatives, and "ordinary" citizens meet to overcome a legacy of suspicion, division, and fear by voicing apprehensions, fostering understanding, identifying shared concerns, and building relationships.

Source: Colette Rausch, "Justice and Security Dialogue: A New Tool for Peacebuilders" (USIP, June 22, 2011), http://www.usip.org/publications/justice-and-security-dialogue-new-tool-peacebuilders.

Trust building is a critical element of establishing a rule of law culture. Trust building is challenging because it requires a change in attitude and behavior by both officials and members of society.

Chapter 1, Part 3: Toward a Rule of Law Culture

However, activities to build trust can be very simple and inexpensive.

EXAMPLE

Kenya Transformation Process— The Performance Pledge

One outcome of the Kenya judiciary transformation workshops in 2012 was the agreement by judicial staff on a Performance Pledge. The pledge contained six commitments that judicial staff made to members of society. It began, "We, the judiciary, cordially pledge to:
• Cordially greet you and welcome you to our courts
• Treat you with courtesy dignity and respect"

The pledge was advertised on radio and television. A complaints system was established for people to submit complaints through SMS (text messaging), a telephone hotline, e-mail, and letter writing when a judicial officer failed to uphold the elements of a pledge. Some staff did not see why the pledges were important. But what they found when they implemented the pledges was that tensions were released and that relationships between the public and staff members were improved. This facilitated smoother and easier interactions, the resolution of problems, and, overall, enhanced trust between the public and the judiciary. Treating people with dignity doesn't need to cost anything and can have big results.

Source: The Judiciary, Republic of Kenya, "The Judicial Marches Week: Taking Justice to the People," *The Judiciary,* August 21–25, 2012, http://www.judiciary.go.ke/portal/assets/downloads/reports/MarchesWeek.pdf.

Visible, high-profile investigations and prosecutions can help build public trust and confidence in the functioning of justice and security institutions, and the government's commitment to strengthening rule of law. To be effective in the long term however, these actions should be part of a larger, holistic plan for change.

EXAMPLE

Guatemala   In September 2015, the president of Guatemala resigned after judges stripped him of immunity and allowed charges of corruption to be pressed. The president was allegedly connected to a fraud scheme involving the customs authority.

Source: Azam Ahmed and Elisabeth Malkin, "Otto Pérez Molina of Guatemala Is Jailed Hours after Resigning Presidency," *New York Times*, September 3, 2015, http://www.nytimes.com/2015/09/04/world/americas/otto-perez-molina-guatemalan-president-resigns-amid-scandal.html?_r=0.

Ghana   A team of investigative journalists publicly revealed that they had evidence showing that judges and magistrates had accepted bribes to acquit defendants. The government acted quickly. The chief justice established a committee to investigate the allegations and advise the president whether to remove any of the judges and magistrates from office in accordance with the constitution. The attorney general also announced that his office would prosecute judges, magistrates, and their accomplices for bribery and related crimes.

Source: Rick Messick, "Ridding the Courts of Corrupt Judges: Ghana Takes the First Step," *Global Anticorruption Corruption* (blog), September 16, 2015) http://globalanticorruptionblog.com/2015/09/16/ridding-the-courts-of-corrupt-judges-ghana-takes-the-first-step/.

TESTING THE IMPACT OF DO—IT'S TIME TO CHECK

In a systematic approach, **CHECK** is used in the sense of "evaluate," "assess," "investigate," or "test." This is also known as "monitoring and evaluation."

Monitoring is an ongoing and continuous process that is conducted throughout the life of a project in order to provide indications of the progress made toward achieving project goals.[8]

Evaluation is an "exercise that that attempts to systematically and objectively assess progress towards and the achievement of an outcome." [9] An evaluation is not done only once. It usually involves a series of assessments being carried out at different points during a project (e.g., midway through the project, at completion, and after completion).

Designing the monitoring and evaluation system for a project should be done during the **PLAN** phase.

Chapter 4, Part 1, A Guide to the Plan Phase

It is important to monitor and evaluate the implementation and progress of an action regularly, considering questions such as: Are we achieving our goal? Is the action contributing to addressing the problem we identified in the **PLAN** phase? Are the outcomes expected? What lessons can we learn from this exercise, and how can we improve the effectiveness of our action?

Our plan may involve a series of formal monitoring activities such as surveys and questionnaires, formal interviews, focus groups, and collections of statistics to assess the achievement of project indicators and project goals.

Guidance on how to design SMART (specific, measurable, achievable, realistic, and time-bound) indicators[10] and goals can be found in the additional resources provided below.

ADDITIONAL RESOURCES +

UN Department of Peacekeeping Operations (UNDPKO) and Office of the High Commissioner for Human Rights (OHCHR), *United Nations Rule of Law Indicators: Implementation Guide and Project Tools,* 1st ed. (New York: UNDPKO and OHCHR, 2011).

World Justice Project, "Rule of Law Index.*"*

Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, eds., *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law*, Cambridge Studies in Law and Society (New York: Cambridge University Press, 2015).

UNDP, *Why, What and How to Measure? A User's Guide to Measuring Rule of Law, Justice and Security Programmes* (New York: UNDP, August 2014), http://www.undp.org/content/undp/en/home/librarypage/crisis-prevention-and-recovery/why--what-and-how-to-measure--a-users-guide-to-measuring-rule-of.html.

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

Monitoring the impact of our actions does not wait for a particular milestone in your strategy and definitely should not wait until the very end of the project time frame. Monitoring our actions is an ongoing activity that does not need to be costly, overly formal, or complicated.

The critical point is that the systematic approach requires a constant gathering of information and assessment of that information to determine the impact of the action and see what is working, what is not, what lessons we can learn, and what adaptations need to be made. In addition to formal monitoring mechanisms, this data collection can also just involve as simple an activity as having regular conversations with the people implementing and directly affected by the action.

EXAMPLE

Malawi   Court user committees bring criminal justice agencies around a table each month in the districts to discuss local problems and find local solutions at a low cost. Committees involve not only state actors such as the police and court staff but also traditional elders and other nonstate actors like community paralegals. In addressing justice problems the committees also draw on the advice and input from nonlegal entities such as the social welfare department, where relevant.

Source: CHREAA, "About CHREAA," http://chreaa.org/?page_id=2.

The **CHECK** phase is often overlooked during the project implementation phase, and this can lead to the continued implementation of an action that is in fact inadequate or ineffective in producing change, or worse, that can have even more negative impacts. The **CHECK** phase is necessary in order for us to be able to move on to **ACT**.

DECIDING HOW TO ACT

The **ACT** phase of the systematic approach requires us to determine whether the action we have implemented should be up-scaled (for example, implemented in more geographical areas or even nationally), amended, or revised (are there some components of the action that need to be altered?); or has the action turned out not to produce the expected or desired results at all? If so, we should stop the action entirely.

Determining which option to apply relies on the data gathered and analysis undertaken during the **CHECK** phase.

Once an option has been selected, it is important to go back to the **PLAN** phase in order to work out our next action. This could mean drafting a new plan for the national roll out of a pilot project, revisiting our original plan and making amendments, or deciding that our diagnosis or assumptions were flawed and that in fact we need to abandon the plan and start the process all over again, beginning with a new diagnosis of the problem.

BACK TO PLAN

Ensuring adequate time and resources are given to the **PLAN** phase is crucial to ensuring that change initiatives are designed to be responsive, relevant, and sustainable. This phase, like all the phases of the systematic approach, does not happen only once. We need to constantly review the context, dynamics, and actors, and adapt our initiatives as required. We also need to constantly monitor and measure our progress, and adapt as required.

A systematic approach involves a process of continuous learning and improvement.

CHAPTER 4 Part 1 ENDNOTES

1   *Oxford Dictionary* online, http://www.oxforddictionaries.com/us.

2   http://www.toyota-global.com/company/toyota_traditions/quality/mar_apr_2006.html.

3   For an example of an expert surveys project tool, see United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools*, 1st ed. (New York: United Nations, 2011), 7.

4   UN Office for Drugs and Crime (UNODC) and United States Institute of Peace (USIP), *Criminal Justice Reform in Post-conflict States: A Guide for Practitioners* (New York: UNODC; Washington, DC: USIP, 2011), 64.

5   Matt Andrews, Lant Pritchett, and Michael Woolcock, "Escaping Capability Traps through Problem-Driven Iterative Adaptation (PDIA)," Working Paper 299 (Faculty Research Working Paper Series, Harvard Kennedy School of Government, Harvard University, Cambridge, 2012), 14–15, http://www.cgdev.org/publication/escaping-capability-traps-through-problem-driven-iterative-adaptation-pdia-working-paper.

6   See "The 8-Step Process for Leading Change" at the Kotter International website, http://www.kotterinternational.com/the-8-step-process-for-leading-change/.

7   Vera Institute of Justice, *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (New York: Vera Institute of Justice, 2003), 2.

8   UNDP, *Handbook on Monitoring and Evaluating for Results* (New York: UNDP, 2002), 6.

9   Ibid, 6.

10   Ibid., 68.

Part 2 | Rights and Responsibilities in a Rule of Law Culture

A government doesn't automatically embrace and abide by rule of law. For a government to do so, its readiness to buy in to the rule of law must be matched by the public's support for rule of law. Leoluca Orlando, the mayor of Palermo, described this relationship as a cart with two wheels: One wheel was the state—its laws and institutions; the other wheel was society, or as he described, "an informed and responsible citizenry." According to Orlando, "The two wheels must turn together and at the same speed if the cart is to go forward rather than in circles."[11]

Chapter 1, Part 3, The Rule of Law Culture in Practice

Rule of law limits and defines the powers of the government and the actions of members of a society. That is, rule of law requires that everyone—members of the public and government officials—has rights, but everyone also has responsibilities within their society.

Freedom, in the context of a rule of law culture, does not mean that everyone gets what they want all of the time, or that people can act without any consideration for the rights of others. Recognition of the joint rights and responsibilities held by both the public and government officials is what forms the foundation of a society based on rule of law.

In countries emerging from conflict, authoritarian civilian rule, or military rule, this idea of joint rights and responsibilities can be a challenge. Newly empowered individuals and communities want to demand their rights and freedoms and may be resistant to attempts to limit those rights. At the same time, justice and security institutions are undergoing significant institutional transformation and are grappling with how to perform their new roles as upholders of rights and freedoms.

For example, consider the issue of members of the public wanting to hold protests or demonstrations to demand their rights, to demand a more accountable government, or to protest a government action with which they do not agree.

The freedom of assembly (also sometimes called "freedom of association") is a recognized human right (see article 21 of the International Covenant on Civil and Political Rights) and is included in many national constitutions.

> *Article 21: The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.*

State and society are two wheels of a cart which must turn together.

The right of freedom of assembly is not unrestricted, however. International law allows for the exercise of this right to be limited, by law, in order to protect the interests of national security, public safety, public order, to protect public health or morals, or to protect the rights and freedoms of others.

The challenge for states and societies is finding a balance between protecting and upholding the right to peaceful assembly, while ensuring national security, public safety, and the rights of others.

Chapter 1, Part 1, The Role of Rule of Law in Balancing Justice and Security

In transitioning countries, where authorities are still trying to assert themselves and consolidate their power, the idea of public protests is also threatening politically, and such protests may, under the rubric of national security, be restricted, prevented, or even violently quashed. Unfortunately, this denial of individuals' basic rights can result in deepened mistrust of the authorities, can undermine the authorities' perceived or actual legitimacy, and can lead to unlawful and increasingly violent actions and instability. In other words, actions taken to deny the rights of people can undermine a rule of law culture.

MECHANISMS FOR STATE-SOCIETY ENGAGEMENT

Building a relationship of trust between the state and society is not easy. It takes time and requires the willingness and support of both sides. Civil society is one mechanism for bridging the gap between the state and members of society, encouraging dialogue and trust building, and supporting the state to develop other direct mechanisms of communication with the public themselves.

Involving (civil) society in policymaking and change processes is an important but rarely straightforward process. In contexts where such engagement at a local or national level has been rare, ad hoc, or nonexistent, setting up effective mechanisms may require identifying an existing association to convene regular meetings with government officials; identifying change agents and influencers to support political buy-in to the process; training and capacity building of all interested parties on how to conduct meetings and facilitate and effectively participate in dialogues; and providing technical support to translate outcomes of dialogues into actionable and responsive policy initiatives.

Actions that deny people's rights undermine a rule of law culture.

EXAMPLE

Citizen Service Centres in Bosnia and Herzegovina

In the town of Domaljevac, in Bosnia and Herzegovina, one consequence of the Bosnian war (1992–95) was a lack of public confidence in government at all levels. The town authorities sought to better identify and fulfill their citizen needs with the support of a project funded by USAID, the Swedish International Development Cooperation Agency, and the Dutch embassy. The project began by working with the local government to improve basic services, introducing the Citizen Service Centre, a one-stop shop that greatly simplified permitting and other services for citizens by bringing the various agencies that manage official documents and processes under one roof. In the past, a person had to go to multiple government offices to obtain necessary administrative documents. Now the process can take mere hours or even minutes. The centres have improved municipal financial management and contributed to the efficiency and transparency of the budgeting process, while dramatically reducing waiting times for citizens to access government services. Citizens can raise their concerns or problems and have immediate access to the relevant officials, enhancing the trust in and responsiveness of the authorities to local needs.

Source: Chemonics, "Building Local Government," http://www.chemonics.com/OurImpact/SharingImpact/ImpactStories/Pages/Building-Local-Government.aspx.

The Extractive Industries Transparency Initiative (EITI)

In some cases, regional or international institutions require that member governments consult with civil society in order to fulfill their obligations. The international EITI Standard requires governments to work with civil society in establishing a multi-stakeholder group to oversee the implementation of the EITI. According to the Standard, an independent civil society must be fully and effectively engaged in the EITI process. The government has an obligation to ensure that there are no barriers to civil society participation, including by providing "an enabling environment for . . . civil society participation with regard to relevant laws, regulations, and administrative rules."

Source: The EITI International Secretariat, "The EITI Standard" (Oslo: EITI, July 11, 2013), http://eiti.org/files/English_EITI%20STANDARD_11July_0.pdf.

THE ROLE OF THE STATE AND CIVIL SOCIETY IN STRENGTHENING A RULE OF LAW CULTURE

A society that embodies a strong rule of law culture requires more than just legal norms and the legal systems and institutions needed to create, implement, and enforce them. To ensure the provision of actual justice and security for all people, these laws, systems, and institutions, and the people within the institutions, must have legitimacy. The people of a nation must believe in them, trust them, respect them, and seek to abide by them. Legitimacy emerges from the principle of inclusiveness: the notion that every person within a society is equal before and accountable to the law; that laws are created and administered fairly, transparently, and in a manner that respects and protects the basic rights of everyone; and that all persons, no matter their financial or social status, have access to effective and efficient mechanisms to resolve their disputes.

Fundamentally, rule of law is about the relationship between the government and members of a society. It is about creating a system where the governors and the governed determine the rules of society together and hold one another accountable to those rules. Rule of law limits and defines the powers of government officials and allows for those officials to limit the actions of members of society; that is, we agree as a society to follow certain rules. It is this recognition, by both the people and government officials, of the joint rights and responsibilities held by every member of a society that forms the foundation of a society based on rule of law.

The relationship between the government and members of a society, however, will succeed only if it is built on trust. To establish a society based on rule of law, the people need to have faith in the government that it is acting in their interests. The average person needs to believe that the agreed-on rules or laws are a fundamental part of justice and can be used to attain it, and that the systems creating and upholding those rules enhance the quality of life of individuals and ensure a peaceful society. *Civil society can play a crucial role in developing, supporting, and maintaining this critical relationship.*

Defining "Civil Society"

The term "civil society" is a modern (predominantly Western) concept, although its roots, like those of rule of law, can be traced back to the time of Aristotle. Today, civil society is regarded as the space outside the state institutions, the family, and the economic market; the space where individuals, through modalities such as unions, associations, parties, and movements, negotiate, argue, and agree with each other and with the centers of political and economic authority to define the social contract.[12] Civil society, therefore, is a space where a community can determine what it means to belong to and live within a *civil* society. While there is no single agreed-on definition of civil society, the term is generally accepted as referring to "voluntary, un-coerced actions in pursuit of shared interests, purposes or values."[13]

Civil society is not to be equated solely with NGOs. Civil society is a broader concept, encompassing all the organizations and associations that exist outside political and economic society, such as labor unions, professional associations, chambers of commerce, ethnic

Legitimacy of the state emerges from the principle of inclusiveness.

associations, religious-based organizations, registered charities, social movements, coalitions, and advocacy groups. Civil society also incorporates the many other associations that exist for purposes other than advancing specific social or political agendas, such as student groups, cultural organizations, sports clubs, and informal community groups.[14]

NGOs do, of course, play important roles in most developed and developing countries. They shape policy by exerting pressure on governments and by furnishing technical expertise to policymakers. They foster citizen participation and civic education. In many countries, however, NGOs are outweighed by more traditional parts of civil society. To focus attention only on the role of Western-style NGOs is to exclude a multitude of diverse, culturally specific, often traditional organizations that play fundamental roles in the maintenance of a *civil* society, such as Burma's Buddhist societies, Pakistan's *jirgas*, or the Rwandese *ubudehe* (a community-based participatory problem-solving mechanism).[15] These groups often have a genuine base in the population and secure local sources of funding, features that the scores of new NGOs that mushroom during a country's transition from conflict or authoritarian rule often lack.

Civil Society versus the State

There can be a crisis of trust between the state and civil society.

In many countries, especially those that have experienced conflict, civilian dictatorship, or military rule, there is often a poor relationship between state entities and civil society. Civil society organizations tend to be seen by repressive governments as antagonistic threats to their power and capable of undermining their control of society. Indeed, in the 1970s and 1980s, Latin Americans and Eastern Europeans embraced civil society as a concept for changing society and for directly opposing militarized and totalitarian regimes.[16] As a result, civil society organizations may be banned, restricted (by law or practice) in their scope of activities, or tolerated only as long as they do nothing to challenge the authority of the state. Members of civil society in such contexts can face arrest, detention, and even torture for trying to do their work. Governments may be concerned that civil society, and specifically NGOs, are tools of external actors or "foreign hands." In the 1990s, Western governments and global institutions used civil society as a tool for introducing democracy and facilitating market reforms in developing countries. Bans or restrictions on foreign funding for NGOs is one tool that oppressive states commonly use to restrict this perceived or actual external interference.

During a country's transition, when power, authority, and legitimacy dynamics are being significantly altered, establishing relationships of trust and legitimacy with the population is important, not only for the emerging state structure but also for civil society. Both the state and civil society have a crucial role to play in promoting rule of law, but both can be beset by a crisis of trust between one another and with the general public. For those in power, there may be a lack of understanding of the benefits of engaging with civil society. There may be a perception within both the state apparatus and civil society that during the "emergency" phase of restructuring and stabilizing the country there is no time to consult. Civil society groups may be reluctant to approach and engage with authorities, given past negative experiences. When they do engage, it can often be in a combative manner that further undermines any potential relationship built on trust.

Civil Society and the State

Civil society can act as a balance to state power, by demanding accountability of the state through monitoring, lobbying, and advocacy work to ensure that the state fulfills its obligations to its people, and by acting as a watchdog for ineffective government policies or abuses of power. Civil society is therefore often seen to play an antagonistic role vis-à-vis the state; however, civil society is not by definition inherently antagonistic. Some civil society organizations, such as locally organized, grassroots, and community-based groups (for example, neighborhood committees, credit unions, and women's self-help groups), may interact with state agencies in very specific, localized ways (e.g., through micro-credit projects aimed at enhancing the social and economic position of project beneficiaries), but they may never enter the policy sphere and may only marginally affect the power equation. Other civil society organizations, such as business associations, unions, or other collective action groups, may interact with political parties or form the basis of national political campaigns (e.g., on economic rights or constitutional reform issues), while others, most often NGOs, may have a specific mission to influence legislation or general policy outcomes (e.g., lobbying for and providing technical assistance on human rights or environmental issues).[17]

Given this breadth of action, there are many ways for civil society to exist and complement the role of government, especially to bridge the gaps that exist between the state and members of society, to encourage dialogue and trust building, and to support the state in developing other direct mechanisms of communication with the public.

Civil society can be a strategic partner in the transformation process in many ways, including:
- Assisting the state in promoting and raising public awareness of specific change initiatives[18]
- Promoting and facilitating public participation[19]
- Facilitating the rebuilding of trust within and between divided communities and between the state and society[20]
- Facilitating and mediating the renegotiating of the social contract through open debate and dialogue between state institutions and society on social needs and concerns[21]

Government policies often require, and can benefit from, civil society assistance, such as through partnerships in project implementation in areas where the government has limited resources; for example, in the provision of legal education and assistance to vulnerable populations, or in the delivery of social services. Here, civil society organizations should act as a complement to, not a replacement of, state institutions. Civil society organizations, such as NGOs, that look like quasi-governmental institutions and/or parallel structures to government institutions can be harmful in the long term; for example, by undermining the trust in and legitimacy of government institutions by seeming to be unresponsive to public needs, damaging the perception of the independence of the civil society organization, and even contributing to ongoing instability within and between communities.

Formal mechanisms that assist in bridging civil society and policymakers are crucial for strengthening the relationship between state and society and for ensuring that public policies are reflective of social needs. These mechanisms can allow civil society to serve as a mouthpiece both for communities in articulating their needs and for the government in communicating government information to communities reluctant to listen to officials.

Civil society can be an important strategic partner for the state.

Establishing effective mechanisms may require identifying an existing association to adopt the role of convening regular meetings with government officials; identifying change agents and influencers to ensure political buy-in to the process; training and capacity building of all interested parties on how to conduct meetings and to facilitate and effectively participate in dialogues; and providing technical support to translate outcomes of dialogues into actionable and responsive policy initiatives. Mechanisms can operate at a local, national, regional, or even international level, as seen with local court user committees in Malawi and Kenya, USIP's JSD program, and the African Union's African Peer Review Mechanism. Such mechanisms help foster a relationship in which civil society actors can establish the linkages with government actors necessary to do their work but also maintain the independence needed to properly fulfill their roles of monitoring the state, communicating with the public, and advocating with the state on the public's behalf.

In this two-way relationship, civil society also needs the state's protection to ensure the autonomy and freedom of action of its members, such as by passing laws upholding the freedom of association and expression; establishing clear, workable regulatory frameworks for the nongovernmental sector, including transparent registration processes; enacting tax incentives for funding of nonprofit groups; and encouraging formal and informal partnerships with civil society organizations. In Myanmar (Burma), for example, civil society organizations came together under an umbrella coalition that included legal drafting experts to assist and advise the government on the drafting of a new NGO law in 2013.

Civil society is not necessarily "better" than the state.

It is important to point out that civil society is not necessarily "better" than the state, and that care should be taken not to idealize or romanticize its role in society. Certainly, civil society everywhere is, as Thomas Carothers described, "a bewildering array of the good, the bad, and the outright bizarre."[22] Civil society is made up of individuals, groups, and associations, representing different viewpoints from within society, who take action in pursuit of a wide range of goals. These goals may not always represent the "public good"; some organizations are intensely focused on their own agendas (such as some environmental groups and other single-interest groups, and those organizations with political affiliations or motivations), and are not interested in balancing different visions of the public good.

Civil Society and the General Public

Civil society organizations are also not automatically trusted by the public.[23] In contexts where there has been a flurry of new organizations emerging, organizations may be poorly regulated, perceived as representing and serving a certain elite (one that speaks English and can engage with international donors in meetings in the capital city, for example), and interested only in securing international donor funding. Civil society actors may also be seen to be extensions of the state apparatus, operating without transparency and with little to show for their actions on the ground. Civil society organizations are often reluctant to cooperate and coordinate with other actors, including politicians, officials, academics, and faith or business groups. Yet cooperation could both increase their impact and increase public trust and legitimacy.

Rights and Responsibilities

Establishing a rule of law culture requires genuine consideration, discussion, and formulation by all actors—state and society—of what it means to be part of a *civil* society. Determining this framework, in which there is an equal recognition of and respect for the rights of every individual and his or her responsibilities within society, cannot be done without the mutually reinforcing roles of both the state and civil society.

CONSIDER

- What are the roles of civil society organizations in your country?

- How are these organizations perceived by the government and by members of society?

- What are some of the criticisms made of civil society organizations?

- What could be done to strengthen the relationship between civil society and the government in your context?

- How could a stronger government-civil society relationship contribute to a strengthened rule of law culture?

Considering Rights and Responsibilities

When a country emerges from a dictatorship or from military rule, such as in the case of Myanmar (Burma) in 2011, there is an opening up of space for members of society to exercise the basic rights and freedoms previously denied to them.

The freedom of assembly is one of those freedoms that newly empowered communities often wish to exercise to voice their opinions regarding political developments, to promote greater realization of other rights (such as access to public services), or to hold a newly formed government to account for its actions. However, assembling to voice these opinions can create tension between citizens, eager to exercise their new-found rights and freedoms, and state officials struggling to promote and maintain law and order, ensure social and political stability, and consolidate their power in the new political landscape.

Frequently, what is absent (due to factors such as a legacy of mistrust of the government, a lack of legitimacy of state institutions, violence, and conflict) is an appreciation on all sides that members of society and officials have mutually supporting *roles and responsibilities* in the establishment of a new rule of law–based society, or, in other words, the establishment of a rule of law culture.

> The following case study provides readers with an opportunity to explore the challenge of respecting and upholding the rights and responsibilities of both government officials (in this case, the police) and members of society.

Case Study: Myanmar (Burma) and Freedom of Assembly

Article 354 of the 2008 Burmese Constitution permits freedom of expression and the right to peacefully assemble. Article 18 of the 2011 Peaceful Assembly and Peaceful Procession Law originally stated that persons or groups who wanted to stage a demonstration must seek prior permission from the local police.[24] If permission is denied, appeal to the regional- or state-level police is possible. Permission may be denied if there is a risk to national security, "law and order, community peace and tranquillity or public order and morality" (Article 18).

Previously, under the military regime, freedom of assembly was not permitted and any sign of public protest was immediately quashed by the military forces. Under the new democratic government, the people have the freedom to assemble, and the police, who lack basic equipment and have had limited training, must manage those protests according to domestic and international law standards.

However, the police denied permission for almost all protests without providing any justification for doing so. People were angry that their right to peacefully protest was being denied. There was no transparency in the decision-making process and no consultation with the potential protesters. Groups were left with the choice to either not protest or do so illegally. When they protested without authorization, protest leaders were targeted for arrest.

Myanmar (Burma) has a history of mistrust between the people, on one side, and the police and the government, on the other. So, many people believed that the government was reverting to its former military dictatorship ways and was not truly committed to upholding rule of law.

Throughout 2012, activists protested against the seizure of local village land for the purpose of expanding a China-backed copper mine in the northwestern part of the country. The protesters included local villagers and Buddhist monks who claimed the mine's operations were destroying their local environment. Further, the villagers claimed that their crop yield had been decreasing in the area due to contamination from the mine, and that the seizure of land by the government for the mine had reduced the amount of pastureland available for livestock breeding (the primary source of income for the local villages).

The protestors did not have police permission to hold their many protests, which had been going on since the beginning of the year. During that time, authorities claimed the protestors had impeded the mine's operations, threatened mine workers, and destroyed property.

On November 24, the Minister of Home Affairs announced on national television and radio that all the protesters should leave the area where they had gathered by midnight on November 27. The head of the local police repeated the television announcement, stating that if the protestors did not disperse, action would be taken. When the crowd did not leave, the township administration department announced again, on November 28, that the crowd would be dispersed by force. Still the protestors did not leave. Members of the police, using megaphones, ordered the protesters to leave, but they refused.

At 3 a.m. on November 29, the police, using high-pressure water hoses and fifty-five tear gas canisters, attempted to disperse the protestors. One hundred eight protesters were injured when the tear gas canisters fell on the tents in which the protesters were taking shelter. The tent material melted and dripped onto those huddling underneath, causing serious burns.

The response by the police, which resulted in the serious injury of Buddhist monks and other protestors, attracted domestic and international criticism, and many people questioned the sincerity of government reforms that had included introducing laws protecting the right to peacefully protest.

CONSIDER

- **What were the responsibilities of the police?**
  Did they adequately fulfill these responsibilities?

- **What were the protestors' rights in this scenario?**
  Did they exercise those rights appropriately?

- **What were the protestors' responsibilities?**
  Did they adequately fulfill these responsibilities?

- **Do the police and protestors have any shared interests or desires? If so, what are they?** For example, the police see their role as being to protect the community and ensure safety and security for everyone, including the workers and owners of the mine. The protestors are frustrated that their rights are not being protected.
  Do you think the police should be protecting you and keeping your community safe and secure?

- **What actions could be taken to address the interests and desires of both parties, and ensure future protests are peaceful?**

The relationship between the government and the people it governs, like all relationships, succeeds only if it is built on trust. Building this trust requires a lot of effort. It requires dialogue, mutual respect, and a legitimate agreement on a rule of law vision for the state by members of both society and the government. It requires understanding one another's perspectives and addressing the root causes of the conflicts and/or mistrust. It is important to have mechanisms in place that facilitate and allow for open communication between society and the government in order to address issues and concerns transparently and effectively.

EXAMPLE

Mitigating Parade Violence in Northern Ireland

The Parades Commission is a quasi-judicial nondepartmental public body responsible for placing restrictions on any parades in Northern Ireland deemed contentious or offensive. Established by law in 1998, the commission can impose restrictions such as prohibiting the playing of music, rerouting parades to avoid contentious areas, or banning certain participants based on previous breaches of commission determinations. The commission's rulings are usually enforced by parade stewards or the police.

The commission was established as a mechanism for mitigating the increasingly violent clashes that occurred during a yearly parade in the town of Portadown in Northern Ireland. The Orange Order, an Ulster Protestant organization, insisted on being allowed to march its traditional route to and from a church on the outskirts of town, which led the group through the densely populated Catholic quarter of the town. The predominantly Catholic and/or Irish nationalist residents viewed the parade as sectarian and supremacist and sought to ban it from their area. The Orange Order, which had marched the route since 1807, saw that as an attack on their traditions. In 1995 and the years following, the protests and resulting clashes spread, sparking protests and violence across Northern Ireland, drawing domestic and international attention, prompting a massive police operation, and threatening to derail the peace process.

The Parades Commission is committed to working as closely as possible with all those who participate in or are affected by parades to ensure that rights are respected and responsibilities accepted by everyone involved. To assist with this, the commission released a parade organizer's guide. The guide is based on a series of principles pertaining to improving communication with local community representatives; agreeing on the time, location, and noise level of parades; and controlling public disorder. The guide sets out a transparent system of application and approval for parades and protests, including time frames, responsible authorities, and appeal avenues.

Source: Parades Commission, "Frequently Asked Questions," https://www.paradescommission.org/FAQs.aspx.

CHAPTER 4 Part 2 ENDNOTES

11 Leoluca Orlando, *Fighting the Mafia and Renewing Sicilian Culture*, chap. 6 (New York: Encounter Books, 2010).

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has been ad hoc and confusing. See, for example, San Yamin Aung, "Arrests Go On Unabated after 'Unclear' Amendment to Burma
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Part 3 | Some Guiding Principles for Promoting a Rule of Law Culture

This section summarizes some of the key lessons that have been learned in the process of rule of law promotion globally.

RULE OF LAW TAKES TIME

- Achieving a strong rule of law–based society is a gradual process
- The more we access information and learn from the past, the faster we can transform

According to the *World Development Report 2011*, creating a society based on rule of law took the twenty fastest-moving countries an average of forty-one years.[25]

FIGURE 4.7

Time taken for governance transformation

The table shows the historical range of timings that the fastest reformers in the 20th century took to achieve basic governance transformations.

INDICATOR	YEARS TO THRESHOLD AT PACE OF	
	Fastest 20	Fastest over threshold
Bureaucratic quality (0–4)	20	12
Corruption (0–6)	27	14
Military in politics (0–6)	17	10
Government effectiveness	36	13
Control of corruption	27	16
Rule of law	41	17

Source: World Bank, *The World Development Report 2011: Conflict, Security and Development* (Washington, DC: World Bank, 2011), 11. The data in the table is from Lant Pritchett and Frauke de Weijer. "Fragile States: Stuck in a Capability Trap?" (background paper for the *World Development Report*, World Bank, Washington, DC, 2010).

The time it takes for institutional transformation depends greatly on the starting point of a society. Factors such as the strength of state institutional experience and literacy rates can have an impact.

Key to achieving institutional transformation is winning the trust of the people. The institutions that endure are sustained by the respect and affection of the population.[26]

In general, transformation is getting faster over time due to advances in technology and communications tools such as the Internet and social media, increased citizen demand for good governance, and experience gained from building on the lessons we have learned over the past decades.

SUSTAINABLE, EFFECTIVE CHANGE REQUIRES A VISION

• Ad hoc and unplanned actions rarely lead to sustainable transformation

Ad hoc and unplanned actions can undermine attempts at transformation, create new challenges, or be unsustainable due to a lack of legitimacy, public buy-in, or government or donor support.

Even if there is no "strategic plan," there must be a specific and attainable guiding vision. Creating a vision can mobilize people and give them passion to pursue a goal they believe in.

Chapter 1, Part 2: Defining "Rule of Law"

A vision allows the government and members of society to focus on something positive. A vision provides a framework for actions taken by both the government and society to promote rule of law.

The vision should be created in a participatory manner, drawing on as many people involved in the issue as possible.

EXAMPLE

The Senegal National Dialogue Process

In June 2008, the Front Siggil Senegaal ("Senegal Standing"), a coalition of opposition forces, launched a national dialogue called the National Conference of Senegal, which gathered over 140 participants from across public life, including representatives of political parties (except the majority Senegalese Democratic Party, which declined to join), trade unions, civil society organizations, religious leaders, and various personalities in the business community. The aim of the conference was to find an effective and durable solution, through consensus, to the serious ethical, political, economic, social, and cultural problems that existed in the country. "Citizen consultations" were launched throughout the country and abroad, in France, the United States, and Canada. At a time when political dialogue had reached an impasse, these exchanges enabled citizens to engage in a visioning for a better Senegal. The process lasted almost twelve months and produced a Charter for Democratic Governance, which laid the foundation for sustainable development and provided a vision for future development.

Source: Giogio Blundo, "Glocal Integrity: Good Governance Brokers and the Appropriation of Transnational Policies in Senegal," in *Democracy at Large: NGOs, Political Foundations, Think Tanks, and International Organizations*, ed. Boris Pétric (London: Palgrave Macmillan, 2012).

TOO MUCH TOO FAST CAN BACKFIRE

• Too much change too quickly risks a backlash from resisters of change
• If a government is unable to fulfill its promises for a better future, people will lose confidence and trust will diminish

Highly visible, immediate actions can be important in building public confidence and trust in the change process and in those responsible for implementing it. But too much change too quickly risks a backlash from power holders and others who are resistant to change.

 Chapter 5, Part 1: Creating Change

When a government fails to deliver on its promises for change, the result can be an institutional loss of credibility and a lack of confidence in and support for the change process amongst the public.

It is sometimes useful to start with small, highly visible changes at first, before launching into larger, more complex or institutional issues. Responding to entry points as they arise (the windows of opportunity), rather than forcing certain activities before there is adequate willingness or capacity to undertake them, may also be helpful.

THERE IS NO "ONE SIZE FITS ALL" APPROACH

• There is no perfect model for establishing a strong rule of law culture
• We can learn from other countries' experiences and global good practices

Transposing an idea from one context to another is unlikely to produce long-term sustainable change. This is because every context has its own unique cultural, social, economic, historical, and political dynamics. It is important to understand and respond to the root causes and drivers of conflict in a specific context.

We can learn lessons and get great ideas from other contexts, but then we must modify or adapt those ideas to suit the specific context and specific problem that we face.

The process of establishing rule of law needs to bring people together in a collaborative, participatory process to identify and address not only the technical rule of law issues but also other drivers of conflict, such as bias, exclusion, lack of understanding, and suspicion among communities.

The process should address transforming conflicts and the relationships between the people involved in those conflicts. If the process ignores these relationship dynamics, transformation outcomes risk reigniting old conflicts, creating new conflicts, or failing to be seen as legitimate (or based on reality) and therefore being unsustainable and/or ineffective in the long term.

SEQUENCING

- There is no best practice approach when it comes to the order in which a government should address justice and security concerns

The order for addressing security and justice concerns depends on the specific context, which includes variables such as the (internal and external) actors involved and their capacities, the legitimacy of institutions, the public perception of the system and institutions, the availability of resources, and the windows of opportunity for change.

We also need to consider *if the time is right for change.* A change initiative that might succeed at one point in time may fail at another because the conditions are not right. It is important to consider the timing before acting on a problem.

Strong justice institutions and systems are as critical to the stability of a country as strong security institutions and systems. There cannot be strong rule of law without both elements. Therefore, an approach that combines both justice and security actors and institutions, and that promotes cooperation across the two, is preferable.

EXAMPLE

Haiti

Impressive police reform efforts in Haiti in the 1990s and early 2000s were undermined because they were not enacted alongside equally necessary reforms in the judicial sector. The failure to address problems within the judicial system contributed to reduced general security in the country. There was insufficient prosecution of criminals; offenders were often released back into communities without due process, and they continued to engage in illegal activities. The inability of courts to settle land and property disputes meant that these disputes were increasingly resolved through violence.

Source: Samuels, "Rule of Law Reform in Post-Conflict Countries," 20.

Whole-of-Government Reforms in the Solomon Islands

In 2003, the Regional Assistance Mission to the Solomon Islands (RAMSI)—a partnership between the Solomon Islands and fifteen contributing countries of the Pacific region—entered the Solomon Islands. RAMSI simultaneously implemented police reforms, reform of the court system and refurbishing the country's prisons. Overall, the "whole-of-government" approach followed by RAMSI achieved some laudable results, such as restoring law and order and helping rebuild the government. However, the cost of the mission, estimated at $2.6 billion, was a price tag that has been heavily criticized.

Source: World Bank, *World Development Report 2011: Conflict, Security and Development,* (World Bank, 2011), 153; and Jenny Hayward-Jones, *Australia's Costly Investment in Solomon Islands: The Lessons of RAMSI* (Sydney: Lowy Institute for International Policy, May 2014), 1.

ADOPTING PARALLEL TRACKS
(Short-Term and Long-Term Initiatives)

- Small-scale, immediate-change actions should be taken in parallel with longer-term activities
- All actions should be consistent with the rule of law vision
- Initiatives should start small and adapt or scale up as positive results are seen

As discussed, sometimes the government needs to institute immediate confidence-building initiatives to garner public support for the change process. For example, initiatives have involved "integrating former rebels into the national army structure, as in Burundi, or guaranteeing long-term employment to former adversaries, as in South Africa through the "sunset clause" offered to white civil servants."[27]

Actions on a small scale that can address immediate problems can and should be undertaken. These actions do not need to wait until the larger plan or strategy has been completed. The actions should, however, be consistent with the vision toward which all the change efforts are working.

These immediate actions may also be useful in informing those involved in the planning process about what may or may not work in the longer term. Initiatives should start small and then scale up by targeting salient issues or specific regions as positive results are seen.

Chapter 4, Part 1: A Systematic Approach

For example, limited access to basic justice services is a problem in many societies. Formal legal aid schemes might exist on paper, but a lack of lawyers in the country and lack of state financial resources to fund the schemes can mean that, in reality, legal aid is not available. A state legal aid scheme could be supplemented by initiatives involving civil society, such as community paralegal schemes. Paralegals can be trained and mobilized quickly to provide free legal information and advice to communities. They can also play a crucial role in nonviolent conflict resolution in their communities.

Chapter 5, Part 2: Practical Actions to Promote Rule of Law

EXAMPLE

Afghanistan Counterterrorism Case Study

A project was initiated in rural Pashtun communities in eastern Afghanistan by the Natural Resources Counterinsurgency Cell (NRCC), a joint effort of US defense and civilian agencies. The project aimed to reduce violence and turn potential recruits away from the appeal of violent insurgency in vulnerable communities. Reducing the strength of the insurgent groups, increasing stability in the country, and alleviating poverty all require a broad array of long-term activities, including the building of an effective and legitimate government. But these activities do not reach the target population of potentially violent young men quickly enough to prevent or alleviate imminent insurgent activity.

The project sought to provide, in the short term, a path for reducing insurgent recruitment that would give space for other longer-term initiatives to take hold. The project was carried out on a small scale and was highly local-specific. An initial assessment identified that the high-value men the insurgents wished to recruit were not motivated by money or material advancement, but by a desire to protect the local culture and to be acknowledged for their integrity, piety, physical ability, intellect, and honor.

The NRCC program created opportunities for these men to contribute to their communities. They went through a rigorous selection process and then were assigned to community-based projects chosen in consultation with elders and community leaders to ensure that they would be valued by the community. Projects included building water conservation and soil erosion control dams, planting trees, creating terraces, and conducting assessments of natural resources. Village elders agreed that the infrastructure the men built would be maintained.

Source: Rachel Kleinfeld and Harry Bader, *Extreme Violence and the Rule of Law: Lessons from Eastern Afghanistan* (Washington, DC: Carnegie Endowment for International Peace, 2014).

INVOLVING THE RIGHT PEOPLE

- Involve the right people in the various stages of planning and implementing change
- Consider the capacity of those involved in designing a reform process
- Understand the interests and priorities of external actors and/or donors
- Protect ownership of the process and the rule of law vision

It is important to involve the right people in the various stages of planning and implementing transformation. Consider the capacity of those involved in designing a reform process. In Kenya, for example, the chief justice called on experts not only in law but also in communications and public relations, human rights, security, and information technology in designing the transformation framework for the judiciary.

When involving external actors and/or donors, bear in mind that they will generally have their own interests and priorities. These may or may not align with those of national actors. Be cognizant of the potential consequences of engaging external actors and consider how to avoid losing ownership of the process and, importantly, the vision.

EXAMPLE

Somaliland   Some commentators have argued that the lack of external assistance in Somaliland was beneficial to the emergence of the political settlement, the maintenance of peace, and other political and developmental achievements. Virtually no foreign funding was used to finance the peace conferences in Somaliland between 1991 and 1997. Funding was provided by the domestic population and the diaspora. Somalilanders were able to negotiate their own locally devised and locally legitimate peace arrangements. Solutions evolved, rather than being imposed, predetermined institutional end points. The lack of external assistance meant that the incentives for elites to cooperate with one another were primarily local. This was at odds with how peace was being pursued in the rest of Somalia, where external actors were spending substantial sums to bring political competitors to the negotiating table.

Source: A. Phillips, "Political Settlements and State Formation: The Case of Somaliland," Research Paper 23 (Developmental Leadership Program, University of Birmingham, UK, 2013), http://www.dlprog.org/research/political-settlements-and-state-formation-in-somaliland.php.

CHAPTER 4 Part 3 ENDNOTES

25 See *World Development Report 2011*, 109.

26 Ibid, 14.

27 Ibid, 100.

Rule of Law in Practice

Rule of Law in Practice

This chapter explores how to move practically toward a rule of law culture, recognizing that this process is one of change. The chapter therefore focuses on defining change, exploring the effects of change, and explaining the role of a change agent. It highlights the skills and tools needed by rule of law promoters to support the change process and to overcome the resistance to change that they are likely to encounter. The chapter also assists the reader in advancing strategic thinking and problem-solving skills, specifically focusing on identifying potential solutions to rule of law challenges present in the reader's specific context.

CHAPTER HIGHLIGHTS:

- The unique challenges of systemic change

- The nature of leading change and the skills needed to be an effective change agent

- Resistance and the motivation for change

- How to engage and influence stakeholders

- Concrete adaptive and technical actions that can promote a rule of law culture

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Part 1 | Creating Change

Having identified a rule of law vision and having been equipped with the critical knowledge and skills to analyze and identify the barriers to achieving that vision, we are ready to consider how to implement effective, sustainable change.

The process of creating a strong rule of law culture in any context is one of change, or transformation. Barriers to achieving the rule of law tend to be addressed purely as technical problems. However, as we have seen, addressing these problems effectively often requires fundamental changes in people's attitudes, perceptions, values, and behaviors.

Chapter 2, Part 1, The Role of People

> "
>
> *"You can create laws, you can change laws. But changing the mindsets of a nation that was brainwashed for decades? That's the toughest job, the slowest process, and also the most important objective when trying to build a democracy."*
>
> Romania's ambassador to the United Nations, Simona Miculescu[1]
>
> "

For promoters of a rule of law culture, it is important to understand what change is, how to be an effective change agent, how to disrupt entrenched ways of thinking and behaviors, how to advocate and support new approaches to exploring old challenges, and how to address the inevitable resistance to change.

WHAT IS CHANGE?

Technical change requires people to put in place solutions to a problem for which they have expert knowledge and skills. In other words, people know what needs to be done and have the ability to implement that change. Technical change requires some change to the existing structure, maybe doing more or less of something; it does not require people to learn anything new or to change their values or beliefs.[2]

Adaptive change involves addressing problems for which we don't yet know the answer. It often involves a change in attitude and behavior. It requires leadership (not expertise), creativity, and innovation; that is, finding new ways of doing and thinking about things. The change can be so significant that it may result in the transformation of the whole system. Adaptive change means doing something fundamentally different from what we have done before.[3]

Creating a rule of law culture requires adaptive change.

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Creating change is hard. Why?

Change is complex.

The root cause and effect of a problem is not always obvious. Discovering the cause and effect of a problem requires thorough analysis and exploration.

Chapter 4, Part 1, Diagnosis

Change involves many people, who hold many different views.

Chapter 4, Part 1, Stakeholders

Change involves uncertainty. We cannot always predict the results of our actions.

Chapter 4, Part 1, Testing the Impact of Do-It's Time to Check

Seventy percent of change initiatives fail[4] because we focus on the outcome we want and not on the process of how to achieve that outcome. We need to take a holistic, systematic approach to creating change.[5]

Change within the justice system takes root when the change is not just related to the individual but is also institutional. The new attitudes and behaviors of individuals need to become part of the institution's culture and framework. This adaptation requires strong leadership that supports and promotes the change. It may also need a variety of experts, such as organizational change experts.

Embedding a new behavior within the institution may require changes in policies and procedures, as seen with the Performance Pledge of the Kenyan judiciary that was discussed earlier. However, to take root, these changes need to be supported by activities such as training of staff, awareness raising of both staff and the public, and the implementation of accountability mechanisms to ensure that the new behaviors are adhered to.

Change takes time.

Creating a strong rule of law takes time because changing deeply rooted attitudes and behaviors takes time.

Chapter 4, Part 3: Some Guiding Principles for Promoting a Rule of Law Culture

"There is a limit to the amount of change societies can absorb at any one time."[6] As we discussed in chapter 4, we often need to build trust and capacity before we can successfully implement change.

"Several successful political transitions, such as the devolution that underpins peace in Northern Ireland and democratic transitions in Chile, Indonesia, or Portugal, have taken place through a series of steps over a decade or more."[7]

Creating a strong rule of law takes time because changing deeply rooted attitudes and behaviors takes time.

Creating change can be like steering a super tanker. Changing direction can be slow, and at times it may feel like we are not moving at all.
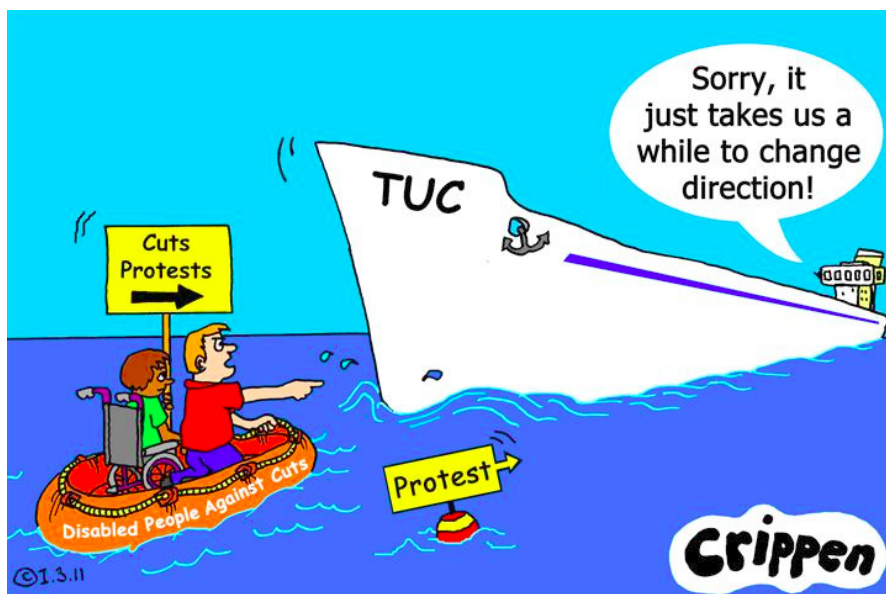
Source: Crippen, Disabled cartoonist, http://www.crippencartoons.co.uk/.

Change is not a linear, step-by-step process.

Disappointments and setbacks are a natural part of the change process. A systematic approach requires us to study why our action did not work and to alter or adapt our approach.[8]

Chapter 4, Part 1: A Systematic Approach

At times, change can be gradual and incremental; at other times, there may be sudden, dramatic changes. An effective rule of law culture promoter will be prepared to act whenever the windows of opportunities open.

Chapter 4, Part 1, Putting the Plan into Action-Time to Do

ADDITIONAL RESOURCES +

Vivienne O'Connor, *Practitioner's Guide: A Guide to Change and Change Management for Rule of Law Practitioners* (International Network to Promote the Rule of Law [INPROL], January 2015), http://inprol.org/publications/14477/guide-to-change-and-change-management-for-rule-of-law-practitioners.

John P. Kotter, *Leading Change* (Boston: Harvard Business School Press, 1996).

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Being an Effective Change Agent

By Adewale Ajadi*

Change is a basic process that evolves in all situations – it is arguably the sign of life. The conscious process of driving change can be done by a 'change agent' – an individual, or a group, that seeks to transform a system or organization from the inside or from the outside. This person or group can use a variety of approaches to achieve the desired change. For example, they might choose to direct a change with pre-determined steps; or they could choose consult others who have a vested interest in the entity or system and work to build a coalition that might guide the changes and ensure their successful transition or transformation.

The Characteristics of an Effective Change Agent

There are five key characteristics to becoming an effective change agent:

Broad Knowledge. The broad industrial, multidisciplinary, conceptual and diagnostic knowledge, in short, a systemic understanding of what works, what does not, and what needs to change.

Emotional or Relational Intelligence. The ability to listen, trust, build relationships and the capacity to know the difference between allies and confidants and when or where to form such relationships.

Wisdom. The ability to read situations, identify personal motivations and then decide when to intervene, when to detach, when to drive an action and when to facilitate others into action. The ability to choose when to be adaptive, flexible , confrontational or permissive.

Authenticity. The discipline to act in accordance with the values that embody the change that is desired.

Curiosity. The habit of constantly searching for effective behaviour, roles and processes that ensures effective transformation.

Resistance to Change

People resist change because they understand intuitively and often unconsciously that change comes at a price (such as financial, status, power, reputation, influence). The challenge often is what sacrifices or what 'price' are they willing to pay to make the change. There is a continuum between the impatience with the way things are and the excitement with the prospect of an alternative future. The change agent has to constantly focus on facilitating these two dimensions of change. When change is resisted, it is because the questions below have not been answered fully in favour of supporting change or 'paying the price':

Who is proposing the change? Will they be accountable for the consequences?

Often, a resistance to change is a resistance to the idea of being responsible for a failed project. This impulse is heightened when the person proposing the changes is an external actor with little attachment to the entity being changed. They will not share in the full sacrifice that the change demands.

What is the logic behind the change?
Has the case for change been adequately made? Is it backed up with evidence?
Resistance to change can also be found when individuals have been given no context as to why the change is necessary, or what the potential outcomes might be. The self-interest or wider benefit has not been made clear.

How is the change proposed?
Communicating changes ineffectively can lead to resistance. People may be confused about what the change entails. The change agent may lose people's support or goodwill for the transformation by not effectively communicating their points.

Does the context match the proposed change?
If the change makes no sense within the system it is proposed for, then it may encounter significant resistance.

Is this a shared vision?
If multiple actors do not take ownership of the changes that are being implemented, or if the changes are being driven by a hierarchy (top-down), then they may encounter significant resistance from those not involved in the development process.

What are the relevant actors' previous experiences of change?
If relevant actors have undergone changes that have gone poorly in the past, they may be reticent to try to change again.

We build habits that we are unconscious about, especially when it comes to something as significant as change. We build responses to bad experiences and bury them deeply (often so deeply that we do not recall them). Because we do certain things for so many different reasons, we can get trapped into patterns of contradictory commitments that cancel themselves out and leave us exactly where we started. For example, we can be committed to changing the way our organisations work to be more inclusive, but we can simultaneously be committed to preventing any action that will affect our position or careers, such as recruiting new staff.

Challenges in Changing
When people try to make change they are confronted by two types of challenges: technical and adaptive.

A technical challenge is a challenge that has been faced before and for which there are existing solutions, for example improved case management by implementing greater transparency and efficiency in maintaining court records.

The adaptive challenge is an original or new challenge that raises prospects of new solutions. This challenge demands creativity and innovation.

Effective Change Agents – Seeing, Being and Doing

Being an effective change agent means being able to respond to the desired transformation in three key areas:

- Seeing holistically
- Being effective in the choice of roles
- Doing what is required to deliver transformation

Seeing

The perspective of a change agent is critical:

- They should use many different lenses to view the same issue. Exploring the same issue from many different angles allows the change agent to understand the situation or position of others and be able to reconcile that with the proposed change.
- Ensure that understanding is not confused with agreement but knowing that to understand is critical to making changes.
- Perspective on their own drivers and positions so that they can allow for, be open to and accept feedback as they promote the change, as well as to be able to make corrections in their own choices and habits.
- Seeing and understanding trends, patterns and anticipating waves of change—identifying the windows of opportunity.

Being

Based on what is seen and understood, an effective change agent must be able to represent or 'be' several things to all stakeholders:

- Be the person that people will trust in order to transform a system
- Be wise enough to build coalitions and networks of people to work across a system to transform it.
- Be the challenger of the status quo or the equilibrium and facilitate solutions to both the technical and adaptive challenges

Doing

Being an effective change agent is about knowing which roles work at which time and having the ability to find and form the kinds of relationships necessary to move transformation ahead. This is not a linear process but one that requires reflection (analysis), reaction (strategising) and proposal (problem-solving). The change agent must be a leader, a facilitator, an activist and a mediator.

Building trust

Building trust amongst different stakeholders that the proposed change will have a net benefit effect on the system or organisation at large is not an easy process. Change agents to anticipate and work with the natural resistance and ambiguity to create a coalition for the desired change that is both sustained and effective.

Some of the capacities that will enable agents to effectively build trust are:

- Any change or transformation is best achieved as a result of a broad coalition of diverse stakeholders cutting across both vertically (across interest areas for example) and horizontally (involving influential players at the top of a system down to the end user). The change agent should use the diversity of a coalition effectively to ensure that the outcomes of the desired change as a whole outweighs the inevitable interests of different constituent parts of the system being transformed.
- The changes being introduced should focus on addressing root causes of the identified problem or challenge in the system.
- The change agent should take multiple perspectives into consideration whenever possible and diagnose and codify the system or institution's culture, in order to propose changes that are relevant to that specific cultural context.

Shifting mindsets, challenging attitudes

In order to address shifting mindsets and attitudes to the changes being proposed, change agents must first understand the attitudes of key players in the system:

- Analyse your stakeholders—who are they? What is their opinion about the system? What are their interests? What are their desires?
- Be consultative – ask for suggestions on the proposed change
- Implement the changes on a small scale first, and evaluate with stakeholders how effective the changes were and how they could be improved.
- In each of these situations, the change agent must transform the role they play in order to be effective. They must become a listener, an architect, a mediator and a teacher in order to successfully achieve transformation.

ADDRESSING RESISTANCE

People naturally like things to stay the same. Change is not easy and is generally something we like to avoid. Resistance is a natural part of change. People resist change for a wide variety of reasons:

- They do not know where to start; they feel like there are too many choices and are paralyzed by the choices.
- They do not have the knowledge or skills to transform their ideas into concrete change.
- They do not know what the change will look like or mean for them (fear of the unknown).
- They have a vested interest in maintaining the status quo; for example, they receive financial incentives from the existing corrupt system, or they do not want their involvement in rights abuses to be revealed.
- They may perceive the change as threatening their social or political status.
- They do not trust the people proposing the change.
- They are embarrassed or ashamed of their lack of technical knowledge or fear failure.
- They feel that their opinion has not been sought out or that they have been excluded from the change process.
- They genuinely disagree with the plan.
- They lack a sense of personal responsibility in the change process and have no real desire to change.
- They are not motivated to change because there is no apparent incentive for change.
- They are just having a bad day.
- They are arrogant and difficult with everyone and not just you!
- They have an unresolved personal conflict, such as a family dispute or land issue, with the change agent or someone connected to the change agent.
- They are suffering from trauma. Their reaction or lack of reaction (caused by dissociation, aggression, or inconsistent performance, for example) could be interpreted as resistance when in fact it is a normal trauma response.

Every proposed change initiative has people who are in favor of the change and people who are against it. Sometimes, as change agents, we forget that not everyone thinks like us or favors change. We need to think through our strategies and approaches to address resistance as part of promoting a strong rule of law culture.

Resistance is a natural part of change.

▶ **Overcoming Resistance to Change—Isn't It Obvious?**
https://www.youtube.com/watch?v=wU3bTkqHoXc.

A rule of law culture promoter needs various *skills and tools* to effectively address resistance. *Skills* include:

- Dialogue, negotiation, and communication (including listening) skills
- Empathy—awareness of others' feelings, needs, and concerns[9]
- Political awareness—understanding power dynamics in a group[10]
- Leadership skills
- Humility—a willingness to learn from others
- Advocacy skills
- Problem-solving skills
- Self-awareness—what frame are you looking through?

Chapter 4, Part 1, Diagnosis

CONSIDER

What other skills does a change agent need?

STAKEHOLDER ANALYSIS

Tools that can assist a change agent include a *stakeholder analysis.*

Begin by mapping who is for and who is against change using the four-quadrant matrix in figure 5.1. Who supports you passively (the group in quadrant A) and also actively (group C)? Who disagrees with your proposed change (group B), and who disagrees with you but also actively seeks to block your change (group D)?

FIGURE 5.1

Supporters and resistors of change

AGREE A	DISAGREE B
AGREE and SUPPORT C	DISAGREE and BLOCK D

CONSIDER

On which quadrant do you think you should focus most of your energy – A, B, C, or D?

A stakeholder analysis depends on your context and the reasons that you are analyzing your stakeholders. There are no hard and fast rules for this type of analysis. The points made in this guide are illustrative, not conclusive. In the end, your judgment is critical.

For example, if your goal is to identify the root cause of resistance, focusing on group D could give you insight into the core reasons of why people are actively blocking the proposed change. It is unlikely that you will be able to change their minds, though. They are already actively undermining your change initiative.

If you want to generate momentum and support for change, focusing on B might be the most useful. The people in group B may disagree for any number of the reasons for resistance listed above. If people in this group understand your plan better, have an incentive to support the change, or see positive action coming from the change, they may be encouraged to join group A or even group C. People in group C are already actively supporting you. The stronger groups A and C become, the more group D becomes a minority voice that may ultimately be overwhelmed. However, this all depends on your context. Consider where your influencers—the power and authority holders—are, and ensure that you harness their support for change.

When analyzing your stakeholders, it is important to bear in mind a number of points:
- Although stakeholders may be organizations, ultimately you must communicate with people. Make sure that you identify the correct individuals within a stakeholder organization to communicate with.
- Consider who the most important stakeholders are.
  - What are their interests?
  - What negative consequences will change bring for them?
  - Who can they influence (persuade to support or to oppose the change)?
  - What capacities/resources do they have that could be harnessed for change?
  - What incentives could make them support change?
- Who are your enablers (i.e., who do you need to implement the change)?
  - Who has the skills or knowledge?
  - Who are the opinion leaders?
  - Who can provide funds?
- Who are the influencers?
  For example, who has positional authority (i.e., an important title or rank) or persuasive power with influence over key decision makers?

EXAMPLE

Sierra Leone In the late 1990s, it was common knowledge that traffic police in Sierra Leone accepted bribes of around US$4–5 per day. Many international experts thought the government should increase the police salaries. The police inspector general disagreed. In his opinion, all that would achieve, at best, was a reduction in the amount of bribes an officer accepted; it would not fully address the problem. He suggested a two-pronged approach. One part was to implement discipline consequences of immediate dismissal if an officer was found to be taking bribes. The other part was to make the police

job too valuable to lose. Over the years, the pay and conditions of service had been progressively devalued. Not only was the salary inadequate and frequently delayed, but officers received no other employment benefits. The inspector general suggested that what the government needed to do was provide a reasonable salary supplemented by decent, free housing; free, quality medical care for the officer, his or her spouse and children; and free education. Additionally, salaries should be paid on time and not subject to corruption by senior officers and paymasters. The intended effect was for the spouse to pressure the officer not to be dismissed for taking bribes, because the family had too much to lose.

Source: Inspector General of Police, speech to the Sierra Leone Parliament, November 6, 1999, on file with author.

FINDING AND SUPPORTING CHANGE AGENTS

A single change agent always has limited influence and limited resources.

Every change agent needs *support*.

Connecting individual change agents is crucial for creating a critical mass for change. The more connected change agents are, the more powerful they can become. Connections can begin by forming a small network of like-minded people to support one another. Once the initial group is established and strong, it can be expanded to include other people who are in favor of change. Establishing a group of supportive, like-minded people is important for ensuring that change agents have a support network when resistance is encountered.[11]

The members of the group do not even need to be in the same geographical area. Twitter, Whatsapp, and Facebook are all examples of social media tools that change agents use to create and maintain their networks.[12]

EXAMPLE

The "We Are All Khaled Said" Campaign in Egypt

Khaled Said died under disputed circumstances in Alexandria on June 6, 2010, after being arrested by the Egyptian police. Photos of his disfigured corpse spread throughout online communities and incited outrage over the allegations that he had been beaten to death by Egyptian security forces. Among those who saw the photo was Google marketing executive Wael Ghonim. Ghonim created a Facebook page called *We Are All Khaled Said*. The page attracted hundreds of thousands of followers, becoming Egypt's biggest dissident Facebook page. Because of the photo, which spread across social media and reached international media, and the heavy amount of local and international criticism that arose from the incident, the Egyptian government consented to a trial for the two detectives involved in his death.

Source: Ernesto Londono, "Egyptian Man's Death Became Symbol of Callous State," *Washington Post*, February 9, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/02/08/AR2011020806360.html.

However, not excluding people who do not immediately agree with your change is also important, as is engaging the voices of dissent and listening to them closely. Moving away from those with different views, or excluding them from the change process because they are being negative or challenging the change is human nature. Unfortunately, doing so just makes the resistance stronger. Sometimes all people need is to feel included and understood, and when they do, their resistance and political opposition might vanish.[13]

Also important is finding the right leaders of change. Leaders need to be trusted, and for that, they need strong leadership skills. They also need the support of a strong network of change agents.

CONSIDER

Consider the role of Mayor Leoluca Orlando in Palermo, or Kenya's chief justice Willy Mutunga (see chapter 6) **in promoting change.**

- **What skills did they possess?**
- **What enabled them to be effective leaders of change?**

Chapter 1, Part 3, The Rule of Law Culture in Practice, &
Chapter 6, Part 2, IDLO Interview with Dr. Willy Mutunga

CHAPTER 5 Part 1 ENDNOTES

1   Simona Miculescu, "Romania, 25 Years On: We Didn't Know What the Rule of Law Meant" (December 17, 2014), http://www.idlo.int/news/highlights/romania-25-years-%E2%80%98we-didn%E2%80%99t-know-what-rule-law-meant%E2%80%99.

2   Vivienne O'Connor, *Practitioner's Guide: A Guide to Change and Change Management for Rule of Law Practitioners* (Washington, DC: International Network to Promote the Rule of Law [INPROL], January 2015), 5, http://inprol.org/publications/14477/guide-to-change-and-change-management-for-rule-of-law-practitioners.

3   Ibid.

4   See John Kotter and his eight-step process for leading change, http://www.kotterinternational.com/the-8-step-process-for-leading-change/.

5   O'Connor, *Guide to Change and Change Management*, 8.

6   World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, DC: World Bank, 2011), 13.

7   Ibid.

8   O'Connor, *Guide to Change and Change Management*, 7–8.

9   Daniel Goleman, *Working with Emotional Intelligence* (New York: Bantam, 2000).

10 SkillsYouNeed, "Political Awareness," http://www.skillsyouneed.com/ips/political-awareness.html.

11 O'Connor, *Guide to Change and Change Management*, 23–24.

12 Ibid., 24.

13 Ibid., 34.

Part 2 | Practical Actions to Promote Rule of Law

It is always good to seek out new and creative ideas for addressing challenges to strong rule of law; however, it is also important to consider what is already working in a specific context or elsewhere. This part of the chapter provides a range of examples of concrete actions that can be taken in the immediate or short term to enhance and promote a rule of law culture, with a specific focus on the provision of justice.

These actions could be confidence-building measures that are aimed at building public trust in justice and security actors and institutions, and that can contribute to ensuring more permanent institutional change and stability in the future.

We must also consider longer-term initiatives, those initiatives that may need a build-up of trust and capacity before they can be successfully implemented. Importantly, the longer-term initiatives described in this part refer not to prioritization and sequencing, but to the time frame required to see improvement. The longer the delay in their commencement, in theory, the longer it will take to bear results and to achieve a rule of law culture.

In essence, part 2 addresses the **DO** phase of the systematic approach discussed in chapter 4.

Chapter 4, Part 1, Putting the Plan into Action-Time to Do

The challenge for the rule of law culture promoter is not just to blindly copy an idea from elsewhere, but to ensure that the idea is adapted and made relevant to the specific context.

Chapter 4, Part 1, Testing the Impact of Do-It's Time to Check

Before moving to the examples, following are two additional tools that can help rule of law culture promoters to think through what solutions they need for their identified problems. The first is the "capacity and integrity matrix." The second is the "solution tree."

THE CAPACITY AND INTEGRITY MATRIX

The capacity and integrity matrix provides rule of law–culture promoters with a tool for setting out the challenges to and potential solutions for a weak justice system. The matrix is an adaptation of the "Capacity and Integrity Framework" designed by Alexander Mayer-Rieckh and Serge Rumin to support the UN Mission in Bosnia and Herzegovina's police reform activities.[14]

This chapter focuses on mapping the judiciary, but the matrix can be applied to any justice or security institution.[15]

The matrix emphasizes that creating a rule of law culture requires change in individuals within the system and in the institutions themselves.

As we saw earlier, an effective system requires adequately educated, well-trained, competent staff and an adequately resourced and mandated institution, as shown in figure 5.2.

FIGURE 5.2

The capacity component of the capacity and integrity matrix

	INDIVIDUAL	**INSTITUTION**
CAPACITY	• Education • Experience • Competence	• Structure • Infrastructure • Resources • Systems

However, as the rule of law culture approach shows us, training staff and building infra-structure are not enough to achieve a rule of law culture.

We must also consider the elements of building *trust* in and *legitimacy* of the system and its institutions and people, and ensuring their responsiveness to the needs of all people in society (*inclusiveness*).

To achieve this, we need to add the component *integrity* to the matrix, as shown in figure 5.3.

FIGURE 5.3

The capacity and integrity matrix

	INDIVIDUAL	**INSTITUTION**
CAPACITY	• Education • Experience • Competence	• Structure • Infrastructure • Resources • Systems
INTEGRITY	• Human rights • Conduct • Affiliation • "Service" attitude	• Representation • Accountability • Transparency • Independence

CONSIDER

- What does the word "integrity" mean to you?
- What does it mean for an institution?

Integrity-based activities may include ensuring that a promotion system is merit-based, not loyalty-based, or that policies, procedures, and training uphold and promote a service approach to the provision of justice and security.

The matrix can assist us to map out the various problems we see with our justice system. That is, the matrix is a tool that can be used during the **PLAN** stage of the systematic approach.

Chapter 4, Part 1, A Guide to the Plan Phase

Table 5.1 sets out a range of problems that are often present in a judicial system. Potential responses to the problems set out in the table are described in the subsequent sections and are summarized at the end of this chapter.

TABLE 5.1

Applying the capacity and integrity matrix to the judicial system

COMMON CHALLENGES WITHIN THE JUDICIAL SYSTEM	INDIVIDUAL	INSTITUTIONS
CAPACITY	• Too many staff, uncertainty about staff numbers, *or* too few staff • Inadequate training and education • Lack of basic resources and equipment • Low morale, low motivation, and low pay • Poor conditions of service • Not "joined up," coordinated, or effectively working with other actors in the system	• Inadequate budget and no budgetary independence • Lack of basic resources and infrastructure • Organizational challenges and inefficiencies (i.e., poor management and leadership; lack of policies, procedures, and structures, poor records management; overly bureaucratic and centralized) • Inadequate administrative and financial structures, procedures, and processes • Poor coordination with other actors in the system • Case backlogs and delays
INTEGRITY	• Implicated in past human rights abuses • Ongoing violations of law and human rights (e.g., discrimination) • Corruption and nepotism • Lack of judicial impartiality / susceptible to external social and political influences • Lack of trust and confidence from the population	• Lack of institutional transparency • Lack of accountability mechanisms (internal and external; no civilian oversight) • Lack of human rights/justice values and "service mentality" • Unfair hiring/ promotion procedures • Lack of representation • Lack of trust and confidence from the public • Executive interference • Lack of laws on judicial independence

Source: Designed by Vivienne O'Connor, senior program officer, USIP.

THE SOLUTION TREE ANALYTICAL TOOL

Another tool available to rule of law–culture promoters is the solution tree.

Let us return to the issue of the police accepting bribes. We saw in chapter 4 that the problem tree could look like the tree in figure 5.4.

The solution tree aims to turn the negative statements in the problem tree to positive ones.[16] The tree allows us to take a holistic approach to the problem; we can see that possible responses involve a wide range of individuals and institutions and may involve different types of interventions. The tree is a useful planning tool for change agents to determine which activities they have the desire, capacity, knowledge, and support to promote and/or implement. An example of possible solutions is provided in figure 5.5.

FIGURE 5.4

The police bribery problem tree

Corrupt officers may be admired by friends and family for their skills in outwitting authority

??

Every other officer does it, so why shouldn't I? Police culture of corruption

Personal concern amongst citizens about "losing face" if a bribe is not offered

National culture that a bribe must be paid for any government service

The problem: corruption (accepting brides) is pervasive within the police

Lack of internal accountability mechanisms/ procedures

??

Low salaries do not match inflation—officers need extra to maintain their standard of living

Lack of institutional accountability—superiors turn a blind eye or engage in corruption themselves

Inadequate human and financial resources to investigate reported crimes—those who pay a bribe will have their claim investigated

FIGURE 5.5

The police bribery solution tree

The solution: reduction in bribe-taking within the police

Establishment of adequately resourced internal investigation and discipline mechanisms

Increased financial and human resources

Capacity building of NGOs to advocate for transparency and accountability

Development of police code of ethics

Training for police/prosecutors on investigating and prosecuting corruption claims

Public complaints mechanisms—hotlines, feedback forums

New/improved anti-corruption laws

Transparency—publication of salary scales, police performance indicators

??

Police training on implications of corruption and their responsibilities as officials

Increased and regular payment of salaries

Journalist training to report on corrupt practices

Citizens' rights education campaign

Transparent, merit-based recruitment and promotion processes that penalize corruption and promote service delivery

??

Identify a high-level national champion to advocate against corruption
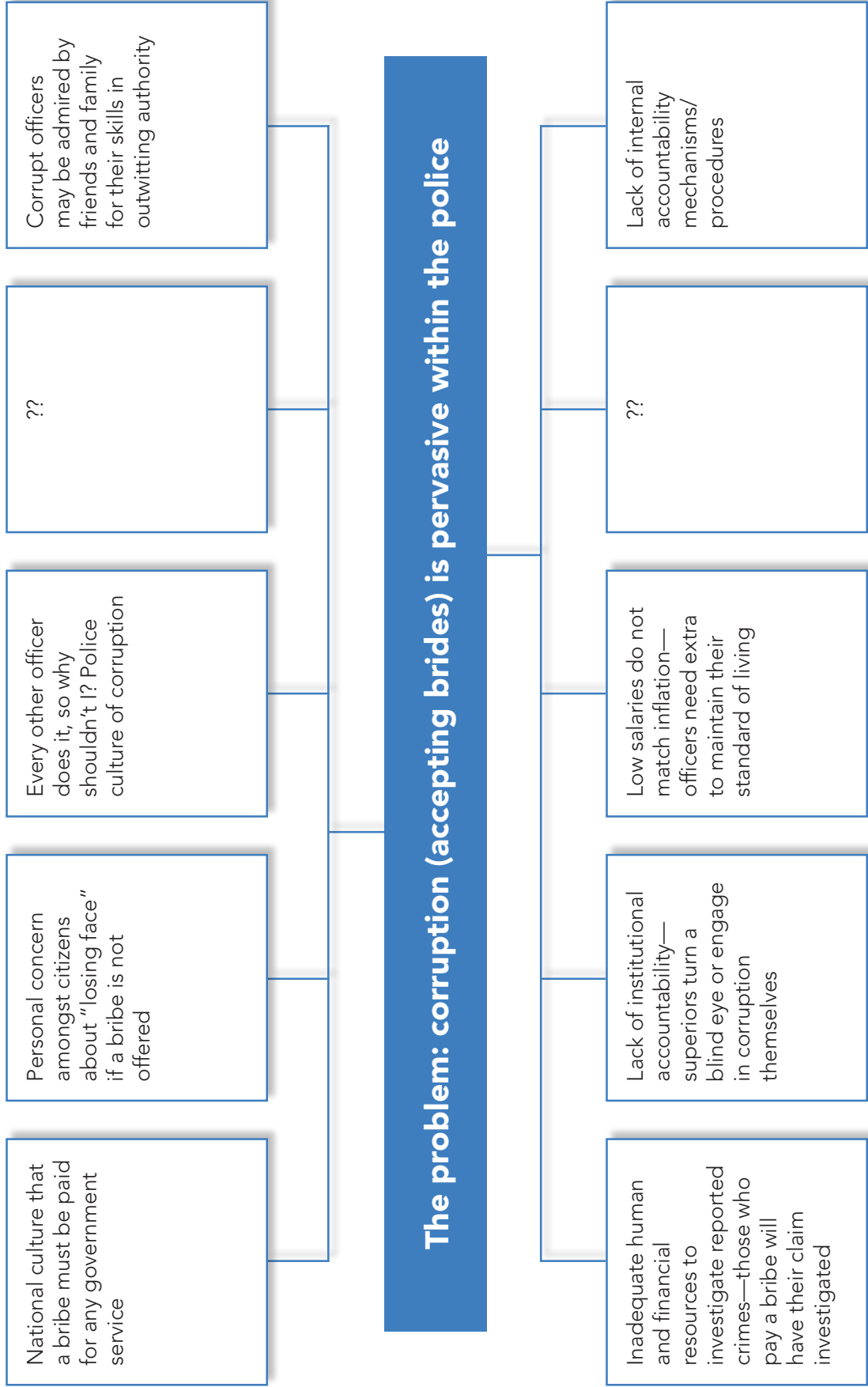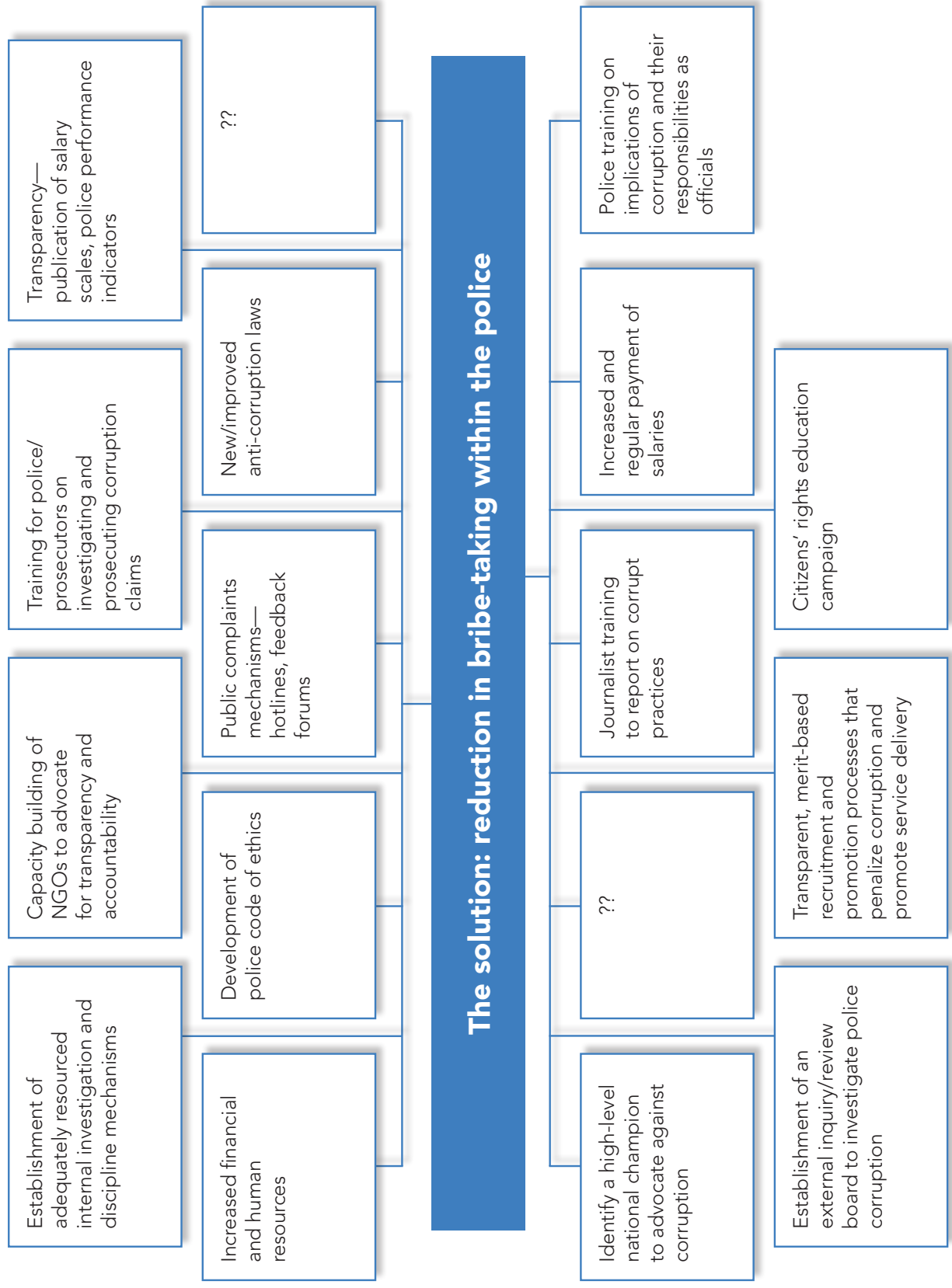
Establishment of an external inquiry/review board to investigate police corruption

FINDING SOLUTIONS TO RULE OF LAW CHALLENGES

The specific solutions that may apply in any single context will depend on:

- The root causes of the problem
- The contextual dynamics
- The specific stakeholders involved
- The resources, skills, and technical capacity available
- The rule of law vision for the society

There is, however, a plethora of examples and lessons learned that we can draw from to better identify potential solutions for specific contexts.

Here, we focus primarily on transforming the judiciary, a critical institution in the promotion of rule of law. The following sections draw on lessons learned from a vast array of contexts. (They were written by Leanne McKay and Vivienne O'Connor, senior program officers at the United States Institute of Peace.)

Chapter 6: Kenya's Judiciary: A Transformation Experience

TRANSFORMING THE JUSTICE SYSTEM:
Enhancing the Administration of Justice

Enhancing the capacity of individuals and institutions to deliver justice may be done through actions such as:

- Strengthening infrastructure
- Implementing coordination mechanisms
- Establishing hybrid or special courts and international judges, prosecutors, and lawyers
- Creating specialized courts
- Training judges, prosecutors, defense counsel, and paralegals
- Recruiting qualified judges and prosecutors
- Promoting legal education and professional training

Strengthening Infrastructure

Courts and other justice buildings may have been destroyed or damaged during conflict. Infrastructure for justice facilities may be absent in remote rural areas. Providing basic infrastructure can be a useful short-term, highly visible initiative to encourage support for judicial reform. This could involve the provision of basic resources—including legal texts, vehicles, paper, and photocopiers—or building or repairing damaged infrastructure.

Court rehabilitation, for example, not only better enables the conduct of judicial proceedings but also provides increased security for staff and the public. Court rehabilitation can promote increased motivation of court staff and foster a strengthened relationship between the courts and the public they serve.

In determining infrastructure needs, it is important to conduct a thorough needs assessment to determine what already exists and where the demand is. The strategy for rehabilitation

and infrastructure development should respond to demand, not supply. For example, some courts have no toilets or running water for judicial staff. Construction of basic bathroom facilities promotes a more conducive working environment for staff members who feel they are being treated with dignity and respect. This increase in morale may have positive flow-on effects to their relationship with court users.

A needs assessment is a necessary step in identifying priorities for the use of available funds. Providing a courtroom with new computers and printers may seem like a good idea for improving case management systems, but the new equipment will have little real effect if staff are computer illiterate or there is no reliable electricity source to run the computers.

The needs assessment should also take into consideration other components of the justice system. For example, if the judiciary undertakes to build more courts in rural areas, but no comparable action is taken by the prosecutorial service or prisons, the result may be that few cases come to the new court for lack of prosecutors, or that accused or guilty persons may be held in prisons far from their community and families.

EXAMPLE

Gardo Prison in Puntland, Somalia

Construction of Gardo prison in Puntland, Somalia, began in order to meet the problem of inadequate prison infrastructure and overcrowding. The designated location for the prison was in the middle of arid desert land. There was no electricity source and no access to potable water. Security concerns in the area prevented international engineering staff and prison experts from monitoring and assisting in the construction of the prison. The project took more than seven years and went into the millions of dollars before the prison was in a state where it could be formally handed over by the international donor to the Puntland government to run.

Source: Leanne McKay, former UN Development Programme (UNDP) Somalia employee.

Lack of Security for Transporting Prisoners in Liberia

When the United Nations Mission in Liberia (UNMIL) was deployed in 2003, it encountered a country struggling to reestablish a viable judiciary and to upgrade its existing legal framework, and in dire need of security reform. Several serious crimes perpetrators escaped while en route from Monrovia Central Prison to the capital's courthouse, either because of a failure to secure the road on which they were traveling or because of a lack of vehicles with which to transport the accused. The need to properly equip the Liberian National Police had to be examined at every step of the serious crimes chain, from investigation to arrest and adjudication.

Source: Colette Rausch, ed., *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners* (Washington, DC: United States Institute of Peace [USIP], 2006), 105.

Implementing Coordination Mechanisms

One way to address weak relationships among justice actors is to establish working-level coordination mechanisms in specific locations. Mechanisms can be developed or enhanced to increase the collaboration of the many interlinked components of the justice system—judiciary, police and corrections institutions, and the community—to respond to people's justice needs.

Coordination mechanisms improve the day-to-day functioning of the justice system and contribute to the various justice components working together to solve systemic problems.

Coordination mechanisms can help to identify urgent reform needs, such as the standardization of systems for collecting and storing evidence, forms for transfer of evidence and detainees, and protocols among agencies for serving warrants and executing judicial decisions.

Coordination and effective linkages between the police and other justice institutions, including the judiciary, public prosecutors, and prisons, assist the state to address crime, violence, and insecurity. This requires simultaneous reform across all institutions.

These forums engender the participation of the state, the local population, and local civil society groups at low cost—perhaps just light refreshments and reimbursement of participants' local transport costs.

A specific example might be pretrial detention or case management committees. When case backlogs lead to prison overcrowding or illegal or prolonged detentions, a working-level committee could be assembled to review the appropriateness of pretrial detentions and make recommendations for action. Such committees should not replace the right of the accused to seek review of his or her detention before a court. Nor should the committees undermine the right of the victim for justice to be done.

Pretrial detention and case management committees should meet frequently and have transparent rules that govern the review of cases. Special attention should be given to habeas corpus questions, by means of which detainees can seek relief from unlawful imprisonment.

Detainees should have access to a judge as well as legal assistance. Prison officials should register all detainees. The establishment of such committees may require a legislative basis and must be consistent with the applicable criminal procedure law and international human rights law.

It is important to make sure that case management committees do not replace the (international human) right of the accused to seek review of his or her detention before a court on the basis that the state has no justification for holding the detainee.

Also, case management committees should not interfere with the duties and obligations of any parole board that is established, nor with the head of state's right to pardon an individual.

Finally, when a person is released from a prison sentence, there should be a clear legal procedure in place that is followed to avoid actual or perceived impunity and opportunities for corruption within the system.

EXAMPLE

The National Commission on Prolonged Pre-trial Detention in Haiti

Before the January 2010 earthquake, Haiti had made efforts to reduce the estimated 80 percent of detainees who had not yet been tried. The Ministry of Justice and Public Security, with the support of the justice component of the UN Stabilization Mission in Haiti (MINUSTAH), established a National Commission on Prolonged Pre-trial Detention to identify affected detainees. The commission reviewed all pending cases and transmitted names and recommendations to the prosecution and the investigating judge's offices. Pretrial detention was also reduced following the establishment of legal aid offices throughout the country and the subsequent availability of legal assistance for all detainees.

Source: UN Department of Peacekeeping Operations (UNDPKO), *Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations* (New York: UNDPKO, June 2013), 158.

Establishing Hybrid or Special Courts and International Judges, Prosecutors, and Lawyers

The development of hybrid and special courts are examples of programmatic activities that are designed to enable the immediate effectiveness of the justice system.

Such mechanisms are created for a variety of reasons, depending on the context, but primarily because of a lack of capacity and/or independence and impartiality of the national justice system.

An example of a hybrid court is the Extraordinary Chambers in the Courts of Cambodia, a national court with both international and local judges. Examples of special courts, which may exist at a national, regional, or international level, include the criminal tribunals for the former Yugoslavia and for Rwanda, and the Special Court for Sierra Leone.

EXAMPLE

Lessons Learned from the Ad Hoc Tribunals

The ad hoc international criminal tribunals for the former Yugoslavia and for Rwanda have proved problematic in several ways: they are very costly; they operate at a great distance from the events in question (the tribunal for the former Yugoslavia convenes in The Hague and that for Rwanda is based in Arusha, Tanzania); they can deal with only a limited number of cases; and they do little to build domestic capacity to handle these crimes. The Special Court for Sierra Leone was developed in part to mitigate these problems, but it has been criticized as a stand-alone court with a very limited caseload. Panels with exclusive jurisdiction over serious criminal offenses in East Timor, while technically part of the existing Timorese judiciary, in fact have been poorly integrated into the national court system, fueling

serious concerns about their long-term impact. One of the lessons learned from the experience with these tribunals, emphasized in the *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, is that they should be integrated as fully as possible into the domestic system, with a clear goal of building domestic capacity to handle challenging cases.

Source: Rausch, ed., *Combating Serious Crimes in Postconflict Societies*, 84.

Creating Specialized Courts

"Specialized courts" are part of the national justice system but have a narrowly focused jurisdiction in a specific field or fields of law, for example, commercial courts, drug courts or administrative courts. This means that all cases that fall within the jurisdiction of a specialized court will be routed through that court.

Specialized courts may enhance effective justice for victims by allowing a speedier and more effective review of cases of a specific nature, such as in the example of the Guatemala specialized courts for addressing cases of violence against women described below.

Specialized courts can allow limited resources to be concentrated on addressing some of the most serious crimes affecting a society. Courts can be outfitted with the equipment needed to effectively and efficiently try serious crimes; specialist judges and prosecutors can be targeted for intensive training on substantive and procedural aspects of serious crimes cases; and special security measures can be installed, such as building security, personal security for judicial personnel, and witness protection. International legal professionals may be able to mentor and train judges, prosecutors, and court administrators in a specialized area of law.

It is important to balance support to specialized mechanisms with actions to strengthen the judicial system more broadly. Specialized mechanisms have been criticized for diverting attention and funds away from long-term efforts to enhance the provision of criminal justice as a whole.

EXAMPLE

Guatemala's Twenty-four-hour Court

"Guatemala has long been seen as one of the worst examples of crimes against women in the hemisphere. In the past decade alone, nearly 4,000 women were killed. Some of the victims had sought help but were rebuffed by local authorities. Less than four percent of these cases were solved. Mounting pressure pushed authorities to pass legislation outlawing gender-based violence. In 2009, a law for femicide, violence, sexual abuse, and trafficking was enacted, but only three men were convicted and sentenced even though in the first two weeks of that year 26 women were killed. . . .

Recently, Attorney General Claudia Paz y Paz and former President of the Supreme Court Thelma Aldana identified the need for a specialized court for cases related to violence against women, exploitation, sexual violence,

EXAMPLE: Guatemala's Twenty-four-hour Court *CONTINUED*

and human trafficking. . . . The new model court opened in October 2012 and includes a criminal court, a public defence office, a police substation, and a forensic clinic, and is staffed by prosecutors, psychologists, doctors, and lawyers. The integrated approach ensures victims receive the assistance they need and strengthens criminal investigation by using scientific evidence. The 24-hour court also includes a special Gesell Chamber that allows judges, prosecutors, and defence attorneys to observe interviews with minors conducted by psychologists.

This court, one of the first in Latin America, represents a fundamental change in Guatemala's justice system. Since the 24-hour court opened its doors, 846 protection measures for women and 307 arrest warrants have been authorized. In total, 125 people have been sent to prison for violence against women and sexual exploitation."

Source: Casey Wheeler de Vides and Carlos A. Rosales, "Guatemala's 24-Hour Courts: Changing the Way Women Access Justice," USAID Impact Blog (March 6, 2013), https://blog.usaid.gov/2013/03/guatemalas-24-hour-courts-changing-the-way-women-access-justice/.

For further examples of innovative court solutions in Latin America, see World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, DC: World Bank, 2011), 155.

Training Judges, Prosecutors, Defense Counsel, and Paralegals

In many countries emerging from conflict or in transition, the training of legal professionals is crucial to ensure that they understand and can uphold existing and newly developed laws.

In many cases, key justice personnel lack basic legal knowledge due to a weak education system; a lack of continuing education opportunities; or former recruitment processes based on nepotism and political influence rather than merit.

Training efforts, while essential, have had mixed results, largely because they are conducted hastily and without adequate attention paid to how to translate new knowledge into actual change in behavior. For example, telling police officers in a training course that torture is forbidden under international law rarely results in the immediate changed behavior or reduction in torture by the police.

More basic training, as well as specialized training, needs to be conducted. Transnational organized crime is a serious challenge for many transitioning states, and these cases are very complicated even for developed countries to deal with. Police, prosecutors, and judicial staff all need specialized training and skills; however, this is hard to accomplish in places that lack training in even basic skills and knowledge, as is common in many states emerging from conflict or in transition.

Before providing training, it is important to understand how particular staff in the system act and what their capacity is, so that training can target the right knowledge and skills areas. Methods for gathering this information include:

- Capacity needs assessment[17]
- Time and motion studies
- Opinion polls
- Public perception studies

Recruiting Qualified Judges and Prosecutors

There may be a shortage of judges and prosecutors in a particular context. Increasing the number of qualified judges and prosecutors can enhance the effectiveness of the justice system by enabling judicial processes to take place.

Some considerations for hiring of new staff could include the need for new procedures, and potentially, new laws, to ensure that the hiring procedure is fair and does not allow for corruption; and laws and procedures that ensure that the justice system is representative and is staffed by adequate numbers of minority groups and women. Representation is important for public confidence and judicial independence.

EXAMPLE

Kosovo

After the establishment of the United Nations Interim Administration Mission in Kosovo in 1999, the international community made an initial determination to empower the local Kosovo Albanian judicial community to administer justice. This mono-ethnic judiciary found itself deciding on cases of interethnic violence and war crimes involving Kosovo Serbs—and doing so, moreover, in the immediate aftermath of a violent struggle between Slobodan Milosevic's Serbian and Yugoslav security forces and the ethnic Albanian Kosovo Liberation Army. Equal justice was not dispensed: war trauma, real and perceived bias, and intimidation and threats of violence combined to create a system biased against Kosovo Serbs. Faced with this realization, the international community reversed its initial decision and deployed international judges and prosecutors to supplement Kosovo Albanian personnel in sensitive cases. In retrospect, many experts argue that if international personnel had been inserted earlier, an effective and impartial system of justice would have developed sooner and would have prevented criminal power structures from cementing their dominance over the political economy.

Source: Rausch, ed., *Combating Serious Crimes in Postconflict Societies*, 145.

Promoting Legal Education and Professional Training

Legal education refers to programs at a university or law school that award a law degree to individuals seeking eligibility to join the legal profession. Professional training generally refers to a broad spectrum of ad hoc courses for individuals who have already qualified to work as legal professionals. The courses may focus on a specific area of law or introduce a new area to enhance existing knowledge. Unlike legal education, the duration of professional training courses is usually short, from a few hours to a few days.

The creation of law schools and universities is often not prioritized, given other pressing problems in the justice sector. However, there is an enormous return on investment that can be derived from educating young lawyers.

According to the *Guidance Note of the Secretary-General, UN Approach to Rule of Law Assistance* (2008), professional training for lawyers, judges, prosecutors, police, and other law enforcement and prison officials that promotes a culture of discipline, service, and ethics is a core part of the framework for strengthening the rule of law. The way a law school operates reflects the integrity of the justice system. If a law school admission process is corrupt, this contributes to the entire justice system being corrupt.

Initiatives to enhance legal education may include:

• Creation of law schools and universities and development of modern course curricula that reflect new laws and legal developments

• Reform of university entrance and grading criteria to reduce corruption and nepotism in the entrance and grading functions, or, similarly, of discrimination in the access to admission of women or minority groups

• Development of accreditation standards for law schools to ensure the quality of legal education as well as international recognition

• Facilitation of faculty and student exchanges and fellowships with law schools outside the country

• Establishment of legal clinics to introduce practice-oriented skills development for law students

• Development (or reestablishment) of coursework to fulfill required obligations for a law degree or of a responsible body overseeing such requirements

• Provision of scholarships and financial aid, including establishing a structure for assistance or linking the educational institution with a donor interested in providing financial assistance

EXAMPLE

Puntland State University, Faculty of Law

In 2008, there were fewer than ten qualified lawyers in Puntland, a region with a population of approximately 3.9 million people. That year, Puntland State University, with the technical and financial support of the UNDP Somalia (the UN Development Programme in Somalia), established the first faculty of law in the region. In February 2013—for the first time in Puntland's history—twenty-three law students graduated, seven of whom were women. The creation of a new generation of law graduates was seen as a critical contribution to the greater goal of strengthening the judiciary and increasing the quality of justice dispensation in Puntland.

Source: Leanne McKay, former UNDP Somalia employee.

Initiatives to enhance professional training may include the following:

- Introduction of emergency professional legal training. In the immediate aftermath of conflict, "emergency" training may be necessary for judges, lawyers (defense attorneys and prosecutors), court personnel, police and prison staff, and civil society representatives.
- Introduction of interactive training modules, moot court exercises, and other proactive teaching methods can build the skills of judicial and legal professionals.
- Establishment of formal training centers and the development of training curricula and materials.
- Provision of mentoring. As a supplement to training, mentoring can be an effective professional development tool, particularly for newly appointed or returning judicial and legal professionals. Mentors may be domestic legal experts or international experts. Staffing of mentor positions must be tailored carefully to local conditions. Many international organizations, such as the International Bar Association, have long-standing reputations.

EXAMPLE

Kosovo

In Kosovo, the UN Mission in Kosovo (UNMIK) helped to establish the Kosovo Judicial Institute to train the judiciary and prosecutors in the aftermath of the conflict. The institute is an independent institution that focuses on general training as well as training on international human rights law and new Kosovar laws. The Kosovo Judicial Institute supports internships and study tours abroad, and facilitates preparation for the new Judicial Entry Exam for future judicial employees.

Source: UNDPKO, *Handbook for Judicial Affairs Officers in United Nations Peacekeeping Operations* (New York: UNDPKO, June 2013), 187.

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TRANSFORMING THE JUSTICE SYSTEM:
Addressing Integrity of Personnel and Institutions in the Delivery of Justice

Building capacity is only part of the picture as we saw in the capacity and integrity matrix earlier in this chapter. Building a rule of law culture requires trust between the governed and the governing, and legitimacy of the justice system, its institutions, and the actors within them. Trust and legitimacy are more likely to be achieved if the system and the people within it act with, and are seen to act with, integrity.

Establishing integrity includes the following components:
• Judicial independence
• Professionalism
• Accountability
• Transparency
• Reputation

Judicial Independence

Judicial independence refers to the principle that judges should be free from coercion, pressure, or influence from the executive branch of government or other actors in order to render impartial and fair decisions. Judicial independence is considered a critical aspect of rule of law. Actions to address weak judicial independence include the following:

Laws ensuring independence for the courts and for judges should be passed. The constitution or similar legislation should ensure that judges are institutionally independent and shielded from the influence of the executive. Included in institutional independence is budgetary independence, which requires the development and approval of government budgets that provide the judiciary with sufficient resources and control over its own administrative and budgeting functions. In addition, within the judiciary, judges should be protected from undue influence of other judges with regard to particular cases they are trying.

Conditions of service and tenure for judges should be set. Reasonable conditions of service—such as tenure, pension, and age of retirement of judges—should all be set out by law or published in rules or regulations. These conditions are key to ensuring that judges enjoy personal independence and cannot be pressured when they are doing their jobs. These conditions also ensure that judges cannot be fired because the government does not like their decision.

Judicial codes of ethics and the annual disclosure of assets should be required. Judges should be required to agree to a code of ethics that ensures their independence and impartiality. Requiring judges to disclose their assets, for example, shows whether those assets exceed their salary and, therefore, whether their independence has been compromised through the receipt of bribes.

Judges should receive adequate salaries. Many justice actors are paid low salaries, and this may increase their susceptibility to corruption. To ensure that judges are not tempted to take bribes to supplement their salary (and thus compromise their independence and impartiality), judges should receive adequate salaries.

Judges should be required by law to excuse themselves from a case when they have a connection to the case or to parties, or be removed by law. In most countries, when judges have a connection to the case at hand (e.g., they know one of the persons involved), the judge must immediately excuse himself or herself from the case. If the judge has not done this, the law should provide that one of the parties to the case can petition for the removal of the judge from the case. The judge should have no personal interest in the case or bias for or against either of the parties.

Courts should be transparent and judges should be drawn from representative groups in society. Actions to promote the concept of transparency include requiring courts to publish their decisions, rules, statistics on cases, and annual budgets and expenditures. In addition, to ensure public confidence, the courts should have representation from various sectors of society (e.g., religious groups, ethnic groups, and women).

Activities such as court open days, judiciary dialogue cards, and court user committees, discussed below, can also promote public confidence and transparency in the courts.

EXAMPLE

Court User Committees in Kenya

The concept of court user committees has been used in various ways in Kenya and other African countries. The court user committee is a forum to bring to account all justice stakeholders in the resolution of shared problems. The committees assist in coordinating responses to criminal and other justice issues, and provide an avenue to address—in an open, consultative approach—a broad range of justice administration matters. The committees play a crucial role in making the judiciary more inclusive and participatory.

Source: Commission for the Implementation of the Constitution (CIC), "Developing Guidelines for Court Users Committees in the Spirit of Fostering Public Participation," article on the CIC website blog, October 19, 2012, http://www.cickenya.org/index.php/resource-center/blog/item/70-developing-guidelines-for-court-users-committees-in-the-spirit-of-fostering-public-participation#.VgVTcGRViko.

Professionalism

Key to enhancing the professionalism of the judiciary is ensuring effective *selection, promotion, and disciplinary systems*. Without clear procedures and systems in place, appointments and promotions may be based on nepotism, which increases the likelihood of executive interference and decreases public confidence in the justice system. Without standards for appointment, judicial actors may lack competencies to satisfactorily fulfill their job requirements.

Vetting. Before or during a conflict, justice officials may have discriminated against citizens, violated human rights, and/or been involved in serious corruption. Leaders of countries emerging from conflict face the dilemma of determining whether judges who are qualified to practice but implicated in human rights abuses should continue to work in the justice system. This challenge is especially difficult where there are no new judges to fill existing positions and where there is a rule of law gap in the immediate postconflict period.

In such a situation, a system of vetting may be considered. Vetting seeks to exclude individuals lacking integrity from public institutions. Integrity refers to a person's ability to serve in accordance with fundamental human rights, professional, and rule of law standards.[18] Vetting involves the establishment of transparent procedures for removing justice actors, such as judges, who were involved in past human rights violations and the selection of a core group of fair-minded professionals noted for their integrity and capacity to replace those who were removed. Vetting may include a review process of current justice actors, such as a certification process that removes unqualified officers, or judicial reappointment, which looks at institutional reconstitution following competition for posts.

Vetting is usually a one-time process and is usually conducted through an independent review body operating in accordance with due process and the maximum level of transparency appropriate for the task. This body should serve as a platform to establish an ongoing capacity to review allegations of misconduct and to undertake evaluations of justice sector personnel. Where disciplinary measures are warranted, measures ranging from warnings to dismissals should be applied. In cases where widespread inappropriate behavior has been identified, supplementing existing personnel with interim local and international staff may be necessary. Care must be exercised to ensure that the vetting process does not become a mechanism for venting frustration over the prior state of affairs or for exacting personal revenge.

A number of risks are involved in vetting. Vetting and broader personnel reform processes in the public sector not only affect those individuals selected for or excluded from office but also have general institutional implications that impact existing power relations and, therefore, often evoke political reactions. For example, a political leader whose interests are threatened may attempt to undermine the system by removing judges or blocking appointments. In addition, some vetting processes have left senior leaders without qualified staff. If a vetting process results in the removal of rights abusers who cannot be replaced by qualified individuals, the functioning of the institution may be affected negatively.

Lessons learned. First, whether established as administrative or as quasi-judicial bodies, legitimate vetting mechanisms should function in a manner respectful both of the sensitivities of victims and of the human rights of those suspected of abuses. Second, civil society should be consulted early, and the public must be kept informed. Third, vetting processes should include attention to the technical skills, objective qualifications, and integrity of candidates. Fourth, procedural protections should be afforded to all those subject to vetting processes, whether current employees or new applicants. Finally, where such mechanisms exist and are seen to function fairly, effectively, and in accordance with international human rights standards, they can play an important role in enhancing the legitimacy of official structures, restoring the confidence of the public, and building the rule of law. These mechanisms are therefore worthy of international technical and financial support, where required.

EXAMPLE

Vetting Process

Following the Bosnian War, the vetting process in Bosnia and Herzegovina required that all judicial personnel be dismissed and reapply, with a process to assess their integrity and independence by hybrid nationally and internationally staffed high councils. Three high judicial and prosecutorial councils, made up of international and national personnel, restructured the court system and reappointed all judges and prosecutors between 2002 and 2004. Almost one thousand posts were declared vacant, and there was open competition to fill them. Indirect mechanisms have also been used to improve professionalism in the justice sector. In Chile, following the transition from military rule, rapid action on civilian oversight of the *carabinieri* was combined with a reform of the promotion and confirmation processes of judges, which encouraged lower-level prosecutorial independence and merit-based promotion to higher courts.

Source: World Development Report 2011, 154.

Judicial selection and appointment. There are at least three guiding principles that should be considered in the reform of the selection and appointment process:

• Transparency and independence
• Participation and representation of society in the selecting body
• A resulting cadre of judicial personnel that represents the diversity of the country

In many postconflict countries, bodies have been established to improve the process of judicial selection. In some countries, these bodies are called "judicial councils," "high councils of the magistracy," or "judicial service commissions." The role of judicial councils varies from one country to the next. Some judicial councils oversee, or even take primary responsibility for, the full range of issues related to the management of the judiciary, including administration of the court system. Development of distinct selection criteria and procedures for appointment of judges should be objective, clear, and made accessible to the public. A broadly representative selection body, such as a judicial council, can be an effective mechanism to screen candidates.

Any system should be based on merit. It is crucial to build in transparency at every stage of the process so that the public is informed and the risk of political manipulation is reduced. Professional and merit-based qualifications go to the very core of the functioning of the courts, the protection of human rights, and the fight against impunity, while at the same time recognizing the rights of the accused, victims, and witnesses in a given case.

Accountability

The absence of accountability mechanisms within the judiciary can diminish the perceived legitimacy of the institution. The public may view the judiciary as a tool of the elite that cannot be trusted to provide justice for everyone in a fair and just manner. Possible responses to a lack of accountability include:

Complaints/disciplinary oversight mechanisms. These should incorporate opportunities for public involvement and should include safeguards to protect judges and prosecutors against politically motivated accusations. Addressing specific allegations of abuse with these mechanisms is important, as is establishing controls that check routine operations for compliance with applicable standards. These functions may be addressed through a variety of institutional structures—such as the ombudsman, a high judicial and prosecutorial council, the inspector general, or the auditor general—and they may review a wide variety of issues, from the personal assets of judges to human resources management. Bar councils can also act as a regulatory body for all legal practitioners, as they ensure appropriate qualifications and training before being "admitted" to the practice. Bar councils can also act as complaints bureaus and tribunals on complaints of misconduct against lawyers. Establishing an effective (and confidential, in some situations) way to lodge complaints is particularly important for enforcing standards. Complaints and disciplinary mechanisms include internal regulations, judicial inspection, judicial counsel in a disciplinary body, professional evaluations, and court monitoring.

Court and judicial practice. Regulations and procedures for handling court functions, such as case assignments, must be in place in order to provide safeguards against potential external influences, develop concrete lines of authority, and improve operational efficiency.

Codes of conduct. Codes of conduct should exist for the judiciary, prosecutors, and lawyers.

Performance measurement and monitoring. Performance measuring systems should not be based solely on the number of cases resolved; instead, the system should also take into account the difficulty of the cases resolved. Such systems should not compromise the independence of the judiciary or influence judges to adjudicate based on the perceived preferences of those who have the power to intervene in their careers.

Professional/judicial associations. Legal professional associations have a key role to play in terms of providing professional self-regulation and development. Supporting their basic infrastructure requirements is important but does not need to be intricate or expensive. While there may be a need for more than one judicial association (e.g., a national association of all judges, regional associations, and an association of female judges), ideally there should be some entity that is representative of all segments of the judicial profession. Judicial associations commonly initiate publications that provide a forum for judges and lawyers to develop technical scholarship. Judicial associations can also highlight the dangers of low salaries and lack of security for government officials, and the vulnerabilities of judges in the face of corrupting influences.

Transparency

Transparency is necessary to increase trust in the judiciary, enhance its legitimacy, and protect the judiciary from influence and/or misuse from the executive or other influencers.

Inaccessibility of information and closed trials. In some countries, judicial decisions are not published, nor are verbatim court transcripts provided. Often, hearings and trials are not open to the public.

Collection and publication of judicial decisions. In both civil and common law systems, the reasoning and proper application of law is of broad relevance to the legal profession and society as a whole. Judges and courts must demonstrate their competence on an ongoing basis, and one of the best methods for accomplishing this goal is to display their work for general public scrutiny and, more importantly, for scrutiny by the legal community, both local and international. Establishing or reinstituting the practice of publishing major judicial decisions is critical in this regard. This could be accomplished, for example, through the establishment or reestablishment of a government publications office or through other means by which judicial decisions are collected and published. The creation of "freedom of information" legal frameworks can also allow maximum transparency of court proceedings.

Budgetary transparency. To ensure transparency of the institutions, the annual budget—and the way in which the budget was allocated—should be made public.

To promote general transparency, the institutions should reach out to the public through a public relations division (which may need to be established or strengthened during the transitional period) to inform the public what is going on. For example, it may be necessary to ask, what new laws will be developed? Are there new policies that have been formulated or are being considered? Are there cases that the Ministry of Justice should highlight to the public? Equally so, the ministries need to reach out to the parliament.

Another mechanism for ensuring transparency is for ministries or justice organizations to work more with civil society. For example, in Malawi, civil society groups are part of a large coordination mechanism that involves all the justice organizations. Being part of formal dialogues with civil society is another way to ensure transparency.

Transparency can be promoted by ensuring public access to court hearings is allowed as much as possible (there are certain restrictions; e.g., sensitive cases involving children, where allowing the public to attend would be too traumatic).

Other public information measures that should be considered are publication of annual reports on the performance of courts; initiation of public outreach programs informing people of court procedures and rules, laws, and rights; and establishment of customer information booths/kiosks at the courts. Court support staff can be trained to facilitate public access to information.

Reputation

In postconflict countries, there are usually many challenges to integrity.

Corruption. In some countries, corruption is seen as the only way to accomplish certain activities, and the payment of a bribe is a normal and acceptable way of doing business. The actual or perceived involvement in corrupt practices affects the reputation of not only the individual judge but also, by association, the entire judiciary. Eradicating corruption is a crucial component of enhancing public trust in the legitimacy of the institution and the government as a whole.

Mechanisms for addressing corruption include:
- New laws on corruption.
- A fair and transparent recruitment system for public officials.
- Codes of ethics for public officials and an investigation if the ethical code is violated.
- An anticorruption commission or task force.
- A requirement that public officials disclose their annual income.
- Publication of key information from courts and other public institutions (e.g., court data and judgments). This can be done on a website. Some courts have information booths staffed by court staff. Others have electronic information kiosks for use by the public in court registry offices. Inquiries can be made to the system to check the status of a case or a particular process, which in earlier times would have been performed by registry staff. Telephone inquiry lines can also be used for this purpose.
- Mechanisms to report corruption (e.g. SMS reporting, hotline numbers, and customer service agents).
- Judicial and prosecutorial activism against corruption (security must be provided for those judges and prosecutors).
- Media highlighting of corruption.

EXAMPLE

The Anti-Corruption Commission in Sierra Leone

In recent years, one of the most common approaches to combating corruption has been to create or reinvigorate anticorruption agencies. In Sierra Leone, for example, one donor country put enormous pressure on the government to establish an anticorruption commission as a precondition for foreign aid. In reality, however, the commission was very limited in its performance; it had few trained investigators, lacked the capacity to prosecute, and often relied on officers from the old and ill-equipped police system to assist in investigations. The commission's performance and accountability improved only after donors insisted on a public expenditure reform program that tracked department performances and subjected them to scrutiny by budget oversight committees.

Source: Rausch, ed., *Combating Serious Crimes in Postconflict Societies*, 25.

Revenue Transparency in Liberia

Liberia recognized that it lacked the capacity to properly oversee its national forestry industry in the postconflict period and turned to nonstate capacity to ensure revenue recovery from logging (under former president Charles Taylor, less than 15 percent of taxes owed from forestry revenue was collected) and to safeguard against money from sale of illegal wood being laundered through the legal supply chain. The government contracted with a private inspection company to build and operate a system to track all timber from point of harvest, through transport, to sale, with an agreement to transfer the system back to the government after seven years. The system ensures that the government collects all revenues, because an export permit is not issued until the Central Bank confirms that all taxes have been paid. Similarly, both Indonesia and Mozambique have used private sector customs collection agencies to help increase efficiency in an area that is always highly vulnerable to corruption.

Source: World Development Report 2011, 156.

Georgia

In Georgia, the Saakashvili government, which was swept into power by the Rose Revolution of 2003, cracked down on public sector corruption by improving the disclosure of public officials' assets, strengthening whistle-blower protections, and improving public financial control and procurement measures. In addition, the government criminalized active and passive bribery, enforced its criminal legislation, and created the Anti-Corruption Interagency Council, which was tasked with developing and implementing a new national anticorruption strategy. Three years later, Georgia ranked as a top anticorruption reformer on several global actionable governance indicators, such that 78 percent of Georgians felt that corruption had decreased in the previous three years, the best result among the 86 countries surveyed.

Source: World Development Report 2011, 156.

Local community and civil society organizations can also combat corruption. "Social accountability" approaches draw on the incentives for citizens and communities to monitor the expenditures most directly affecting their welfare. These tools include citizen report cards,[19] community scorecards,[20] participatory public budgeting,[21] and public expenditure tracking surveys,[22] as well as community-driven development approaches, where expenditures are publicized transparently at the community level. In fragile situations, these types of social accountability tools can contribute to building the trust of members of society in the state at the national and community levels.

EXAMPLE

Stop the Bribes Project

In Nigeria, a civil society organization called the CLEEN Foundation, in collaboration with the Nigerian police and with international donor support, established the Stop the Bribes project, where victims and/or witnesses of corruption carried out by law enforcement and other public officials could report the incident via SMS, telephone, or e-mail, or by using the project's website application. The project used the information received to develop "corruption hotspots" maps, which could guide police oversight authorities in deploying more resources in the fight against low-level corruption within the police.

Source: Stop the Bribes, "About Us," http://www.stopthebribes.net/page/index/1?l=pr_US.

Public interest litigation. This is a mechanism that has been used to protect the rights of certain groups or certain rights where there is a functioning and strong judicial system and judges who are champions of justice. Local communities/groups link to public interest lawyers to take cases affecting their rights. Public interest litigation emerged prominently in the 1970s. Since the 1980s, both the Indian and South African higher courts, for example, have led the way in the protection of economic, social, and cultural rights. In 1980, the Indian Supreme Court ordered a government municipality to fulfill its statutory duties to provide water, sanitation, and drainage systems to the community. Later judgments from South Africa's Constitutional Court have upheld the right to housing and health. In one case, a group of residents who were living on the edge of a sports field filed a claim that their right to housing was being violated. The court found that the government authorities had failed take reasonable legislative and other measures within its available resources to achieve the progressive realization of the right to housing. The court has continued to make a number of rulings protecting the rights of groups facing displacement or seeking access to resettlement. In a decision that received much international attention in 2002, the court ordered the rollout of a government health program to prevent mother-to-child transmission of HIV/AIDS.

EXAMPLE

Kuwait

In facing discrimination against women in Kuwait, the Constitutional Court issued two rulings in favor of women. The court refused to obligate female members of parliament, female candidates for parliament, and female voters to wear the hijab during the exercise of political action; and ruled to enable Kuwaiti female citizens to obtain passports without the consent of their husbands.

Source: Bureau of Democracy, Human Rights, and Labor, "2009 Country Reports on Human Rights Practices: Kuwait" (Washington, DC: Bureau of Democracy , Human Rights, and Labor, March 11, 2010).

EXAMPLE

Lebanon

The Association for the Defense of Rights and Freedoms in Lebanon filed a lawsuit against the state before the Shura Council to stop the implementation of a communication from the minister of the interior that would severely restrict the freedom of association of nongovernmental organizations (NGOs). The council issued a decision to annul the communication, considering freedom of assembly and association as one of the basic freedoms guaranteed by the constitution, and stating that it was not permissible to place restrictions on the establishment or dissolution of associations except through a legal provision, and therefore the validity of their formation may not be subject to any prior intervention by the administration or the judiciary.

Source: Salim Nasr, *Arab Civil Societies and Public Governance Reform: An Analytical Framework and Overview* (Jordan: UNDP, January 2005), 12, ftp://pogar.org/LocalUser/pogarp/books/participation/civil-reform-e.pdf.

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TRANSFORMING THE JUSTICE SYSTEM:
Access to Justice

Access to justice is an essential element of rule of law and justice. If people are unable to access the justice system to protect their rights, there can be no justice or rule of law.

Access to justice is present when *all people*, especially the poor and vulnerable who are suffering from injustices, are able to have their grievances listened to and to obtain proper treatment of their grievances by state or nonstate institutions, leading to redress of those injustices on the basis of rules or principles of state law, religious law, or customary law in accordance with the rule of law.[23] This is the "inclusive" element of a rule of law culture.

Chapter 1, Part 3: Toward a Rule of Law Culture

Access to justice supports sustainable peace and stability by affording the population a more attractive alternative to violence in resolving personal and political disputes. Disputes that are not dealt with in a fair way can lead to stress for the people involved, health problems, risk of escalation, disturbed relationships, lack of trust, or harm that remains unaddressed. In addition, sustained feelings of injustice can eventually lead to violence and conflict in the community.

There is no access to justice where citizens (especially marginalized and vulnerable individuals) fear the system, see it as alien, and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where individuals do not have information or knowledge of rights; or where there is a weak justice system.

Ensuring access to justice requires the equal involvement of both state and nonstate actors.

Mechanisms for enhancing access to justice include:
• Mobile courts
• Legal assistance programs
• Legal aid NGOs
• Community paralegals
• Law clinics
• Court service centers and help desks
• Alternative dispute resolution
• Legal information and awareness
• Personal safety and security

Access to justice is also enhanced through initiatives discussed earlier, such as building the capacity of judges, lawyers, and others to better provide justice services; developing the capacity of courts and other justice and security institutions to more efficiently, effectively, and transparently manage cases; and enhancing the integrity of the judiciary.

Mobile Courts

Mobile justice facilities bring judges, prosecutors, defense counsel, and any necessary court administrative staff (including interpreters and registrars) to remote locations where regular courts do not exist. These mobile courts can help prevent case backlogs and lengthy pretrial detention by ensuring that criminal proceedings are carried out expeditiously. They are also an important tool in addressing fundamental access to justice problems such as geographical access, exclusion of minorities from the justice system, and financial barriers, such as travel costs.

EXAMPLE

Mobile Courts in Puntland, Somalia

For the residents of the Xaaji Kheyr village in Puntland, Somalia, a drive to the nearest court takes two hours. Due to the cost and time involved, most residents do not have a chance to seek justice. In 2009, the Puntland Supreme Court, with the support of UNDP, set up four mobile courts in order to bring justice to the region's rural communities. The courts consist of a judge, prosecutor, chief registrar, and lawyer. They adjudicate primarily civil and family cases, but also criminal cases. For Xaaji Kheyr resident Halima Hassan, having access to such mobile courts has been life-changing. She was in an abusive marriage and unsuccessfully tried mediation to resolve the conflict between her and her husband. When she found out about the mobile courts, she approached them to seek a divorce.

Source: http://www.youtube.com/watch?v=WwXYtze_9J4.

Shari'a Mobile Courts in Aceh, Indonesia

In Aceh, many children were orphaned following the 2004 tsunami. Relatives took children in, but in many cases began to fight over the child's inheritance. Some relatives saw the inheritance as their right to take and use as their own, despite clear laws against doing so. The International Development Law Organisation (IDLO) worked with communities to a) identify communities with high numbers of orphans; b) run workshops with guardians and community leaders about the rights and responsibilities of guardians; c) help guardians to prepare the necessary legal documentation needed to formalize the guardian status through the Shari'a courts; and d) facilitate Shari'a court judges and registrars to travel in mobile courts to remote villages to formalize guardianship. The campaign increased community awareness of the rights and responsibilities of guardians, provided the children with greater legal protection, and ensured that communities knew how to hold guardians who transgressed their role to account.

Source: Leanne McKay, former IDLO employee.

Mobile Military Courts in the Democratic Republic of the Congo

In the Democratic Republic of the Congo, a system of mobile military courts has successfully prosecuted security personnel for sexual violence. As a model of service provision, mobile courts may also help address the absence of state-provided justice services in nonconflict, historically neglected regions, and provide a longer-term solution beyond interim service provision.

Source: Jake Sherman, "Criminal Justice: Security and Justice Thematic Paper," *World Development Report 2011* background paper (World Bank, Washington, DC, November 9, 2010), 6.

Legal Assistance Programs

International human rights law requires that persons who do not have the means to pay for a lawyer should be provided one when the "interests of justice so require" (article 14(3)(d) of the International Covenant on Civil and Political Rights). Defendants are usually given free legal assistance if the criminal offense they are accused of is serious or where the sentence for the offense is severe. Providing free legal aid is the responsibility of the state. Each state can determine how that legal aid is implemented in practice.

The three most common systems of state legal aid provision are:
- The court-appointed lawyer, also known as judicare or ex-officio schemes
- The public defender scheme
- The hybrid scheme

Each scheme has a number of advantages and disadvantages. A court-appointed lawyer's scheme alone can work well when there is a comparatively small number of cases and an independent body in place that has the resources to efficiently administer the scheme. However, the scheme is usually neither desirable nor feasible when there is a large number of cases to handle and/or where a state faces budgetary constraints. A public defender scheme is generally considerably less expensive than the court-appointed lawyer system in the long term, although there can be substantial start-up costs, and a nationwide roll-out may prove expensive.

The most commonly adopted scheme worldwide is a mixed, or "hybrid," scheme, where legal aid is provided primarily by public defenders, with support from court-appointed lawyers, all of whom are supervised and managed by an independent statutory legal aid body. Priority is given to the use of public defenders who are full-time state employees, but private lawyers are contracted to represent indigent defendants when the public defenders do not have the capacity or skill level needed or when there is a conflict of interest.

Few states provide comprehensive free legal assistance to everyone who needs it. Where the state cannot or will not provide free legal assistance, alternatives can include access to legal aid lawyers through NGOs, pro bono lawyers through a bar association or similar body, community paralegals, or law students through clinical programs.

Legal aid NGOs. In many countries where the state has inadequate resources to provide legal assistance, local NGOs have sought to fill this gap. Often the NGO's client eligibility criteria is focused on the provision of legal aid to the most vulnerable, and the scope of work may include legal representation, legal information and advice, community awareness, and sometimes nonlegal services such as psychosocial counseling. The NGOs may be limited in their geographic reach or the type of cases/issues they address (for example, a legal aid NGO may work solely on housing or land and property issues, or take on only criminal cases). Most NGOs must rely on local or international donor funding, raising concerns about their long-term sustainability.

An important function of many NGOs is the provision of legal assistance to detainees at the pretrial stage in police stations or on remand or appeal in prisons. Some NGOs, such as the Paralegal Advisory Service Institute in Malawi, conduct legal awareness sessions in prisons to educate prisoners about criminal law and procedure, so that prisoners can understand and apply them in their own cases at their next court appearance. For example, a prisoner might decide to make his own bail application; enter a plea of guilt, and put forward his reasons for seeking a mitigation of sentence; or conduct his own defense.

EXAMPLE

Legal Aid in Bosnia and Herzegovina

Vaša Prava is a legal aid NGO that undertakes advocacy on behalf of poor and disenfranchised Bosnians. Its work directly addresses the legacy of the war by dealing with problems of housing, income, health care, and social services. The NGO promotes individual human rights, helps build legal systems that hold governments to account, and advocates for systemic changes to address real problems. Vaša Prava is helping to build an active civil society and a culture of rights. It is also playing a vital role in making recovery-oriented legal reforms a reality for Bosnia's disadvantaged, dispossessed, and disenfranchised populations, thus helping to rebuild their lives and their country.

Vaša Prava provides legal advice and representation in court, conducts public awareness sessions, gives media presentations, trains local officials, prepares brochures on legal issues, operates a website, and publishes a magazine. The NGO presents public interest cases to the European Court of Human Rights. The bulk of its work involves letting people know of their rights (awareness). Vaša Prava lawyers appear constantly on radio and television, discussing topics such as labor laws, utility services and bills, illegal construction, temporary refugee status, the freedom of access to information law, disability benefits, administrative appeal procedures, civilian victims of war, and gender-based violence. Similar information is distributed through brochures and leaflets, as well as *Vaša Prava Magazine*, and a dedicated website.

Vaša Prava took part in negotiations between the Bosnia and Herzegovina Ministry for Refugees and Displaced Persons, the Ministry of Energy and Public Enterprises, and representatives of the international community on ways to restore power throughout the country. Because Vaša Prava had represented thousands of individual property owners, it had the evidence to show patterns of discriminatory actions by the power companies.

Source: Vaša Prava's website, http://www.vasaprava.org/.

Gaza, Palestine

When people were applying for reconstruction grants through international organizations for damage to their property during the Israeli incursion on Gaza in 2009, they were required to prove ownership of their land. But many people had never formally registered their land, having inherited it from family or acquired it by other informal means. A legal aid center established by the international NGO, the Norwegian Refugee Council, and staffed by local lawyers, provided people with concrete information about the process

for registering land, the necessary documents, and the costs of the process. Staff met with local authorities to explain the assistance they were providing and to get support. Individuals could then go and access the registration process themselves. Only when an individual faced specific problems in the registration process did a lawyer intervene and provide direct assistance.

Source: Leanne McKay, former Norwegian Refugee Council employee.

Community paralegals: Many disadvantaged individuals and communities do not have access to the formal legal system or to qualified lawyers. This situation can be due to a shortage of trained lawyers; for example, in Egypt, with a population of 85 million people, there are around half a million lawyers, many of them struggling to make a living from legal work. In Mali, there are only 265 lawyers serving a nation of more than 14 million people. In the relatively wealthy Kazakhstan, there are provinces where there are less than 13 lawyers per 100,000 inhabitants, due to the remoteness of many rural communities and the lack of formal justice system infrastructure across the country.

Community members often rely on customary justice processes, informal interventions by local leaders, or similar arrangements to solve their day-to-day problems. Programs with community-based paralegals (also called "facilitators," or "barefoot lawyers") are now a popular mechanism for bridging the gap between the formal and informal justice systems and ensuring that people have greater access to fair justice mechanisms.

A community-based paralegal is a person who:
• is a member of the community or part of an organization who works in the community and has knowledge of the ways community members solve their problems (including through traditional or informal justice mechanisms);
• is respected and trusted within his or her community;
• has a basic level of formal education (he or she can read and write);
• has received some specialized training about the law and the legal system and its proce-dures, and has basic legal and communication skills, including fact finding, interviewing, mediation, conflict resolution, and negotiation skills;
• is able to effectively communicate ideas and information to community members using various methods;
• can have good working relationships with local authorities and service delivery agencies; and
• has community organizing skills that can be used to empower communities to address systematic problems on their own in the future.

Community-based paralegals can offer a range of legal services that do not necessarily need to be provided by a lawyer. These services include legal and general advice such as on whether a rights violation has occurred, what an individual's legal rights are in a particular situation, how to access government or NGO legal aid, how to file a claim in court or at an administrative tribunal, and how to navigate local authorities when registering land,

a birth, a marriage. These paralegals also undertake community education and awareness raising (e.g., by holding workshops) and distribute legal educational materials.

Community paralegals, however, do not undertake legal representation in court. They are most effective in situations where they are linked with lawyers to take cases to court as a last resort option (generally, people will do everything they can to resolve a case without going to court).

Community paralegals are not the answer to all community justice challenges, nor is there one model that must be followed; however, the same model may work in many contexts. Some community paralegal programs are generalist; some may specialize in working on specific issue, such as prisoners, or in a specific methodology, such as mediation.

▶ **Penal Reform International, Path to Justice,** http://www.penalreform.org/multimedia/path-justice

EXAMPLE

Timap for Justice in Sierra Leone

Timap for Justice, a not-for-profit organization, offers free justice services in sites across Sierra Leone by trained paralegals. The paralegals provide information, mediate conflicts, and assist "clients" in navigating authorities. For community-level problems (e.g., where domestic violence is prevalent in the community, or a mining company unlawfully acquires villagers' farmlands), they engage in community education and dialogue, advocate for change with authorities, and organize community members to undertake collective action. The paralegals are back-stopped by lawyers. In severe and intractable cases, the lawyers employ litigation to address injustices that the paralegals cannot handle on their own. Because litigation, or even the threat of litigation, carries significant weight in Sierra Leone, the access to lawyers adds strength to the paralegals' ongoing work as advocates and mediators. The program strives to solve clients' justice problems—thereby demonstrating concretely that justice is possible—and at the same time to cultivate the agency of the communities among which it works. Qualitative research has shown that Timap's interventions have empowered clients (especially women) to claim their rights. Community perceptions of institutional fairness and accountability of the police, traditional leaders, and courts also improved as a result of Timap's work. Building on Timap, donors and the government of Sierra Leone joined with NGOs and community-based groups in 2010 to develop a national approach to justice services, including a front line of community paralegals and a smaller core of supporting lawyers.

Source: Timap for Justice, http://www.timapforjustice.org/.

There are many ways in which community-based paralegals can develop trust and a good working relationship with local problem solvers such as elders and religious leaders. One way is providing training in key skills such as mediation. Paralegals can also work as assistants to the community decision makers in various ways, including collecting background information on a dispute, organizing dispute resolution sessions, making records of proceedings, or providing advice to the customary leader on issues such as domestic law.

Sometimes, however, engaging with existing informal mechanisms is not possible, at least in the short term. Where necessary, paralegals can provide services such as mediation and counseling directly. For example, they can facilitate meetings in which parties listen to each other and explore good solutions, help the parties decide on a solution that is in accordance with domestic law and rights (thus contributing to increasing respect for the rule of law), and ensure that the parties comply with the outcome and are held accountable through follow-up.

EXAMPLE

Justice and Confidence Centers, Darfur, Sudan

Justice and Confidence Centers were established across Darfur in the camps providing shelter for internally displaced persons. The centers were staffed by trained paralegals who were from the community, had a reputable profile, and were accepted by members of the community. The paralegals offered legal advice and mediation of local disputes. A major challenge was the high volume of family disputes. According to traditional practices, a female party to a dispute has no right to be present or to be heard during the dispute resolution process. Through the intervention of the paralegals, this challenge was eventually overcome and the community and its leaders accepted the right of women to have a say in the issues affecting their lives. Paralegals addressed this issue in a holistic manner—training leaders, women and men on human rights and women's rights, and providing a neutral space in the camp for people to come to discuss their problems including weekly coffee sessions for women. Paralegals built community trust and worked with leaders to develop their mediation skills. They also offered an alternative dispute resolution mechanism to the traditional mediations being carried out. If all parties agreed, as well as the local leader, the mediation would be facilitated by the paralegals on one condition: the process and outcome of the mediation must respect the rights of all parties, including those of women. Part of this condition was that women must be permitted to participate in the mediation. Eventually, women were allowed a voice in mediations conducted by leaders/elders too.

Source: UNDP Sudan, "Strengthening the Rule of Law and Legal Protection in Darfur," http://www.sd.undp.org/content/sudan/en/home/operations/projects/democratic_governance/rule_law_protection_darfur.html.

Facilitadores Judiciales in Nicaragua

This program has over 2,500 facilitators, elected by the community and spread throughout rural Nicaragua. This network of facilitators is under the supervision of local judges, who oversee the mediation processes and ensure that the outcomes are of a quality and substance that would hold up in court. Eventually, the scheme was integrated formally within the court system. This integration ensured regular funding and local ownership by a Nicaraguan organization (not the international organization that started the program).

Source: The Hague Institute for the Internationalisation of Law (HiiL), *Trend Report*, part 1, *Towards Basic Justice Care for Everyone, Challenges and Promising Approaches* (The Hague: HiiL, 2012), 112.

Law clinics. The use of law students supervised by lawyers and academics to provide legal advice and assistance is a common way of providing access to justice for the poor and marginalized.

University law clinics usually provide free legal advice to poor persons under the supervision of qualified staff members who are legal practitioners. Most university law clinics either require law students to work in a university law clinic or assign the students to an outside partnership organization where they can provide legal services under supervision.

University law clinics can play a valuable role in supplementing the work of national legal aid bodies and in advancing the promotion and protection of human rights. The involvement of law students in legal aid provision, with appropriate guidance and monitoring, not only expands legal aid services but also places in the hearts and minds of the next generation of legal professionals a sense of social responsibility and an understanding of the potential of the law as an instrument for social justice and reform. One of the major purposes of legal education is to train future lawyers to be not only competent practitioners but also to recognize that their professional responsibility includes being sensitive to the need for improvements in existing justice systems. For example, university legal aid clinics were the first organizations in South Africa to focus on providing access to justice for poor South Africans. Nearly all twenty-one law faculties and law schools at universities in South Africa now operate law clinics independent of the state-funded law clinics.

EXAMPLE

Street Law Projects in South Africa	The South African street law project is a preventive legal education program that provides people with an understanding of their legal and human rights and teaches them how they can enforce such rights. Street law students at the universities are taught how to use interactive learning methods when teaching school children, prisoners, and ordinary people about the law. The program has been conducted in hundreds of high schools throughout South Africa and also involves training high school teachers to use a street law student text book designed for the pupils and the teacher's manual. *Source*: "Street Law South Africa," http://www.streetlaw.org.za/.

Court service centers and help desks. Court service centers or help desks can provide legal advice, assistance in filing complaints or legal instruments, and information on rights and court processes, thereby demystifying the formal system. Help desks are places where people can obtain information about their legal rights and obligations, or their case in court, or about legal proceedings in general. The help desks provide a central location where people can seek informal guidance to promote their legal awareness. They can increase citizen involvement in the formal justice system, provide outreach to segments of the public that previously may have had limited access to the courts, and can increase public confidence in the justice system.

EXAMPLE

Customer Care Desks in Kenya

Customer care desks were instituted in every court in Kenya as part of the Judiciary Transformation Framework adopted in 2012. There was a lack of trust and confidence in the courts due to past negative experiences with the justice system. Courts offered poor customer service. Customer care desks were implemented as one mechanism for enhancing confidence in the judiciary and providing better service to the public. Customer care desks are found in each court station and courtroom across the country at the entrance of the court. Staff members trained in customer service skills run the desks and are able to answer questions and provide information on a range of issues such as bail procedures, fees information, and courtroom procedure matters. The staff members are clearly identified with badges so that court users can identify them and are able to track the quality of service. In September 2013, the Judiciary Transformation Secretariat and Judiciary Training Institute trained 108 employees to staff the customer care desks. An initial assessment identified that "court users have found the court environment more friendly and easier to use."

Source: The Judiciary, Republic of Kenya, "State of the Judiciary and the Administration of Justice Annual Report: 2012–2013," 131, http://www.kenyalaw.org/kl/fileadmin/SoJA_2012-2013.pdf.

Alternative Dispute Resolution

Alternative dispute resolution includes processes to resolve disputes such as arbitration and mediation. Alternative dispute resolution mechanisms may be contained within the formal justice system; for example, some courts now require parties to partake in alternative dispute resolution mechanisms before allowing a case to proceed. However, alternative dispute resolution mechanisms can also operate within the "informal," or nonstate, context, as discussed earlier, for example, under "Community paralegals".

EXAMPLE

House of Elders in Somaliland

In Somaliland, clan elders uphold customary law within and between subclans. In general, the elders do not have any legal education, and their decisions regarding disputes are, in practice, not recorded, despite domestic law that requires customary decisions to be lodged at the local court. In order to improve the quality of the elders' decision making, a program, partnering a legal aid lawyer (himself an elder) with elders in a particular town in Somaliland, was established that provided advice to the elders on the law and rights, and assistance with recording their decisions and ensuring that the decisions reached were legally sound and were lodged at the court. This provided the parties affected by the decision with an appeal option and an enforcement option through the state apparatus if the nonstate system failed them.

Source: Interview with Simon Ridley, UNDP Somalia.

EXAMPLE

Blending Traditional and State Systems in East Timor

In East Timor, an innovative program, linking state and nonstate conflict resolution mechanisms, is being adopted to address land tenure issues. The first step is to map who owns what parcels of land and under what arrangements, given the likelihood that different types of ownership covenants exist—not only for the land itself but also for what lies on and beneath it. The preference in East Timor is for local dispute resolution mechanisms, where possible, because they are seen to be cheaper, quicker, fairer, more accessible, easier to understand, less corrupt, and more supportive of reconciliation between disputants than the court system. Thus, the state is establishing, by law, a land tenure dispute resolution mechanism that reflects the traditional system but is regulated by law, with decisions that are binding.

Source: "Land Tenure Conflicts and East Timor: Peter Woodrow, Partner and Progam Manager, CDR Associates," interviewed by Julian Portilla, *Beyond Intractability* (2003), http://www.beyondintractability.org/audiodisplay/woodrow-p-2-landetimor1.

Legal Awareness

Engaging with the public on issues related to the justice system is a critical part of the work of governments to ensure access to justice and to an accountable justice system, and to build trust in and the legitimacy of justice institutions. This engagement should involve sharing of information about reform efforts and providing legal rights and education to the public so that individuals can more actively engage the justice system and therefore promote the achievement of a rule of law culture.

Public education campaigns related to pertinent legal issues may be conducted by national stakeholders, such as the court spokesperson, bar, judges associations, and justice-related NGOs. This type of commitment to public service helps to build respect and esteem for the judiciary.

Legal awareness—which may also be referred to as "legal literacy," "capacity building," "legal training," or "legal education"—aims to educate people about their legal rights and obligations, and about institutional structures of the legal system and specific mechanisms and legal procedures. Legal awareness can help to address public perceptions that the courts are intimidating, unapproachable, or not to be trusted.

Mechanisms for enhancing legal awareness could include:

Use of plain language in legislation and legal documents. The purpose of plain language is to make sure people understand what the law means. Complicated legal language means that people need to hire a lawyer to interpret the law. Most countries have adapted a plain-language approach to legal drafting.

Disseminate laws and regulations. In many countries, copies of new laws and regulations are neither distributed in hard copy nor put online. To ensure legal awareness and literacy, laws should be distributed in print form and/or be available online.

Schools and other civic programs. School and civic programs can also act as effective mechanisms to provide relevant information about justice issues to children, students, and their parents.

Research centers and libraries for the public to access information. The state can create libraries (or sections in existing libraries) for the public to access information about justice. As with public awareness programs, such initiatives are most often carried out by civil society actors.

Public awareness campaigns. It is important not only to distribute new laws and regulations to judges but also to the media, to libraries, and to the public. Educating the public about a new law is important for conducting a public awareness campaign because it ensures that people understand their new rights and responsibilities. Educating the public can be done in a variety of ways, including:

- Print media
- Informational flyers
- Pamphlets and posters
- Stories and comics illustrating human rights
- Radio and television outreach
- Dramatic performances
- Workshops
- Low-cost copies of legal texts and laws
- Court help desks
- Community justice centers, where community members can receive legal advice
- Telephone hotlines
- Websites, text messaging, and smart phone apps

While it is the state's responsibility to disseminate information and raise legal awareness, the role tends to be undertaken mostly by civil society organizations.

Legal awareness campaigns. Campaigns need to clearly identify who the audience is and how best to reach it. It is interesting to compare the way in which legal information typically is delivered (leaflets, rallies, radio, booklets, trainings, etc.) with where people go to seek information and support when they have a problem. People generally shop around in their social network, looking for information and people who can help them. So informal sources (such as networks of people that may include family or friends) are also important to target. Informal mechanisms and sources of information offer opportunities to disseminate legal information among vulnerable people. In addition, we shouldn't just target the victims of a rights abuse. We need also to identify and target all stakeholders, including the perpetrators and those indirectly affected, such as youths and community leaders/decision makers. Awareness raising is also about changing attitudes in society, which requires the involvement of all members of society.

Legal awareness materials should be creative, interesting, and understandable for the target audience; if there is a high level of illiteracy, textual brochures are not helpful, but posters of pictorial depictions may be.

Legal information is most useful if it is understandable, tailored to the problem at hand, and arrives just in time. Ideally, legal information is sufficient to cope with the problem, offers limited options, and is easy to put into practice. If people use the information, they tend to need assurance or support from some form of personal assistance—a help desk, an information center, or a hotline, for example.

EXAMPLE

Legal Education Films in Aceh, Indonesia

Aceh, Indonesia, has a high level of illiteracy, particularly among women. The major legal problems facing women after the tsunami were denial of inheritance rights, land rights, and guardianship. IDLO produced a thirty-minute educational film titled *The Stories of Aisha, Rauda and Ainun: Protecting Women's Legal Rights Post-Tsunami.* The film traces the lives of three women, each of whom are struggling to overcome some of the most common legal issues affecting communities in the aftermath of the tsunami. Through these narratives, the film examines the law relevant to land, inheritance, and guardianship, and the possible solutions to problems arising in those areas. IDLO legal staff screened the film (using a television and portable generator), coupled with discussion and information sessions facilitated by a lawyer, in more than one hundred tsunami-affected villages. People were not only informed about their rights but also provided with access to someone who could assist them to realize those rights.

Source: E. Harper, IDLO, "Post-Tsunami Legal Assistance Initiative for Indonesia, Monitoring and Evaluation Report (February 2006–September 2007)" (Rome: IDLO, September 26, 2007).

Women's Rights in Morocco

In Morocco, unwed mothers and their children are not legally recognized. They lack the legal identity necessary to assert a host of other fundamental rights; at best, neither officially exists; at worst, unwed mothers can be and often are criminally prosecuted for having had sexual relations outside of marriage.

Two problems face the unwed mothers: registration of the birth of their child, and lack of a family booklet, the main official document proving one's legal identity and civil status. The current law restricts the drafting and granting of a family booklet to a married man only; there are a few exceptions where his wife may obtain a copy.

Most unwed mothers who seek out local NGO assistance are not aware of their legal rights under Moroccan law. They see themselves as societal outcasts, deprived of their rights, often feeling inferior without an identity. Local NGOs provide legal information to unwed mothers, including group field trips to local public institutions responsible for women's rights such as the police station, Civil Status Office, and courthouse. During field trips, women meet and hold question-and-answer sessions with relevant personnel. By accompanying and assisting unwed mothers, NGOs help them avoid humiliation at public administration offices, help them navigate complex procedures, and help protect them from corruption and abuse of authority by civil servants.

EXAMPLE: Women's Rights in Morocco   *CONTINUED*

In areas where there is a legal gap, as with issuing a family booklet to unwed mothers, local NGOs work with local authorities to encourage alternative solutions that are more beneficial to women's rights, such as convincing the local Civil Status Office to give unwed mothers their own family booklet.

Source: Stephanie Willman Bordat and Saida Kouzzi, "Legal Empowerment of Unwed Mothers: Experiences of Moroccan NGOs," in *Legal Empowerment: Practitioners' Perspectives*, ed. Stephen Golub, no. 2 in the series *Legal and Governance Reform: Lessons Learned*, (Rome: IDLO, 2010), 179.

Bhoomi Kosam in India

In India, nearly 17 million rural families across the country are either landless or have insecure land titles. In the Andhra Pradesh region, 6 million cases of land disputes have occurred in past years. *Bhoomi Kosam*—literally "for the land"—is India's first television program on land entitlements. It informs citizens of their rights and demystifies complicated laws and legal codes. The show attempts to significantly reduce the obstacles many citizens face in accessing justice and seeking redress through state and local institutions.

Each episode is divided into three sections. The first section addresses a generic land issue with expert commentary, compiled by Landesa India, an international nongovernmental organization specializing in land rights, and HMTV, a local news channel. Land experts weigh in on a particular case and identify potential solutions and strategies to address the relevant issues. During the second segment, viewers are prompted to call in with their own questions. The third segment explains revenue terminologies and records to highlight best practices and solutions to typical land grievances.

Making people aware of their land rights in their language and in a style that is accessible was the unique selling point of *Bhoomi Kosam*. Episodes of the program are now being distributed to revenue officials, paralegals, and NGOs in Andhra Pradesh. The show is being used in training sessions, particularly as a visual aid complementing existing lessons and modules in areas with high levels of illiteracy.

Source: M. Sunil Kumar, "A Systems Approach for Providing Legal Aid for Land" (paper prepared for the Annual World Bank Conference on Land and Poverty, World Bank, Washington, DC, April 8–11, 2013), 12, http://www.landesa.org/wp-content/uploads/A-Systems-Approach-for-Providing-Legal-Aid-for-Land-263-Kumar.pdf.

Legal Hotline in Aceh, Indonesia

In cooperation with the Shari'a and state courts, IDLO launched a weekly column in the local newspaper in Banda Aceh that profiled different justice sector institutions and examined topical legal issues as well as stories on individuals who have successfully resolved cases through the justice system. The articles included the number of a telephone hotline for people to call for legal advice.

Source: Harper, IDLO, "Post-Tsunami Legal Assistance Initiative for Indonesia."

EXAMPLE

Integrating a Public Information Campaign into Afghanistan's Counternarcotics Strategy

Acknowledging the importance of public information in reducing the cultivation of opium poppies and the use of illegal drugs, Afghanistan has launched an information campaign that stresses the importance of establishing the rule of law, the illegality of poppy growing, the damage that opium does to Afghanistan's international reputation, and the need to offer farmers alternative ways of making a living. Antidrug messages have appeared on a wide variety of media, including not only radio and television but also comic books, billboards, booklets, matchbooks, stickers, banners, transit advertising, and calendars. During late 2005 and early 2006, President Hamid Karzai underlined the message in several public speeches against opium cultivation and in a series of meetings with local political and tribal leaders to gain support for counternarcotics efforts.

Source: Rausch, ed., *Combating Serious Crimes in Postconflict Societies*, 125.

Encouraging interaction between judges and communities. This can be done formally or informally and is an important mechanism for overcoming mistrust between the public and state institutions.

Interaction helps judges and local communities better understand one another's needs and challenges. Judiciary dialogue cards and court open days also encourage interaction between judges and communities.

Bridging the gap between communities and law enforcement actors, dispelling mistrust, and building cooperation is key to the promotion of respect for and adherence to the rule of law, reducing levels of crime and violence in communities, and protecting the basic rights of the disadvantaged. Dialogue can also be part of advocacy efforts, and civil society and the police—working together—can address rule of law challenges, and solve them, at the local level.

Court open days are one way to enhance confidence in the court system. Open days can play a role in making courts seem less intimidating and in building public confidence in the judiciary. Court open days bring together all court users (including police, prison officials, prosecutors, lawyers, NGOs, and civil society). Court users get to informally mingle with judges and court staff. The aim of the open days is to help people feel confidence in the courts, to help them understand the justice system and their rights, and for the courts to learn from users how to do their jobs better.

Judiciary dialogue cards are useful in gaining insight about how the courts are functioning and provide the basis for court user committees.

EXAMPLE

Judiciary Dialogue Cards in Kenya

A judiciary dialogue card is a small survey card containing a structured questionnaire with multiple-choice answers. The card also has space to allow respondents to make suggestions or complaints about specific cases. Respondents have a choice between remaining anonymous or identifying themselves and/or the relevant cases.

Each judiciary dialogue card bears a unique printed number. That number is also printed a second time on a tear-off strip at the top of the card, called a "card number slip." The instructions on the card recommend that the respondent tear off and retain the card number slip for later reference before placing the rest of the completed dialogue card in a secure box at the court.

A simple computer spreadsheet program, which can be used by staff at a court station, has been developed to collect and collate the data provided on each dialogue card. The spreadsheet program produces a simple statistical report on data extracted from cards received at each court station. In that way, each station has ready access to both numerical and case-level information from its client base.

Source: Barry Walsh, *In Search of Success: Case Studies in Justice Sector Development in Sub-Saharan Africa* (Washington, DC: World Bank, June 2010), https://openknowledge.worldbank.org/bitstream/handle/10986/2912/574450ESW0P1121n0Africa010June02010.pdf?sequence=1.

Personal Safety and Security

The security of judicial personnel, lawyers, victims, and witnesses is an important component of enhancing access to justice. Courts may not have security personnel, and antiquated court facilities frequently have limited equipment to detect weapons. Court designs may lack separation between defendants and judges. Courts may also lack segregated waiting rooms for litigating parties, victims, or witnesses. There may not be separate and protected entries for judicial personnel.

The protection of victims, witnesses, and their families is an important element of an effective justice system. Measures should be taken to ensure the safety of witnesses fearful of intimidation and retaliation, both to address the concern of the individual and to ensure that due process is served by securing the witness's testimony.

For witnesses who are afraid to give evidence in court (where there is a legitimate threat of injury or death), and for that reason will not access justice, providing witness protection measures may be necessary. These measures include a) providing a safe house where the witness can stay in advance of the trial or police protection at his or her residence; b) removing the witness's name from public court records; c) giving evidence behind a shield, from another place, or through videotaped examination of the witness; and d) removing the accused from the courtroom. For less-serious cases, and where the witness or victim is scared or intimidated, a court liaison officer (or paralegal) may show witnesses around the court, explain the procedures to them, and make them feel more comfortable about the process of going to court.

Open Society Foundations, *Community-Based Paralegals: A Practitioners' Guide* (New York: Open Society Institute, 2010), https://www.opensocietyfoundations.org/publications/community-based-paralegals-practitioners-guide.

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Rausch, ed., *Combating Serious Crimes in Postconflict Societies.*

CHAPTER 5 Part 2 ENDNOTES

14 See Alexander Mayer-Rieckh, "Early Post-conflict SSR Assessment and Planning Tools: Needs and Actors Mapping and the Capacity and Integrity Framework," ISSAT Blog, May 4, 2011, http://issat.dcaf.ch/Share/Blogs/ISSAT-Blog/Early-Post-conflict-SSR-Assessment-and-Planning-Tools-Needs-and-actors-mapping-and-the-Capacity-and-Integrity-Framework.

15 See, for example, Geneva Centre for the Democratic Control of Armed Forces (DCAF) and International Security Sector Advisory Team (ISSAT), "SSR in a Nutshell: Manual for Introductory Training on Security Sector Reform" (DCAF and ISSAT, 2012), http://issat.dcaf.ch/content/download/2970/25352/file/ISSAT%20LEVEL%201%20TRAINING%20MANUAL%20-%20SSR%20IN%20A%20NUTSHELL%20-%205.2.pdf.

16 Community Sustainability Engagement Evaluation Toolbox, "Problem Tree/Solution Tree Analysis,"http://evaluationtoolbox.net.au/index.php?option=com_content&view=article&id=28&Itemid=134.

17 See, for example, UNDP, "Capacity Assessment Methodology: User's Guide" (New York: UNDP, Capacity Development Group, Bureau for Development Policy, May 2007), http://europeandcis.undp.org/uploads/public/File/Capacity_Development_Regional_Training/UNDP_Capacity_Assessment_Users_Guide_MAY_2007.pdf.

18 UN Office of the High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States—Vetting: An Operational Framework* (New York: United Nations, 2006), 4, http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf.

19 Citizen report cards enable users to provide feedback on the quality and adequacy of a public service. See "Citizen Report Card Learning Toolkit", http://www.citizenreportcard.com/.

20 The community score card process is a community-based monitoring tool created to exact social and public accountability and responsiveness from service providers. The tool involves an interface meeting between service providers and the community that allows for immediate feedback. See Janmejay Singh and Parmesh Shah, "Community Score Card Process: A Short Note on the General Methodology for Implementation," at the World Bank website, http://siteresources.worldbank.org/INTPCENG/1143333-1116505690049/20509286/comscorecardsnote.pdf.

21 Participatory public budgeting is a process in which community members directly decide how to spend part of a public budget. See Participatory Budgeting Project, "What is PB?," http://www.participatorybudgeting.org/about-participatory-budgeting/what-is-pb/.

22 Public expenditure tracking surveys collect data on public spending by local government. See World Bank, "Public Expenditure Tracking Survey (PETS)," http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTPCENG/0,,contentMDK:20507700~pagePK:148956~piPK:216618~theSitePK:410306,00.html.

23 Leiden University, Van Vollenhoven Institute, "Access to Justice: The Concept" (2010), http://law.leiden.edu/organisation/metajuridica/vvi/research/access-to-justice/access-to-justice/the-concept.html.

SUMMARY OF POTENTIAL RESPONSES TO IDENTIFIED RULE OF LAW CHALLENGES

CHALLENGE	PERSONNEL	INSTITUTION

CAPACITY	• Staff censuses, staff capacity assessments
	• Public perception surveys and end-user needs assessments
	• Transparent, merit-based recruitment procedures
	• Fair and transparent salary scales
	• Internal oversight and accountability mechanisms and procedures
	• Increasing and/or culling staffing levels
	• Equipment and resources (furniture, legal texts, computers, etc.)
	• Skills training (administration, management, court room, and caseload management, etc.)
	• Ethics training (roles and responsibilities, ethics)
	• Human rights training
	• Professional legal education:
	  – Establishing professional training centers
	  – Staff capacity building (administration, management, adult learning, etc.)
	  – Revision of law school curriculum
	  – Development of accreditation standards
	  – Law school clinics
	  – Scholarships and financial aid for marginalized law students
	  – Oversight/quality control mechanisms
	  – Study tours, seminars, and workshops
	• Mentoring schemes (domestic or international mentors)
	• Personal security measures (e.g., for judicial staff)
		• Time and motion studies, institutional mapping, needs assessment
		• Clear transformation "vision" and strategic framework
		• Budgetary independence
		• Updated case/record management systems
		• Provision of leadership and management training
		• Adequate financial and administrative policies, procedures, and management structures
		• Strengthened infrastructure (court/prison rehabilitation, etc.)
		• Interim use of international staff (judges, prosecutors, lawyers, police, etc.)
		• Use of hybrid or special courts
		• Specialized courts
		• Coordination mechanisms (justice sector working groups, court user committees, etc.)
		• Administration capacity building and modernization (e.g., human resource and financial management)
		• Law reform
		• Change management/organizational change expertise

INTEGRITY	• Vetting procedures for prior human rights abuses • Transparent, merit-based recruitment and promotion procedures • Fair and transparent salary scales • Disciplinary procedures • Internal oversight and accountability mechanisms and procedures, such as judicial inspection schemes, complaints mechanisms; anticorruption bodies, internal investigation units • External accountability mechanisms (court monitoring scheme, ombudsman, human rights commission, etc.) • Code of conduct/ethics • Professional associations • Laws/constitutional provisions protecting independence of the judiciary (separation of powers)	• Interim use of international judges, prosecutors, lawyers, etc. • Use of hybrid or special courts • Credible vetting and appointment processes • Adequate legal framework • Disciplinary procedures • Internal and external accountability mechanisms (e.g., ombudsmen, civilian oversight bodies [court user committees], community scorecards, complaints hotline, court monitoring, etc.) • Representative staffing policies • "Freedom of information" legal frameworks • Budgetary transparency • Publication of annual reports • Ratification of key international treaties and incorporation into domestic law • Disclosure of annual budget and spending

Summary of Potential Responses to Identified Rule of Law Challenges *CONTINUED*

CHALLENGE	PERSONNEL
ACCESS TO JUSTICE	• Assessments—knowledge, attitude, and perception surveys; study of nonstate justice systems • Mobile courts • Creation of state-sponsored legal aid offices/scheme (e.g., public defenders) • Nonstate legal assistance: – law clinics – bar associations – community-based paralegal services – NGO-supported legal aid • Support for alternative dispute resolution, small claims tribunals • Distribution of legal information—plain language legislation and legal documents; public awareness campaigns (e.g., posters, media, radio, newspapers) • Public access to information—libraries, research centers, hotlines or help desks/information kiosks at courts • Law reform—sentencing and detention alternatives, waiving of court fees for the poor, etc. • Reduce litigation costs (e.g., bail, transcripts, filing fees) • Sensitizing justice sector stakeholders to cultural, linguistic, and religious needs of minorities • Secure court premises; victim and witness protection • Civil society capacity building • Codification/enhanced linkages between state and nonstate justice systems

Kenya's Judiciary: A Transformation Experience

Kenya's Judiciary:
A Transformation Experience

This chapter contains the material for the final exercise in the "Toward a Rule of Law Culture" course. The exercise focuses on the transformation of the Kenyan judiciary and has been designed for use by course participants working in small groups. The exercise requires participants to put the rule of law culture approach into practice by drawing on the skills, tools, and knowledge explored throughout the course and contained in this guide.

CHAPTER HIGHLIGHTS:

- A real-world illustration of efforts to achieve a rule of law culture

- Change can fundamentally transform a people and an institution

- Transformative leadership in practice

- The challenges of balancing the provision of justice and the provision of security

- Seeing a systematic approach in practice

Contents

Introduction

The following exercise is based on desk research and a series of interviews—conducted in Nairobi, Kenya, in 2014—with members of the Kenyan judiciary, civil society representatives, and other justice sector stakeholders. A special thanks must be made to Judge Joel Ngugi, head of the Kenya Judiciary Training Institute, for his valuable guidance on the content and assistance in arranging key judicial interviews.

The Kenyan judiciary's transformation experience represents an ongoing endeavor to establish a strong rule of law in Kenya through the application of a rule of law culture framework. From determining a vision, to adopting a holistic approach to the justice system, to applying a systematic approach to creating change, the judiciary's experience reveals in real-time the benefits and challenges of a rule of law culture approach. The experience provides readers with a unique opportunity to analyze and critique the rule of law culture approach, to learn lessons from Kenya's experience, to take inspiration, and to pass that inspiration on to others.

Background Information: Kenya

Kenya is located in East Africa and is bordered by Somalia, Ethiopia, Sudan, Uganda, Tanzania, and the Indian Ocean. The capital of Kenya is Nairobi. The country has a population of over 44 million people divided among forty-two ethnic groups.

Approximately 75 percent of the workforce is engaged in agriculture, mainly as subsistence farmers. The unemployment rate is estimated at 40 percent.

Recent Political History

Independence. Kenya gained independence from the United Kingdom on December 12, 1963, and formed a republic one year later. Jomo Kenyatta, head of the Kenya African National Union (KANU), became Kenya's first president in December 1964. He led Kenya until his death in 1978.

Multiparty elections. From 1982 to 1991, Kenya was officially a one-party state led by KANU. In response to public protests and international pressure, Kenya held its first multiparty election in December 1992.

During elections held in 1992, 1997, 2007, and 2013, government officials and their supporters allegedly incited violence and hostility among political and ethnic groups with impunity in their attempts to retain power. Efforts by religious leaders, civil society, legal professionals, and others to reform the outdated constitution were persistently thwarted by political players.

2007 general election. In the election held on December 27, 2007, the two main presidential candidates were the incumbent president Mwai Kibaki (of Kikuyu ethnicity), and Raila Odinga, a member of parliament (of Luo ethnicity).

Initial results indicated that Odinga was leading Kibaki by at least 200,000 votes. The final results were delayed for several days, fueling public tension and accusations that the delay was a sign that the president's party was attempting to rig the elections.

On December 30, Kibaki was declared the winner of the presidential election by more than 230,000 votes. The result sparked allegations of ballot-rigging, and a number of reports showed voter irregularities.

Raila Odinga disputed the results, but refused to take legal proceedings, stating, "Everybody knows that the courts in Kenya are part of the Executive and we do not want to subject ourselves to a kangaroo court."

Violence erupted. More than 1,300 people died. Approximately 350,000 people were displaced between December 2007 and February 2008. By early February 2008, the loss to the economy was estimated to be over Ksh 100 billion (close to US$1.5 billion).

National Dialogue. The Kenyan National Dialogue and Reconciliation (KNDR) process began in January 2008. Negotiation teams representing the Party of National Unity (Kibaki's party) and the Orange Democratic Movement (Odinga's party) began talks under the auspices of former UN Secretary-General Kofi Annan and the Panel of Eminent African Personalities.

On February 28, 2008, President Kibaki and Raila Odinga signed a power-sharing agreement. The National Accord and Reconciliation Act 2008 was passed in March 2008 in order to give legal force to the power-sharing agreement and to lay the foundation for moving the country out of the crisis.

The coalition government committed itself to addressing long-term issues that may have constituted underlying causes of the prevailing social tensions, instability, and cycle of violence, including the need for constitutional, legal, and institutional reform. The government agreed to undertake comprehensive reform of the constitution and key governance institutions. Judicial reform was identified as necessary for restoring the credibility, integrity, and independence of public institutions in Kenya.

▶ **Political Crisis in Kenya: Moments 2008, by Rita Tinina**, https://www.youtube.com/watch?v=vHo7mPt36r4.

THE JUDICIARY

Since Kenya's independence, the judiciary has been controlled by the executive. Between 1992 and 2010, twelve reports on and strategic plans for reforming the judiciary were written. However, reform activities were ad hoc and, overall, ineffective.

A Gallup poll revealed that even before the election violence in 2007–08, just under half the interviewees had confidence in the judicial system. By mid-2009, that had dropped to below one-third.[1]

Following the election violence in early 2008, public confidence in the judicial system had virtually collapsed. Formal justice was seen as being available only to the wealthy and influential.

With both the government and judiciary recognizing the need to restore public confidence, a series of reform initiatives began in 2008. However, a 2010 report by the Taskforce on Judicial Reform found problems of corruption, political influence, and nepotism. The general lack of independence of the judiciary (controlled by the executive) persisted.

Addressing these challenges required a radical transformation of the relationship between the judiciary and the executive. This change was enacted through the new 2010 constitution.

2010 CONSTITUTION

On August 8, 2010, 69 percent of the Kenyan electorate voted to ratify a new national constitution. The new constitution provides for the transformation of not only the judiciary but also Kenyan society as a whole.

The new constitution upholds the independence of the judiciary. Article 159(1) states, "Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."

The constitution establishes a Supreme Court, and requires the establishment of an expanded Judicial Service Commission, an oversight body; the retirement of the chief justice; public interviews for recruiting new judges; and an independent and public vetting of judicial officials (including the chief justice). Vetting was conducted by the Judges and Magistrates Vetting Board, which consisted of three foreign judges.

THE NEW CHIEF JUSTICE

In June 2011, Willy Mutunga, a lawyer, intellectual, and reform activist with a strong civil society background, was appointed the Chief Justice of Kenya and President of the Supreme Court of Kenya. It was a controversial appointment, as he was not, and had not been, a judge; however, the public reception to the appointment was generally favorable.

The chief justice inherited a vast array of challenges:
- A backlog of court cases, estimated in 2011 as being approximately 1 million cases.
- Endemic corruption—a survey conducted in 2012 asked: "In your opinion are court officials trust-worthy?" A mere 16 percent of respondents answered affirmatively.
- Inefficient and ineffective case flow management—there was no systematic data collection mechanisms or detailed case statistics available, except for the number of cases filed and the number disposed.
- Poor terms and conditions of service for judicial and administrative staff—many staff members had received no job training; in some instances, no promotions had been made for over ten years; no pay review was in place, nor a pension plan.
- Pay/salary imbalances due to inconsistent salary scales—the pay disparities between judges and magistrates, on one hand, and judicial officers and administrative staff on the other, were acute.
- Poor infrastructure—in some court stations, staff worked in shifts in order to share the limited number of desks available; many court stations had neither running water nor toilet facilities.
- Absence of a clear transfer policy—judges could be reassigned to remote rural areas with no consultation and virtually no notice.
- Weak staff capacity—62 percent of all judicial staff had only primary or secondary education.
- Understaffing and artificial workloads due to unfilled approved positions—the judiciary operated with just 47 percent of all approved positions being filled. For example, although the law allowed for seventy high court judges, for years only forty-two of those positions were filled.

- Weak institutional and staff-performance management systems.
- Inadequate implementation capacity of institutional reforms recommended by the various task forces.

CONSIDER

In which quadrants of the capacity and integrity matrix (chapter 5) would you place the above challenges?

The new constitution provided a significant window of opportunity for the judiciary to address problems that had existed for years. Where previous attempts to reform had been frustrated by a lack of political will and financial support, now there was a clear and mandatory commitment (through the National Dialogue process) by the government to support and promote reform.

Under the guidance of the new chief justice, the "Judiciary Transformation Framework 2012–16" was launched. It set out a roadmap to transform the judiciary and to ensure equitable access to, and efficient and effective delivery of justice.

CONSIDER

- **In what ways does this transformation process appear different from previous reform efforts?**
  - For example, is there public support for the transformation?
  - Who else is supportive of this process?
  - Does the legal framework make change possible?
  - Who are the key change agents?
  - What is the benefit of having a transformation framework or roadmap as opposed to a detailed strategic plan?

- **What influence could these factors have on the likely success of the change initiatives?**

- **What more might be needed to ensure successful change?**

ADDITIONAL RESOURCES

Republic of Kenya, "Judiciary Transformation Framework, 2012–16," http://www.judiciary.go.ke/portal/assets/filemanager_uploads/Judiciary%20 Transformation%20Framework%20-%20JTF.pdf.

"The Constitution of Kenya, 2010" available at the *Kenya Law* website, http://kenyalaw.org/kl/index.php?id=398.

CHAPTER 6 ENDNOTE

1 Steve Crabtree and Bob Tortora, "Lacking Faith in Judiciary, Kenyans Lean toward The Hague," *Gallup*, August 5, 2009, http://www.gallup.com/poll/122051/Lacking-Faith-Judiciary-Kenyans-Lean-Toward-Hague.aspx?g_source=&g_medium=&g_campaign=tiles.

Part 1 | Applying a Systematic Approach

AIM: The aim of this small group exercise is to apply a systematic approach to creating change with a focus on the PLAN stage described in chapter 4. Based on the background information and additional information provided, participants are asked to undertake an analysis of the context, considering root causes, identifying stakeholders, and recognizing potential opportunities for intervention.

INSTRUCTIONS: The Judiciary Transformation Framework 2012–2016 (JTF) is the Kenyan judiciary's plan for change. It is structured around four pillars, namely:

1. People-focused delivery of justice
2. Transformative leadership, organizational culture, and professional staff
3. Adequate financial resources and physical infrastructure
4. Technology as an enabler

Each of these pillars, including its related strategic goals, is detailed below.

Each group will be assigned one of the four pillars.

As a group, you are to identify and describe *one proposed activity* that you believe will contribute to achieving one of the stated strategic goals of your assigned pillar.

Your group should discuss and explain the following:
i) Why you chose this activity. Describe your problem analysis and your theory of change, i.e., how does your activity link to one or more of the strategic goals you wish to achieve?
ii) The scope of the activity and any sub-activities.

Specifically consider the political and relationship dynamics of implementing the transformation, including who might resist this activity, who might be your supporters, and how you could engage the various stakeholders.

Be Creative, Innovative Change Agents!

Group One

People-Focused Delivery of Justice

"

"This Pillar is based on Article 159 of the Constitution, which states that while judicial authority is derived from the people of Kenya, it is vested in the Judiciary. It follows that this delegated authority should be exercised for the benefit of the people of Kenya. Under this Pillar, the Judiciary will pursue strategies aimed at creating a legal system that ensures equality of all before the law and an equitable legal process."

"

Source: Judiciary Transformation Framework, 2012-2016, Chapter 3, page 13.

The strategic goals of this pillar are:

- To provide equitable access to justice for all
- To improve public confidence in the judiciary by positively engaging the public and enhancing public awareness
- To promote stakeholder dialogue, collaboration, and partnerships between actors across the chain of justice

Design an activity that will address one of the above strategic goals.
In addition to the information provided in the Introduction handout, consider the following statistics:

A survey conducted in 2012 asked over five thousand Kenyans about their opinion of the judiciary:

- Less than one-half (46.2 percent) believe they can access law courts easily.
- Less than one-quarter (20.6 percent) perceive court procedures as being friendly.
- Only 30 percent thought it would be easy to access a lawyer if they needed one.

Another survey conducted in the same year produced similar results:

- Only one-third of the respondents knew that the Supreme Court was the highest court in Kenya.
- Two-thirds of the respondents did not know the different roles and mandates of the different levels of courts.
- Sixty-two percent said that they found the costs of accessing justice through the courts not affordable. The majority of respondents said transportation was the greatest cost.

CONSIDER

- **What are the "adaptive" questions** (questions related to the need for a change in attitude or behavior) **that must be answered?**

- **What role does adaptive change have in this problem?**

- **What impact do you want to have with your chosen activity?**

- **Who are the key stakeholders you need to involve in your activity?**

- **How does this activity address the responses in the two surveys conducted in 2012?**

Chapter 5, Part 1: Creating Change

Group Two

Transformative Leadership, Organizational Culture, and Professional Staff

"

"The Judiciary was the agency for the transformation of the Kenyan society imagined by the new Constitution. We, however, needed to re-orient the Judiciary from being an institution of self-entitlement to one of public service."

"

Source: Kalpana Rawal, Deputy Chief Justice, Kenya, at the Southern African Chief Justices' Forum annual conference, 2013.

The strategic goals of this pillar are:
- To promote culture change in the judiciary
- To optimize human resources staffing in the judiciary

Design an activity that will address one of the above strategic goals.
In addition to the information provided in the Introduction handout, consider the following information:

The Kenyan judiciary has traditionally been very hierarchical. Judges do not speak with magistrates, and magistrates do not speak with clerks. In a court building, when a judge walks down the corridor, everyone hides until he or she has passed.

The judiciary appears distant and remote from the public. According to the JTF, the public perceives the judiciary to be alien and insensitive. Its structure, rules, dress code, and other features have removed it from social reality.

Judges are required to undertake a wide range of administrative functions in addition to their judicial tasks, including managing budgets and attending various administrative committee meetings regarding the functioning of their court stations.

Many officers have been in one position for over ten years without any promotion. One staff member had served in the judiciary for thirty-nine years and had never attended a professional training course or workshop.

CONSIDER

- **What are the adaptive challenges** (challenges related to a change in attitude or behavior) **that you face?**

- **Are there any technical actions that can be taken to address these challenges?**

- **Who are the key influencers who can support and promote change?**

- **Who is likely to block your activity?**

- **What are the benefits of this activity?**

Chapter 5, Part 1: Creating Change

Group Three

Adequate Financial Resources and Physical Infrastructure

The infrastructural investment in the judiciary has been grossly inadequate. There are not enough court stations or rooms. Existing court stations and courtrooms are not user-friendly and suffer from years of neglect and underinvestment. The judiciary has historically faced inadequate funding from the government. The constitution now grants the judiciary financial autonomy through the creation of the Judiciary Fund. The judiciary's annual budget is to be held in this fund, which will be administered by the chief registrar and will finance the discharge of the judiciary's functions.

The strategic goals of this pillar are:
- To develop and maintain comprehensive court facilities
- To provide adequate working tools and other infrastructure
- To mobilize resources for successful implementation of the JTF

Design an activity that will address one of the above strategic goals.
In addition to the information provided in the Introduction handout, consider the following information:

The current judicial budget is Ksh 16.1 billion, which represents just over 1.3 percent of the Kenyan government's total discretionary expenditure. This is a big improvement on the past (in 2010 the judiciary received only Ksh 3.7 billion), but it is still significantly below the international benchmark of 2.5 percent of the national budget for judiciaries.

Further, the allocated budget is only 77 percent of the total amount requested by the judiciary in order to continue with its transformation programs and expand access to justice throughout the country.

To make things even worse, earlier this year, Parliament slashed Ksh 500 million from its total budget of Ksh 16.1 billion. This money had been allocated for the repair and construction of court buildings. Infrastructure in some court stations was so dire that in a court selected to be a pilot transformation court a cobra was found, as well as rats in the registry eating case files.

CONSIDER

- **Are these technical or adaptive** (related to attitude and behavior) **issues?**

- **Who are your enablers, i.e., the stakeholders you need to be involved to achieve your goals?**

- **What is your theory of change for your choice of activities? How will it contribute to achieving the goal?**

- **What outcomes do you expect to result from your activity?**

Group Four

Technology as an Enabler

Information and communication technologies (ICT) has an enormous potential to improve the administration of justice. ICT is an important and relevant tool that can be used in achieving many of the goals of the other pillars of the JTF. For example, when used properly, ICT can facilitate speedier trials—thereby promoting the Pillar 1 goal of improved access to justice—and enhance the efficiency and effectiveness of administrative processes—thereby supporting the goals of both Pillars 2 and 3.

The strategic goals of this pillar are:
- To develop a comprehensive ICT infrastructure
- To adopt automation and e-systems in judicial and administrative processes
- To build ICT human capacity in the judiciary

Design an activity that will address one of the above strategic goals.
In addition to the information provided in the Introduction handout, consider the following information:

Seventy-seven percent of the Kenyan voting population has access to a mobile phone. Only 41 percent have access to the Internet.

In a 2012 survey of fifteen hundred Kenyans, the most common reason (42 percent of all responses) for dissatisfaction with the judiciary was delays in court cases. One respondent with a court case pending said, "It is time consuming the way cases are handled and whenever you go to the court the cases are adjourned. Sometimes you have to travel from Upcountry to Nairobi to attend to a case. . . . It becomes tiresome."

Sixty-two percent said they found the costs of accessing justice through the courts not affordable. Three-quarters of these respondents said the greatest costs were transportation/travel costs.

Some court stations in Kenya still do not have reliable power sources. Only 21 out of 117 court stations have adequate wiring for an Internet network. Many senior judges are resistant to and unfamiliar with new technology, including e-mail.

CONSIDER

- **Are these technical or adaptive** (related to attitude and behavior) **issues?**

- **Who are your enablers, i.e., the stakeholders you need to be involved to achieve your goals?**

- **In what way does your activity promote a culture of the rule of law?**

- **How sustainable is the activity within the specific context?**

Chapter 5, Part 1: Creating Change

Conclusion of Exercise

Present your activity plan to the other groups.

- **Is your suggested activity one of the ones identified by the Kenyan judiciary?** See JTF, chapter 5, "Results-Based Matrix," 22–48.

- **In what ways does the JTF reflect a rule of law culture approach? In what ways does it not?**

"

The untold story of transformation is about the culture change in the Judiciary. It is the institution's most important achievement because it springs from a realisation first that the Judiciary is about administering justice—it is not about buying things and procuring services; it is not about megaprojects; it is instead about micro-actions of winning back the trust and confidence of Kenyans through better performance and service. . . . Finally, the best and surest way to entrench transformation far beyond the tenure of the current Chief Justice was by persuading the majority of Judiciary staff that, in terms of political economy, they have a stake in the transformation. They needed to fight for it.

"

Source: State of the Judiciary and the Administration of Justice Report 2012–2013, 120.

Part 2 | Critical Challenges to Justice and Security

This part focuses on two specific challenges currently facing the Kenyan judiciary. The first, the continuing high backlog of court cases, relates specifically to the need for improved delivery of justice and the strong administration of justice. Promising efforts have been made to address the improved delivery and administration of justice. Yet another challenge threatens to undercut these efforts. Faced with serious terrorist threats, worsening community-level insecurity, and lack of safety, the government's focus is shifting heavily toward the need for a stronger security response. The judiciary has been criticized for being soft on terrorist suspects, and the institution still struggles to attain budgetary independence, making it vulnerable to budgetary cuts by Parliament.

Chapter 1, Part 1, The Role of Rule of Law in Balancing Justice and Security

AIM: The aim of this small group exercise is to consider the "power and politics" component of promoting a rule of law culture. Course participants are asked to explore how a power and politics approach could assist the judiciary to promote a strengthened rule of law that promotes and protects a balance between the delivery of justice and the protection of rights and freedoms, and the provision of national and human security.

PARTICIPANT INSTRUCTIONS: Each group is to advise the chief justice on potential solutions to the challenge described below.

Specifically, groups should consider:
- The role of rule of law culture promoters as both *political players* and *strategic relationship builders*
- The full range of actors and institutions involved in an *effective justice system* and the role they should all play in ensuring justice and security

As a group, make a recommendation to the chief justice of *one political and/or strategic relationship-focused activity* that you believe can contribute to addressing either the backlog or security issue. Your group should discuss and explain:
1. Why you chose this activity—how does this activity address the political or strategic relationship elements of the rule of law? Who are the actors or stakeholders that the chief justice needs to engage and how?
2. The scope of the activity and any sub-activities—how will the chief justice implement your activity?

<div style="background:green">**Challenge 1:**</div>

Backlog

There is a significant backlog of cases within the formal judicial system in Kenya. In his 2011 progress report issued on the 120th day of his being in office, the chief justice stated that there were *1 million backlog cases*. In the High Court alone, there were over two thousand pending criminal appeal cases. Some cases have not been heard for as long as twenty years because their files are missing or incomplete. It was estimated it would take the high courts alone twelve years to clear their backlog, assuming no new cases are filed.

Public Perception

Case delays. In a 2012 survey conducted of 1,500 Kenyans, the most common reason (42 percent of all responses) for dissatisfaction with the judiciary was delays in the resolution of their court cases. In the same survey, 29 percent of respondents stated that their court cases had taken over one year to be determined by the courts.

Ninety-eight percent of cases are settled in the United States, compared with 8 percent in Kenya. Defendants have no incentive to settle when they can wait six-plus years for the High Court to hear their case and in the meantime hope the complainant will drop the lawsuit.

Traditional justice mechanisms. Many Kenyans are frustrated and dissatisfied with the court process, and there is a tendency to seek justice through traditional justice systems, which are considered more accessible, affordable, and timely.

These systems differ between communities and, generally, they address both criminal and civil cases including land matters, family disputes, domestic violence, theft, marriage, and divorce. Cases that cannot be resolved through the local chiefs, particularly serious crimes, are often referred to the courts.

Article 159(2)(c) of the 2010 constitution recognizes and promotes the role of traditional justice dispute resolution mechanisms as long as they do not contravene the Bill of Rights; are not repugnant to justice or morality or result in outcomes that are repugnant to justice or morality; and are not inconsistent with the constitution or any written law.

Traffic Offenses

According to the chief justice, two thirds of the backlog cases are traffic offense cases. Traffic offenses are a major source of revenue for the court, and the collection of bribes supplements the very low salaries of some corrupt police officers.

Stories of police demanding bribes from drivers for traffic offenses are common across Kenya. Those who refuse to pay the bribe and/or plead not guilty to the traffic violation can find themselves before a court. Generally, people are not familiar with the law and do not know what the penalty for committing a traffic violation really is. For example, the Traffic Act states that a person who fails to carry his or her driving license can only be fined up to Ksh 100. Routinely, individuals are fined up to Ksh 8,000.

The Role of the Police and Prosecutors

In 2013, the Independent Policing Oversight Authority released a baseline study of policing standards.

The study assessed police performance based on reviews of actual closed case files in five police stations in Nairobi. The studied cases established that the quality of investigations must be improved.

Overall, 64 percent of the criminal cases reviewed did not meet the minimum evidentiary threshold to charge a person with an offense. This was attributed to poor police investigations as well as unclear instructions from prosecutors. Only 25 percent of the cases taken to court resulted in convictions.

Technical Approaches to Addressing the Backlog

Since taking office, the chief justice has implemented a range of judicial initiatives designed to address the backlog issue.

A number of judges and magistrates, including 28 new High Court judges, have been hired specifically to help ease the backlog. In July 2014, the chief justice set up a special initiative for 11 newly appointed judges to spend two weeks assisting in the clearing of about 1,500 backlog cases in the civil division of the Milimani High Court in Nairobi before being posted to their working stations. The chief justice called the initiative "The Civil Cases Service Week." The Milimani court has the highest number of pending cases (more than 35,000) in the country. Of those, almost 8,500 are civil cases, and some have been pending for over fourteen years.

The chief justice redeployed three experienced chief magistrates to clear the backlog of cases in civil, criminal, and commercial appeals courts.

The *State of the Judiciary and the Administration of Justice Report, 2012–2013* details additional activities aimed at reducing the backlog:

- The Court of Appeal has digitized ten thousand records covering the years 1999 to 2010. Over one thousand cases that should be progressing in the High Court are awaiting arguments at the Court of Appeal. Parties in the oldest cases, filed as far back as 2004, are having their cases heard within one month so that their matters can be disposed of.
- Work is under way to create an electronically based system for monitoring and tracking overdue judgments and rulings, with a view to taking remedial action.
- A plan is being implemented to allow the public to access case information by short text messages (SMS).
- A major computerization of the judiciary has begun; the goal is to ensure that proceedings are recorded electronically.
- A suggestion by Kenyans to extend the sitting time of courts and to hold night courts is being considered.
- Judges who formerly had to sit on administrative committees, such as for procurement and tendering, are now being assigned purely judicial functions, that is, hearing and deciding cases.

- Performance-based management systems will be applied to both judicial and administrative staff.
- Deadlines on writing of judgments and hearing of cases will be strictly enforced.
- A total of 129 researchers will be hired to provide every judge with a research assistant to speed up judges' ability to decide cases.

Despite all the new technical initiatives introduced to address the backlog issue, the public and the judiciary are frustrated that the backlog of cases is still not decreasing fast enough.

Challenge 2:

Security

Security is a major concern for Kenya at the present time. Kenya faces a very real terrorism threat, as demonstrated most recently by the attack on Nairobi's Westgate mall, which killed over sixty people and left over one hundred injured. At the same time, a Small Arms Survey report based on interviews with more than 2,500 Kenyans across the country revealed that 42 percent of respondents believed there is a likelihood of their being a victim of violence and/or crime in the next year. The survey also showed that 42.5 percent of respondents feel unsafe when they are outside their homes at night.

Terrorism

Since 2011, Kenya has seen an upsurge in violent terrorist attacks by Somalia's Al Shabaab, which claims these attacks are in retaliation for the Kenyan military's ongoing intervention in southern Somalia. The attacks are also a response to what the group sees as the Kenyan state's mistreatment of Muslims, particularly in the coastal region where the killings of a number of clerics have gone unexplained. The failure of the government to effectively investigate these killings and disappearances of suspects has eroded community trust in the government, and fueled the belief that the Kenyan Anti-Terrorism Police Unit (ATPU) perpetrated the murders and disappearances. The ATPU has regularly arrested suspects but has delivered very few convictions in court.

The most high-profile attack was on September 21, 2013, when gunmen attacked the upmarket Westgate shopping mall in Nairobi. The attack, which lasted several days, resulted in at least sixty-seven deaths, including four attackers. Over two hundred people were reportedly wounded. Al Shabaab claimed responsibility for the attack. The parliamentary inquiry into the Westgate attack identified shortcomings across the police, the military, the intelligence services, and various government departments. Among its findings, the report referred to the negligence and unresponsiveness of the police to terror alerts in Nairobi, as well as a widespread lack of discipline.

In April 2014, following attacks in Mombasa and Nairobi by unknown perpetrators that killed twelve and injured at least eight, six thousand police were deployed to Nairobi's Eastleigh neighborhood to arrest foreign nationals (mainly Somalis) who were in the country unlawfully and anyone suspected of terrorist links.

A report on the operation from the Independent Policing Oversight Authority found that police were responsible for widespread misconduct, including instances where officers took bribes in exchange for releasing detainees. Human rights groups reported that police raided homes, buildings, and shops; looted cell phones, money, and other goods; harassed and extorted residents; and detained people without charge and in appalling conditions for periods well beyond the twenty-four-hour limit set by Kenyan law.

These events have all contributed to a deep mistrust between Somali/Muslim communities and the government and its security institutions. These communities feel targeted, profiled, and victimized. They are increasingly reluctant to engage and cooperate with justice and security institutions to resolve community security concerns and address terrorism.

At the same time, Kenya faces many other domestic security concerns beyond terrorism.

Human Security

In 2013, the Police Act was amended to allow police to use firearms not just to protect life or in self-defense but also to protect property, to stop someone charged with a serious crime from escaping, and to stop someone who is helping someone charged with a serious crime to escape. These additional grounds are contrary to international standards on use of force, and human rights groups fear that they may facilitate unlawful killings.

In 2012, 62 extrajudicial killings occurred at the hands of police. In 2013, that number rose to 143, with 87 killings by police occurring in Nairobi County alone. In the first seven months of 2014, 176 extrajudicial killings had occurred, with 129 of those occurring in Nairobi. These figures represent more than a 280 percent increase in the number of extrajudicial killings by police in less than two years. The police act with almost total impunity. The Independent Policing Oversight Authority has not taken a single case against a police officer for misuse of force.

The Kenyan police force is hampered by limited resources, poor pay, poor working conditions, a lack of capacity, and a deep-rooted lack of professionalism after years of being used as a tool of repression by the political elites. The police force is regarded by Kenyans as the most corrupt state institution. People tend to rely on private security companies, barbed wire, guard dogs, small arms, and other weapons to protect their homes, property, and families.

In 2013, the Independent Policing Oversight Authority released a baseline study of policing standards. The study assessed police performance based on reviews of actual closed case files in five police stations in Nairobi. The studied cases established that the quality of investigations must be improved.

Overall, 64 percent of the criminal cases reviewed did not meet the minimum evidentiary threshold to charge a person with an offense. This was attributed to poor police investigations as well as unclear instructions from prosecutors. Only 25 percent of the cases taken to court resulted in convictions.

International Justice Mission (IJM), an NGO based in Nairobi that works with both the prison service and the police, found that around 20 percent of persons awaiting trial in Kenyan prisons are victims of police abuse. Many poor Kenyans cannot afford to pay bail or to hire a lawyer. Arrest carries a heavy social stigma and can result in the loss of livelihood, the disruption of family life, and even divorce, and rejection by the accused's community.

Conclusion of Exercise

Present your activity plan to the other groups.

CONSIDER

- Why might a strengthened judiciary face resistance and criticism from other sectors of government or society?

- How important are political and strategic relationship-focused initiatives in the transformation process?

- Why are these initiatives often difficult to define and implement?

Watch the following interview with Chief Justice Willy Matunga and consider the questions below.

IDLO Interview with Dr. Willy Mutunga, (2012).
https://www.youtube.com/watch?v=Hg1tVixhCp4.

CONSIDER

- What was the first debate that the chief justice initiated?

- What were some of the challenges he faced when he assumed office?

- What was his experience of change?

- What was his change strategy, and why did he adopt this particular strategy?