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report

The Rule of Law as the Measure of Peace?

Responsive policy for reconstructing Justice and the Rule of Law in post conflict and transitional environments

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Paper for UNU-WIDER Conference on ‘Making Peace Work’
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The Centre for Humanitarian Dialogue is an independent and impartial organisation, based in Geneva, Switzerland, dedicated to the promotion of humanitarian principles, the prevention of conflict and the alleviation of its effects through dialogue.

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1 Summary

The paper[1] argues that reconstruction in the justice and rule of law sector is a priority from the moment a conflict allows for an assistance intervention, as it is pivotal to building and sustaining peace, and ensuring development. It illustrates linkages between justice and the rule of law and other key sectors, and discusses how issues of power, politics and national ownership are especially complex, important and insufficiently tackled in this area. It describes how solid strategic thinking on how to design and implement programmes in this sector has been lacking due to an overly technical approach from the assistance community. It draws comparisons between economic and social assistance experience and research to make recommendations as to how to make policy

1 Paper produced for UNU-WIDER Conference on *Making Peace Work* Helsinki 4-5 May 2004, and also available on UNU-WIDER's website at http://www.wider.unu.edu/conference/conference-2004-1/conference2004-1.htm.

for reconstruction in the sector more responsive, effective and efficient. These recommendations include:

- Analyse the issues of power involved in justice and rule of law reform and programming, and ensure explicit responses to them are designed and implemented
- Assess people's current daily needs in justice, not just institutional structures
- Further develop qualitative indicators for development in justice and rule of law to reveal impact and outcome, not just output
- Ensure that communications strategies for justice and the rule of law programming are developed and implemented
- Make judicious use of comparative regional and cultural analysis
- Devote greater effort and resources to identifying transitional strategies and mechanisms for justice and rule of law assistance in 'no peace, no war' and complex post-conflict situations, and to suggesting workable prioritisation and sequencing patterns which can be adapted to individual cases.

2 Introduction

In the early 1990s, elections were the darling of the international assistance community, taken as the high water mark of a successful transition from conflict to peace. When examples like Cambodia started to demonstrate that elections alone might not suffice, the assistance community thought again, turning to other symbols like constitutions as the guarantors of lasting peace. Then the mid to late 90s juggernaut of wholesale state-building exercises overshadowed the peace-making scene, with its bewildering array of challenges and priorities: should peace and stability be prioritised over justice for the crimes of the conflict? Which institutions of a failed or new state should be built first? Does creating a health system take simple precedence over building the economy and creating jobs or vice versa? How should you involve or not involve elites, belligerents, ex-combatants, the general population, minority groups, the Diaspora in any or all of these decisions? Now, early in the first decade of the 21st century, in a world no less messy if slightly less plagued with deadly combat in terms of numbers of conflicts ongoing, some amongst the assistance community have started to see reconstructing justice systems and re-establishing the rule of law as the centrepiece for making peace work.

In response to this new interest, an experienced field of endeavour once known as 'law and development' has been dragged out of its comfortable seat round the development table, and asked to freshen

itself up as a global enterprise for application to difficult and dangerous newly post conflict and transitional environments. 'Law and development' is a well-respected sector dealing often with community-based, longer-term initiatives such as improving the legal status of poorer populations in relation to land tenure. Although of course its activities still persist, its new incarnation has several guises as a sector or set of programmes, known sometimes as justice and rule of law (ROL), justice and security sector reform, or governance, to name but a few. As sectors of specialism do, it has generated or joined forces with, a phalanx of organisations, programmes, consultants and experts[2]. The agencies and programmes of the United Nations have been agonising about where among them it belongs and who is best suited to take care of it[3]. It has even piqued the interest of the United Nations' Security Council, which has requested a report on ways to harness international expertise and experience in order to improve efforts to establish justice and the rule of law in post-conflict situations[4].

This fervent interest looks far from being on the wane. Given this, the two questions this paper will address are first, why this is something which warrants serious and lasting commitment, i.e. why the assistance community should indeed be placing justice and the rule of law at the heart of its efforts to make peace stick; second, the paper will examine what have been the shortcomings in terms of policy and approach, of the assistance community's attempts to do this to date. In analysing those weaknesses, it will also offer some suggestions about how they might be overcome. These suggestions are based on the recognition that complex individual country problems are not amenable to generic solutions; however they do imply that more generic diagnostic tools of what needs to be taken into account can be of service, and that the broad disciplines of social science and economics could borrow from each other more constructively in this regard.

When speaking of a sector comprising the reconstruction of justice systems and the rule of law, the paper intends to refer to activities relating to the following illustrative areas: international and national police forces, their selection and training, their specialisms in, for example, counter-terrorism, counter-narcotics, organised crime, intelligence services; the judiciary, the international and national prosecutorial and defence services, their selection and training, court infrastructure and administration including translation services; specialised areas in justice such as juvenile, military, crimes against humanity and war crimes, informal or traditional systems; the development of the legal profession and legal education; penal systems, their international and national staff, their selection and training, prison administration and standards; legislative policy issues such as review, reform and drafting which could include considerations of applicable law, constitution drafting or reform,

2 For example: the International Human Rights Law Group, the International Bar Association, The International Centre for Transitional Justice, the International Legal Assistance Consortium, institutional programmes like the United States Institute for Peace Rule of Law Programme; donor budget lines named for governance and the rule of law, or donor programme strategies like DFID's Access to Justice or UNDP's Justice and Security Sector Reform Unit

3 *Final Report, ECPS Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations*, United National Department of Peace Keeping Operations, August 2002

4 At a meeting on 24 September 2003

codes relating to crimes and serious crimes, civil issues - in particular land and property - commercial and fiscal matters and the civil service; customs and border control; human rights protection and promotion, human rights institutions; public oversight mechanisms; and the development of sustainable fiscal frameworks to support institutions in the sector.

The paper does not train its focus on the role of justice for the crimes of conflicts past and present. This is not because it fails to recognise that these issues of transitional justice are indeed crucial to societies in processing and moving on from the trauma of war. As the Commission on Human Rights stated in a 2003 resolution[5] :

'Accountability of perpetrators, including their accomplices, for grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system, and ultimately, reconciliation and stability within the state'.

A further marker of importance is the heat of the debates surrounding the supposed but contested dichotomy between peace and justice, which has been used to justify the pursuit of stability at the price of allowing continued impunity in places like Afghanistan. Rather, the paper works from the premise that these vital considerations have been well-argued[6] and have received much attention; however those considerations have too rarely been put into the broader context of the other factors that can promote and nurture peace to which justice and rule of law establishment can contribute. Furthermore the paper tries to anchor the more philosophical arguments about why justice and the rule of law matter to peace into a concrete discussion of how policymakers can make them work in practice.

The paper will draw largely on a range of examples, including Afghanistan from early 2002 to date, Cambodia during and post the United National Transitional Authority in Cambodia from February 1992 to September 1993 and East Timor during and post the United Nations Transitional Administration in East Timor from November 1999 to June 2002. Although it will allude to the rich experiences and literature relating specifically to the international administration of post conflict territories, the paper aims to look at post conflict transitional countries in general, the majority of which, if we scan the globe of today's conflicts, are likely to have their own government, however weak or flawed.

5 Commission on Human Rights Resolution 2003/72:25 April 2003

6 See, for example, *Beyond Retribution: Seeking Justice in the Shadows of War*, Rama Mani, Cambridge: Polity/Blackwell 2002

3 Carpe Diem: the brief window of transition

Before describing how justice and the rule of law can provide the glue for the complex business of rebuilding shattered nations, the paper will clarify the temporal focus of the discussion. This involves reframing our understanding of the boundaries between conflict, transition, post conflict and development. It places the burden of the paper's discussion at a point in time well before an uncontroversially developmental phase has taken root, thus before we might comfortably be able to say that sustainable peace is alive and well. This is not to detract from the importance of a continuing focus on justice and rule of law in the development process; rather, the aim is to stress the imperative of bringing them into the discussion of how to end a conflict and deal with its consequences not just earlier, but at the very beginning.

In fact, the argument is that there has been a failure to bring them in early enough, which, in combination with a failure to understand the sector and its institutions holistically, has undermined the assistance community's capacity to help war-torn nations make peace work for them. Not only are there substantive reasons for putting justice and the rule of law close to the top of the list from the earliest days of involvement, but there are also crucial contextual ones: the time when the most money, attention and political will is available comes very soon after a peace agreement is concluded, and, famously, does not last. East Timor looked on nervously as Afghanistan took its place in the brief sun of media and international interest; Afghanistan watched events unfold anxiously in Iraq for the same reasons. Some desperately needy countries like the Democratic Republic of Congo, barely make it into the spotlight at all.

Experience has taught us that a smooth linear path from humanitarian assistance to long term development was something of a figment of our often too tidy minds. Evaluation after evaluation has suggested that we need to be more strategic in our prioritisation and action, working on several fronts at once in different ways[7]. In the same way, we are still learning that the place where conflict ends and post conflict recovery begins is not a neat stage on a timetable marked by the signing of peace agreements.

Ceasefires and peace agreements are hammered out under pressure and as a result of this time constraint are almost of necessity imperfect. The best we can hope for them is that they provide sufficient cover for the real issues to be worked out over time

7 E.g. *A Review of Peace Operations: A Case for Change*, King's College London, March 2003, *Comprehensive Review of the Whole Question of Peacekeeping Operations in All Their Aspects: Report of the Panel on UN Peace Operations* UN document A/55/305-S/2000/809, 21 August 2000 (the Brahimi Report)

without wrongly prejudicing any critical questions. What this means is that the situations to which we are keen to apply our post-conflict solutions, such as Afghanistan or Liberia, are more accurately described as situations of transition than of strictly post conflict. This does not mean transition from international control to national control (although that may sometimes be the case), but a transition from a state of conflict, insecurity and instability, to one where peace, security and stability prevail even if imperfectly. Until the chances that serious conflict or unrest might break out again are significantly reduced, we cannot say with any confidence that peace is in the ascendance over conflict. The outbreak of renewed violence in Kosovo in March 2004 was a vivid and saddening example of this.

Thus the priorities within the sector may change along with the context and political realities, both internal and external. What does not change is the need for the sector as a whole to be identified as a priority from the earliest possible moment in time both for the substantive reasons explored below, and for the painfully pragmatic reason that only then are the greatest resources, attention and will available.

4 Justice and rule of law as the centrepiece for making peace work

'As in Bosnia, so in Iraq, everything depends on the early establishment of the rule of law: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and the courts. The process is sequential.... [W]hatever our differences, the paramount importance of establishing the rule of law as the foundation of democratic development remains the same. And here, the first hours are the ones that matter most. In Bosnia and Kosovo we paid a bitter price for not establishing the rule of law early. It is not a mistake we should repeat in Baghdad.'[8]

8 *What Baghdad can learn from Bosnia*, Paddy Ashdown, The Guardian, 22 April 2003

These words of Paddy Ashdown's which express the relationship between the establishment of justice and the rule of law, and of peace, ought not to be particularly controversial. It seems

unnecessary to make an argument for the proposition that all societies need institutions to place limits on the use of force, settle disputes, and provide redress for criminal acts, together with mechanisms to enforce property rights and contracts. In each country the extent to which these needs are met by formal or informal systems will depend on the nature of the issue and parties in question, and the specific conditions of the country (culture, religion, income level, literacy, technology)[9]. It will also depend on that country's status vis à vis conflict and peace.

War-torn countries and failed states, far from manifesting a lack of such systems, are more likely to exhibit many different kinds – both formal and informal. Afghanistan and Somalia are cases in point where different secular and religious regimes and frameworks are in use across the country, interpreted by trained and untrained people, sometimes alongside or separate from a range of traditional practices which may have ethnic, religious or other roots. Nature abhors a vacuum in dispute resolution as much as in anything else. The result of conflict is thus not likely to be a lack of systems for addressing this issue, but, less neatly, a proliferation and fragmentation of such systems, especially outside urban centres where at least the bare machinery of state may still survive. The result is that institutions of justice and rule of law can become localised to a community or group, and are not institutions that can bind people through shared values and identity across the borders of province, district, clan, family and more that may lie between them. In a society that needs to solder itself back together, this state of affairs is at best a missed opportunity, and at worst a downright danger.

In a world where developed societies have increasingly privatised or outsourced what used to be state functions, there is a strong argument for saying that if anything really represents the state anymore, it is the institutions of national security, justice and the rule of law – the defence forces, the judiciary, the police, the penal system. There are those that argue for bypassing the state to achieve the best results in dispute resolution, especially for the poorest[10]. This debate belongs very much in a developmental context, where poverty reduction and anti-corruption are guiding stars, and where people's daily security and livelihood are not at real threat from imminent or actual state collapse and conflict. But when dealing with countries torn apart by conflict, along whatever lines, one of the most obvious solutions to healing rifts is to provide the people of that country with something they can all share and believe in together; indeed this may not only embody the gentle art of healing and reconciliation, but may represent a much tougher political imperative: if you do not give the people common goods in which to believe and partake, they have every reason to remain at odds with one another. The suggestion then, is that a strong, credible state apparatus providing

9 *Institutional Reform and the Judiciary : which way forward?*, Roumeen Islam, World Bank Policy Research Working Paper 3134, September 2003

10 *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Stephen Golub, Carnegie Endowment for Peace, Democracy and Rule of Law Project, Working Paper No. 41, October 2003

justice and the rule of law in a way that is perceived as fair, fast and effective is something that gives people a real, tangible reason to buy into that state. It is a question of building that fragile, hard-to-measure political trust which Onora O'Neill feared in her 2002 BBC Reith Lectures that developed democracies like the UK, at the other end of the spectrum, are in danger of regulating and legislating out of existence[11].

Taking the argument the other way around, Simon Chesterman proposes that the legitimacy of an international transitional administration like East Timor's exists through 'governance, promotion of the rule of law and basic economic goods'[12]. The emphasis is presumably on the fact that you need not only to have systems and laws, but to be able to enforce them, to be able to deliver. It does not seem unreasonable to apply the same measure for legitimacy to national transitional administrations like Afghanistan's. In either case, the state needs to provide certain fundamental goods and services to justify its existence to its people, not just because they are goods in themselves, but because the existence of a functional state is seen as a vital necessity in shoring up the country against existing and future threats to its stability and security.

The International Council on Human Rights Policy[13] gives an example of a wasted opportunity in this regard, from Cambodia in the 1990s. Because assistance actors had identified that state institutions were weak and corrupt, and because some of them had only limited funds, they chose not to work with the state institutions, pouring their resources instead into what was then a very nascent Khmer civil society. The result, unsurprisingly, is that access to justice and respect for human rights in Cambodia are considered today to be unacceptably poor, despite more than a decade of donor engagement. Khmer Rouge leaders have not been brought to justice for the egregious crimes they committed. The state institutions remain weak, surrounded by strong, reformist NGOs who are not in a position to provide the services on whose quality they advocate, and who are themselves able to identify that 'Cambodia still has no rule of law, and no institutions: only personalities and personal power'[14].

Thus, access to justice within a culture that respects the rule of law are not simply objective goods in themselves, they are political goods which weigh in on the side of the state against fragmentation or at worst, anarchy. A remark that Chesterman makes about the common, fallacious *tabula rasa* assumption that the international community has made in the case of international transitional administrations, clarifies the point:

'One of the errors that is often repeated in these situations is the conscious or unconscious assumption that, when the institutions of the

11 'Confucius told his disciple Tsze-kung that three things are needed for government: weapons, food and trust. If a ruler can't hold on to all three, he should give up the weapons first and the food next. Trust should be guarded to the end: 'without trust we cannot stand'. Confucius' thought still convinces. Weapons did not help the Taliban when their foot soldiers lost trust and deserted. Food shortages need not topple governments when they and their rationing systems are trusted, as we know from WWII.' Onora O'Neill, BBC Reith Lectures 2002, Lecture One: *Without Trust We Cannot Stand*

12 *You, the People: the United Nations. Transitional Administrations and State Building*, Simon Chesterman, OUP, May 2004, p. 112

13 *Local Perspectives: Foreign Aid to the Justice Sector - Main Report*, ICHRP, June 2000

14 ICHRP, ibid, p. 41, quoting a Cambodian human rights activist

state collapse or are so divided as to be dysfunctional, politics ceases to happen. In fact, the control of power becomes more important than ever, for the very reason that it may be exerted through informal or incoherent means.'

Nature abhors a vacuum here too. Not only does the reconstruction of the systems and institutions of justice and the rule of law help pragmatically to get a country on its feet and running again, but on a deeper level it provides the political foundations and justifications for the peace and nation building project. It provides a necessary restraint on power, gives unity and identity to the state, and in doing this, acts as a brake on possible future conflict.

5 Missed Opportunities: weaknesses in approaches to justice and the rule of law assistance

The paper now turns to look at some of the ways in which the assistance community and the governments it seeks to assist have failed to harness the potential of prioritised justice and rule of law reconstruction programmes in their approach to the sector. It will not focus on the weaknesses of particular programmes, which are amply described in the literature referred to and beyond, but on how the international community and the governments who receive their aid have missed critical windows of opportunity in time, underselling not only the issues of justice and the rule of law themselves, but those upon which they touch.

Too hot to handle: the sovereignty question

If we are prepared to accept the argument that the institutions of justice and the rule of law embody, to some extent, the state, we must also face the fact that this makes them extremely sensitive areas in which for outsiders to get involved. They symbolize the power and sovereignty of the state and thus any involvement with them is of necessity political, and cannot pretend to remain purely technical.

While it is obvious that international transitional administrations have to tread especially carefully around these natural sensitivities, international assistance to national transitional administrations has to

remain equally vigilant. The reason for this is that most countries in this situation are so dependent on massive international support, with overwhelming proportions of their national budgets represented by aid money, that the issues of sovereignty and who is setting the pace remain extremely pertinent.

Fearful of accusations of colonialist behaviour, the international community has thus shied away from tackling particularly contentious areas, like land tenure. This has the effect of exacerbating already complex, difficult problems by neglecting them, and delivering to fragile, capacity-weak national institutions caseloads which they may not be equipped to handle[15], either technically or in terms of their political ramifications. Uncomfortable issues in Kosovo and to some extent East Timor (in the early days of the United Nations' transitional administrations in both territories) about who constitutes the judiciary and how they are chosen are eloquent of this. Hastily appointed national judges had to be replaced or teamed with international judges, in an unpopular move seen by nationals as a policy u-turn on the part of the United Nations. In Afghanistan everyone, national and international, talks about the strong links between the judiciary and one of the most powerful of the so-called warlords, but so far the political will from within and without has not proved sufficient to tackle what everyone admits to be a glaring problem in terms of the independence, quality and capacity of the judiciary.

15 *The East Timor Reconstruction Program: Success, Problems and Trade Offs*, Sarah Cliffe and Klaus Rohland, World Bank CPR Working Papers No. 2; *The Ottoman Dilemma: Power and Property Relations under the United Nations Mission in Kosovo*, Lessons Learnt and Analysis Unit of the EU Pillar of UNMIK, August 2002

Another political problem that any institutional reform efforts may face is the recalcitrance of well-ensconced ruling elites to countenance anything which undermines their privileges. There are many ways in which they can present their recalcitrance not as vested interest, but as a desire to protect the threatened sovereignty and national character of the institutions they claim to represent. Exploiting the skills of the Diaspora is an interesting example here: both East Timor and Afghanistan have numbered (and continue to do so) nationals from their Diaspora amongst cabinet members and prime movers in government. Negotiating a way in for these individuals, who bring rich skills and experience, but not the authentic experience of having lived with their brothers and sisters through conflict or struggle, can be a political minefield. Their reforming efforts can be presented as a Trojan Horse bringing values counter to the national interest by those whose interests may be threatened.

"by being involved in this sector, we are required to confront power itself

We are thus faced with a paradox: if we recognise that there are deeply political aspects to reconstructing justice and the rule of law, we are confronted with the sovereignty of national politics. To be more explicit, by being involved in this sector, we are required to confront power itself. The possible responses range from doing nothing and accepting the consequences of that neglect, to ignoring the political aspects and focussing on purely technical ones, to finding

a way of constructively and sensitively engaging with the issues on the political level as well as the technical level. It takes implementers with advanced political and diplomatic skills to dance this particular dance. Often those who design and implement programmes have a specialised technical background, but are not trained or experienced in operating at this strategic, powerful level. These problems are discussed further below (page 15).

Switching off the tunnel vision: how justice and the rule of law underpin other sectors

Simon Chesterman notes that the international community has a tendency to conflate armed conflict and criminal activity more generally[16]. This point could be developed further, to suggest that there is a tendency to highlight the criminal over the civil in general, and not to distinguish sufficiently between ordinary people's daily needs from a justice system, and the national level questions of bringing to justice the perpetrators of major war crimes. Both are of the utmost importance, but require different responses.

16 Chesterman, ibid, p. 181

To give an example, a commentary by Sarah Cliffe and Klaus Rohland of the World Bank on the state of affairs in East Timor on independence, notes that:

'gaps in core legislation, and roadblocks in the justice sector are causing constraints in every other area of development' giving examples such as that *'the civil service cannot systematically sanction bad performance because no legal framework exists; citizens who complain about bribery cannot expect redress or accused civil servants expect due legal process; private sector development cannot take off because firms cannot rely on stable property rights or enforcement of contracts. These weaknesses limit long-term recovery and diminish faith in the institutions of the post-conflict state, which in turn risks the re-emergence of social unrest or destabilising political forces'*[17].

17 Cliffe and Rohland, ibid, p. 20

A different example from Afghanistan illustrates neatly how land issues are of the utmost importance in predominantly agricultural economies because they are the key to livelihoods and survival and thus of deep, political significance to ordinary people in a way which a government would do well to take into account:

'*Discontent over the land issue is one of the factors behind growing disenchantment with President Mohammed Karzai's Western-backed government. One of Karzai's first acts was to ban further land distribution, in recognition of the fact that the warlords would simply grab it for themselves. This freeze is thawing in many areas – further undermining the president's authority*'[18].

18 *Legal Aid for Returnees: the NRC programme in Afghanistan*, Conor Foley (NRC), Humanitarian Exchange Number 26 (Humanitarian Practice Network, Overseas Development Institute), March 2004

While arguments for the social value of justice and security are relatively easy to make, the literature is empirically stronger on links between justice and the rule of law and economic and commercial development of the kind suggested by Sarah Cliffe and Klaus Rohland. This imbalance in the literature is partly due to the fact that more sophisticated (and probably better resourced) tools exist to measure economic performance rather than social development. A further factor may be a sense of moral force behind arguments for the linkages between justice and rule of law and improved social indicators, which can make those putting the arguments feel, perhaps justifiably, that they do not require hard data to be convincing – or right. The link between female literacy and the respective family's health and well-being has been proven, thus does the need for families to feel safe sending their girl-children to school without fear of their being abducted or assaulted require further argument? Given that we accept the relationship between landlessness and economic disempowerment in agricultural societies, do we need to construct arguments as to how small land-holders, share-croppers and others require legal protection from more powerful individuals who may otherwise exploit them? Having said that, there are World Bank studies which show strong correlation between rule of law and development indicators such as gross national income and infant mortality.[19]

19 *Legal and Judicial Reform: Strategic Directions*, World Bank, Legal Vice Presidency, Paper 26916, January 2003

The more traditionally recognised sectors of assistance, such as health, or education, have taken a while to wake up to the fact that justice and rule of law issues are highly relevant to their areas of expertise in order to guarantee access to basic services for all citizens, and to ensure accountability of government for the range of services it does – or does not but should – provide to its people. As organisations have become more sophisticated about understanding the structures, policies and process that underlie conflict, poverty and neglect, so they have begun to make these linkages more explicit. The policy and advocacy work of Care International, a humanitarian and development NGO, in Afghanistan provides a good example of this: Care led a consortium of NGOs to conduct a survey about how security and related issues affected the lives of ordinary Afghans[20], both in order to be able to advocate credibly on their behalf, but also to understand the constraints affecting those with whom Care and its consortium partners are trying to undertake humanitarian and development programmes. The survey showed that the highest priorities for Afghans in terms of improving their security, at 33% and 23% respectively, are disarmament and the strengthening of an accountable Afghan police force and army. Care has also worked closely with organisations such as the Centre for International Cooperation to analyse flows and priorities in donor funding for Afghanistan and the impact this has on fundamental issues such as

20 *Speaking Out: Afghan Opinions on Rights and Responsibilities*, The Human Rights Research and Advocacy Consortium (Afghan Organizations: Afghan Development Association, Afghan Independent Human Rights Commission, Agency for Rehabilitation and Energy Conservation in Afghanistan, Afghanistan Research and Evaluation Unit, Coordination of Humanitarian Assistance, Cooperation for Peace and Unity; International Organizations: CARE International, Mercy Corps, Ockenden International, Oxfam International, Rights and Democracy, Save the Children Federation, Inc.), November 2003

security, law and order and the rule of law[21]. This important issue is discussed further below in (page 19).

21 *Building a New Afghanistan: the Value of Success, the Cost of Failure*, Barnett R. Rubin, Abby Stoddard, Humayun Hamidzada and Adib Farhadi, Centre on International Cooperation NYU in cooperation with CARE, March 2004

Not just technicalities: why justice and rule of law programming means more than training police and judges

There seems to be a growing consensus that justice and rule of law reconstruction are not approached in a strategic way. The King's College study on peace-building exercises[22] highlights this as a key finding, noting in particular tendencies to hive post conflict justice off as a separate and specialised issue, and to demonstrate an obsession with infrastructure, which often ends up as symbolic hardware rendered useless by lack of adequate software. The classic example is freshly built courthouses, with no trained staff to work in them and no community awareness of the resource they represent.

22 *A Review of Peace Operations: A Case for Change*, King's College London, March 2003

The infrastructure argument is a double-edged one. On the one hand Sarah Cliffe and Klaus Rohland note in East Timor's case that progress in institution building and policy making tended not to correlate with success in physical infrastructure reconstruction, suggesting that institution-building which is longer term and more sustainable, suffers if more priority is placed on the quick, visible, but less empowering business of rehabilitating public infrastructure. On the other hand, Simon Chesterman[23] makes the point that the appearance of authority is a critical factor in the important game of winning hearts and minds and convincing both nationals and internationals to take a government seriously. New provincial reconstruction programmes in Afghanistan are built around the idea that the state must be tangibly and proudly present in terms of presentable buildings as well as adequately trained people to staff them.

23 Chesterman, ibid

The King's College cry of 'no strategy' is backed up by security sector reform expert Nicole Ball who states that 'efforts to support security sector reform and transformation have been atomised. External actors do not have a comprehensive view and provide patchy assistance'[24]. Analysis of country situations confirms this, revealing a failure of broad strategic vision linked to fragmented foci on specific areas, often driven by the mandate of the organisation offering technical assistance[25]. To give one example, in East Timor, judicial training provided by one organisation was criticised for being in the wrong language, being overly commercially focussed, and taking up so much of the trainees' time in such large numbers that they stopped attending due to pressure from courts and their clients whose business naturally ground to a halt in their absence.

24 *Democratic Governance in the Security Sector*, Nicole Ball, CIC, February 2002

25 *Assistance to Justice and the Rule of Law in Afghanistan: a Strategic Analysis*, Centre for Humanitarian Dialogue, February 2004

The literature, which again tends to focus on providing justice and the rule of law in international transitional administrations, is strong on specific, technical issues, but not on how to build systems, or

work out and address priorities through assistance programmes[26]. Thus we find stimulating, practical discussions on the question of applicable law; the need for better trained police both for emergency deployment and for training and capacity building; the need for policing to be local and community-based; successes and failures in using international, national and mixed judiciaries; the depressingly familiar problem that no donors wish to fund penitentiary systems despite their integral role in any justice system; the need to explore more constructively the interface between formal and informal justice systems; the need to communicate more effectively with the population and manage expectations; the problems of deploying judicial and legal experts from different legal and cultural backgrounds and traditions. It is harder to find experience-based analysis on management, administration and resource issues, or on how to translate policy recommendations into projects that can actually be implemented under the very challenging circumstances provided by an Afghanistan or an East Timor.

Furthermore the assistance community is still in the process of developing its capacity to respond to justice and rule of law challenges in a way that is not purely developmental, and which recognises the short political timeframe defined by donor and international interest, and the need for governments to have a positive impact for their people. Michèle Griffin argues that the UN continues to grapple with a split between its conflict management and development functions, and the difficulties the international community has experienced in providing consistent and appropriate assistance in justice and the rule of law from the moment of crisis provides a clear example of this[27]. A further example comes from the CRAFT report on Afghanistan[28] in March 2002. This quick, but strategic assessment of security and rule of law issues homed in on the need to work on short term issues, like funding the salaries of government employees or compiling and distributing available applicable texts of law, while also focussing on longer term issues such as training and education for the judiciary and legal profession. Yet implementers largely failed to use its approach, preferring to conduct their own assessments, and to programme in their own areas of expertise or interest.

Operating on multiple fronts: the challenges of sequencing in justice and rule of law programming

The economic literature suggests a similar problem with complex sequencing of activities and priorities. John Hewko's[29] arguments are based more on post-communist countries in Eastern Europe than the broader sweep of post-conflict situations which are our concern, but contain some useful insights which confirm the direction of the argument here. He cites an example which brings us back to the point made earlier about the non-linear progression

26 See for example *The Law and Order Dimension: an analysis of Kosovo*, Kari Margrethe Osland, NUPI, October 2001 (CAEC Task Force) or *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, Hansjörg Strohmeyer, American Journal of International Law, Vol. 95:46, pp46-63

27 *The Helmet and the Hoe: linkages between UN Development Assistance and Conflict Management*, Michèle Griffin, Global Governance 9 (2003), pp199-217

28 *Filling the Vacuum: Prerequisites to Security in Afghanistan: Report of the Consortium for Response to the Afghanistan Transition*, IRG, ABA Asia Law Initiative, IFES, IHRLG, March 2002 ('The CRAFT report')

29 *Foreign Direct Investment: Does the Rule of Law Matter?*, John Hewko, Rule of Law Series, Democracy and Rule of Law Project, Number 26 April 2002, Carnegie Endowment for International Peace

of events in a time of transition, arguing that the abstract ideal of sequencing events such that institutional and human resource capacity are built prior to enacting new legislation is just that, abstract and ideal. In reality, you have to do everything at once, prioritising some actions on the basis of outcomes you want to achieve quickly, and others on the basis that they are so fundamental that work must begin on them immediately. This refers us back again to the issue of working out what the people want and need which can be delivered to them most quickly, and what will bring the government the greatest gains in terms of the trust and support of the people.

Sequencing and emphasis problems are also evident in the broader context: given that many situations of intervention are in a situation of neither peace nor war (Sri Lanka, for example), the assistance community is faced with a dilemma about whether to abstain from working to build the capacity of institutions or address reform questions until a final settlement has been reached, or whether to work with institutions on one or both sides of a conflict (where that conflict may be in ceasefire mode). Obviously in the first case, the very real needs and rights of civilians could be neglected to an unacceptable degree for an indefinite timeframe; in the second, the assistance community must confront the complexities of prejudicing or favouring one side over the other, or, where trying to be even-handed, finding itself in a situation where it is dealing with groups whose status and legitimacy may be questionable. There is a reluctance on the part of donors to establish transitional mechanisms which may eventually have to be disbanded in favour of something more permanent, but this may be a nettle which has to be grasped in such situations. The World Bank's Lower Income Countries Under Stress (LICUS) unit[30] gives examples of useful and explicitly transitional structures in other sectors, such as procurement contracts with integral capacity building clauses in high-level government offices in Afghanistan and the Democratic Republic of Congo, or the phased handover in East Timor of the health services from NGO to government management. The question remains as to whether such structures can be developed for the complex sector of justice and rule of law; again, the suggestion is that the assistance community make swifter and more strategic efforts to come to grips with that question.

30 *World Bank Group Work In Low-Income Countries Under Stress: A Task Force Report*, World Bank , September 2002

Design flaws: putting people and participation back in the picture

Moving back from the question of how you sequence assistance to the principles on which you design it, again we find the economic literature taking a more pragmatic, people-centred view. Roumeen Islam argues that the important thing is:

'*Structuring the legal and judicial system such that the incentives for appropriate behaviour are there while the costs to society are kept as low as possible. There are no ideal ratios of formal versus informal mechanisms that one should aspire to; neither is there an absolute standard of efficiency*[31].'

31 *Institutional Reform and the Judiciary: Which Way Forward?*, Roumeen Islam, World Bank Policy Research Working Paper 3134, September 2003, p. 11

Obviously this misses the critical question of the extent to which systems comply with or violate international human rights norms, but the operating principle is pragmatic and valid. He adds, sounding like a good development practitioner that

'*Courts are only relevant to the extent that they approach dispute resolution in a manner that is understood by the people they serve and that meet their needs*[32].'

32 Islam, ibid, page 4

Also in developmental tone, John Hewko makes a strong argument for inclusion of a broad range of stakeholders in the reform process prior to adapting legislation. The argument for participation, a call so common in the social sectors of assistance that it can sometimes seem meaningless, wins a sharper edge from being cited in support of business and investment. Interestingly, he also argues for more realistic short and medium term objectives in legislative reform, in terms of attracting and retaining a threshold level of investment. This may involve constant tinkering with a workable body of law rather than a wholesale approach to revising it. This chimes with arguments made elsewhere in terms of post-conflict reconstruction that we need to stop working with idealised scenarios, even while keeping precious principles firmly in mind[33].

33 Centre for Humanitarian Dialogue, ibid

These crucial points about the needs of ordinary people, and the importance of participation are interestingly less strongly highlighted in the social assistance literature on practical experience in post conflict justice and rule of law referred to above.

The suggestion is, then, that the assistance community has not developed or implemented assistance plans which are both strategic and practical. It has not taken account of the fact that identifying what people need provides a more fertile and potentially responsive framework for programme design than starting purely from an analysis of existing structures. For example, the assistance community takes the principle of the independence of the judiciary to be a core and universal criteria for an effective formal justice system; but rather than looking only at whether a body of such quality exists in a country of intervention, it could be useful also to look at how the systems which are already in place try to ensure that the values which underpin the concept of an independent judiciary are respected i.e. the values of fairness, impartiality and acceptability in dispute resolution. Somewhat blinkered, then, by its structural approach, the assistance community has thus not

"the assistance community has not developed or implemented assistance plans which are both strategic and practical

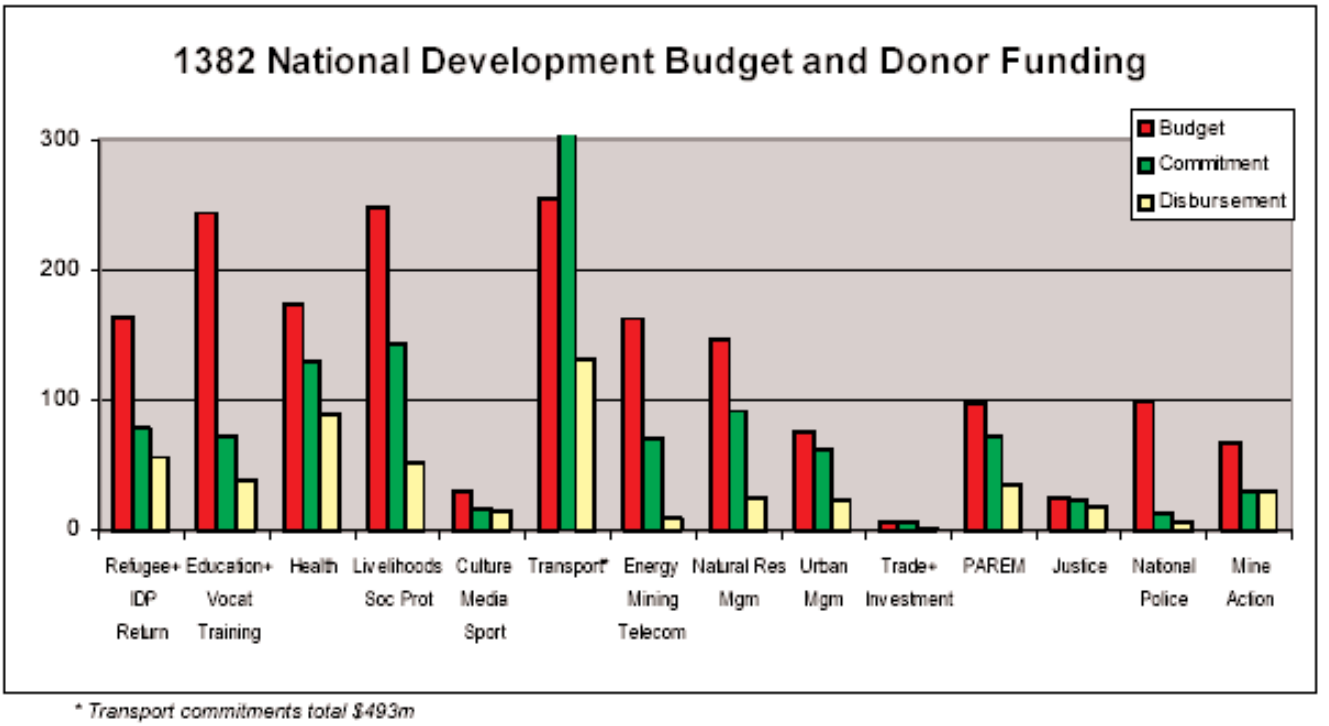
recognised that technical specialists alone are not always the right people to design policy and programme frameworks. These failures may be due to a continuing lack of recognition of the fact that programming in justice and rule of law are both technical and political; furthermore, where programming is purely technical, attention to substantive technical matters has not been matched by sufficient attention to the management and administrative sub-structure which underpin them. The failures also show that the assistance community has not yet grasped that timing is everything.

The bottom line: the impact of cost and funding issues for justice and the rule of law

Finally, the cost and funding for activities in the sector are issues. Effective, accessible justice is not cheap. There are uncomfortable questions around sustainability and the vexed subject of country or region-appropriate responses as opposed to world class ones. Despite the centrality of the issues, funding devoted to justice and the rule of law tends to represent small fractions of government and donor budgets. The table below shows budget, pledged and disbursed amounts for Afghanistan's national budget at a review in September 2003[34]. The story it tells is graphic in both senses, with amounts planned, pledged and delivered on justice and police dwarfed by almost every other sector:

34 Islamic National State of Afghanistan, 1382 Mid Term Budget Review

1382 Budget, Requirements, Commitments and Disbursements
19 September 2003



** Transport commitments total $493m*

More complicated still, there remains a disconnect between humanitarian and development funding, and assistance and political funding. Where funding from political branches can be quicker, less bureaucratic, and more responsive to these kinds of needs, it is likely to be smaller and less sustained than funding from more cumbersome development assistance organizations. Very few donors really have dedicated reconstruction and recovery funding mechanisms, and there is little agreement amongst them about what level of recovery and transitional programming should be contained in emergency funding appeals such as the United Nations Consolidated Appeal Process.[35] The need for multi-year funding commitments for long-term programmes[36] continues to run up against the time horizons of governments only able to commit with certainty within the lengths of tenure of their own political administrations.

35 *Humanitarian Financing: Donor Behaviour* Ian Smilie and Larry Minnear , Montreux Paper for Humanitarianism and War Project, 2003

36 For the most recent, strong example of this repeated call, see the Government of Afghanistan's report *Securing Afghanistan's Future*, March 2004, produced in collaboration with the World Bank, Asian Development Bank, United Nations Assistance Mission in Afghanistan, and United Nations Development Programme

6 Constructive Approaches

At the outset, the paper was careful not to advocate generic solutions for country specific problems in justice and the rule of law. Instead, it suggested that there might be broadly applicable elements for diagnosis. The ideas sketched below do not provide a comprehensive check-list for diagnosis, nor do they respond to all the weaknesses described above. But they do provide pointers for a serious reappraisal of how the assistance community addresses itself to justice and rule of law issues in post conflict and transitional states.

- **Analyse the issues of power involved in justice and rule of law reform and programming, and ensure explicit responses to them are designed and implemented**

In response to the argument that re-establishing justice and the rule of law is a power issue, and thus as much a political as a technical endeavour, strategists and planners need to analyse the position of the government, from internal and external view points, as to where and how it can make the most useful gains in both serving and winning over the population while dealing with its own internal power issues. For example, if land-grabbing by local commanders is what most troubles ordinary Afghans trying to ensure their families' livelihoods, make legislation and effective enforcement on that a priority.

- **Assess people's current daily needs in justice, not just institutional structures**

  As described above, the tendency is to start from the structures when assessing the problem: how do the courts, the judiciary, the police, the prisons, the human rights and civil society institutions (if any) look and work? What is their actual capacity? This is quite rational, and will yield useful information. But it has the same weakness of approach as looking at outputs alone rather than considering them with impacts and outcomes: it has a tendency to produce quantitative rather than qualitative results. A more revealing question might be: what are the predominant, the most pressing problems which ordinary people face which might normally be dealt with through such structures? And what is the role of power and the holders of power within those structures? How might that be affected by any changes?

- **Further develop qualitative indicators for development in justice and rule of law to reveal impact and outcome, not just output**

  An extremely helpful development in this regard has been efforts, particularly by the Vera Institute, and the World Bank with UNDP, to develop indicators for justice and governance that help to reveal impacts and outcomes of activities in the sector. The Vera Institute[37] points out, as does much of the literature emanating from World Bank policy units, that for citizens and officials, perceptions of safety and security are at least as important as reducing the actual number of assaults on persons or property. Thus they propose marrying a statistical/structural approach to a more people-centred approach, which allows the measurement of experience and perception. An example would be measuring changes in confidence in the police not just through proportions of certain groups reporting crimes to the police, but also the proportions of certain groups expressing positive or negative changes in terms of their confidence in the police. The kind of indicators suggested by the Vera Institute could also be developed for situations in much earlier stages of development, and to capture perceptions and experience of the state, which could provide very useful baseline material for programme design.

- **Ensure that communications strategies for justice and the rule of law are developed and implemented**

  An important part of answering to people's needs and the power issues lies in addressing and resourcing the question of how to communicate with and to the population, recognising that changing attitudes and behaviour is the toughest part of education in any field but also the very essence of reform.

37 *Measuring Progress Towards Safety and Justice: A Global Guide to The Design Of Performance Indicators Across the Justice Sector – Summary Paper*, Vera Institute of Justice, November 2003

- **Make judicious use of comparative regional and cultural analysis**

  Roumeen Islam suggests that 'integral components of an effective institutional reform strategy are country-specific data which illustrate how a given system is working, comparative data which help suggest ways in which a system may improve, and an analysis which identifies the importance of the data collected and hypotheses formed relative to competing hypotheses'.[38] This is not to suggest the wholesale importation of templates, but the nuanced use of comparative analysis. Comparative regional analysis, or analysis across countries with similar histories or culture can be extremely appealing to the conflict-affected countries struggling to hold onto their identity in the face of what may seem to them like a new kind of foreign invasion by the international assistance community.

38 Islam, ibid, page 36

- **Devote greater effort and resources to identifying transitional strategies and mechanisms for justice and rule of law assistance in 'no peace, no war' and complex post-conflict situations, and to suggesting workable prioritisation and sequencing patterns which can be adapted to individual cases**

  The paper has drawn attention to a need for policy makers to be more concrete in addressing the particular problems of post conflict, ceasefire and 'no peace, no war' periods. While recognising that any solution must be geared specifically to the country in question, the suggestion is that some models of transitional mechanisms and some sample prioritisation exercises could be useful tools for the assistance community and governments in tackling these issues.

  Taking these elements as guiding principles, governments, donors and implementers may be able to develop more workable solutions to the enormous challenges they face. With a more politically aware, people-focussed approach that has made a genuine effort to identify the outputs and impacts which are aimed at, the possibility of delivering more effective, responsive programming may be greater. The question of restructuring the way donors provide financial assistance will no doubt remain a point of concern and advocacy for the foreseeable future. But at least the means of delivery may be much better tailored to the needs if those needs are more holistically and realistically understood and more strategically prioritised and resourced.

7 Conclusion

The paper has argued that justice and rule of law provide the bedrock for sustainable peace and development, and demand priority attention from the moment of crisis. They can anchor programmes across all key sectors and contribute to state stability in tangible and intangible ways of immense significance. Confronting power, sovereignty and political issues are part of the business of providing assistance, in which the assistance community must learn to be both more honest (in recognising what it is dealing with) and more subtle (in how it deals). But there is no sector in which power is more openly confronted than in this; this is precisely what creates such enormous challenges for those trying to assist.

It is unlikely that the international community will get to try its hand many more times at the business of international transitional administration, although occupation is a particular example of this, and is more in evidence today than we might have expected ten years ago. Furthermore the nature and causes of conflict are likely to change over time. But its impact, and that cumulative impact of conflicts past and present on struggling nations will continue to be felt, and to require addressing.

The generic suggestions made here about principles and approaches to bear in mind when approaching the reconstruction of justice and rule of law systems, institutions and cultures in the many and disparate situations that continue to confront us, should help the assistance community to be more honest, effective and responsive. They warrant further development, and will benefit from further cross-fertilisation between the different disciplines and fields of practice whose concern is to see conflicts resolved, shattered and stumbling countries rebuilt, and war-damaged societies on the road to well-being.