



## International Forum for the Challenges of Peace Operations

### The Rule of Law Protection and Protection of Civilians

Professor Charles Sampford

Director, Institute for Ethics, Governance and Law

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#### **Increasing focus by UN on the rule of law**

During the last decade there has been growing agreement that the rule of law is critical in both domestic and international affairs. At the 2005 United Nations World Summit, member states unanimously recognized the need for 'universal adherence to and implementation of the rule of law at both the national and international levels'. This resolved an impasse in which some western countries were pressing for improvements in the rule of law in developing countries and others were pressing some western countries to adhere to the international rule of law – especially with regard to interventions and other missions involving the deployment of troops.

One of the problems of this welcome consensus is that the term 'rule of law' is subject to a range of interpretations/perspectives/dimensions that are affected by context as well as theory. Even within the United Nations (UN), the variety of interpretations is considerable and influenced by the perceived missions of various UN agencies.

Protection Missions (i.e. UN missions whose mandates include the protection of civilians) now typically involve police, military and civilian components from a range of countries as well as NGOs and several UN agencies. Most recognize the importance of the rule of law but often have different conceptions of what the rule of law means and, more importantly, what it requires. Protection Missions raise issues of both international and domestic law and so form one of the intersecting points of the domestic rule of law and the international rule of law. These overlapping rule of law issues that should be addressed concurrently and consistently rather than divorced at the risk of making the missions and the participants appear hypocritical.

I draw on work on the domestic rule of law going back 21 years and culminating with an OUP book on 'Retrospectivity and the Rule of Law', work on peace missions and the rule of law going back a dozen years to a major linkage with (then) Lt Col Mike Kelly and ten years work on the international rule of law including a book on the concept and a major project with the United Nations University (UNU), UN rule of law unit, Centre for International Governance Innovation (CIGI) on 'building the rule of law in international affairs'. The link between the earlier 'domestic work' was made when Mark Plunket, the UN Special Prosecutor in Cambodia, came to one of our workshops and told me that he was in the middle of the practical version of 'Rule of Law 101' and that he did not think he had been taught the theory very well.

However, the practical version did seem to be very much on track with his suggestions for giving priority to police, courts and corrections as being necessary to provide security. He introduced me to Mike Kelly who had a Hayekian justification for the rule of law in peace missions – if you state clearly, firmly and convincingly in advance how you will use force then others adapt their behaviour to avoid that which will generate that use of force. The rule of law in this sense must start when the first ‘blue helmet’ puts a foot on the ground, not after the first elected president takes office.

What I will seek to do in this talk and, especially, in the paper to follow is to:

1. understand the various meanings/interpretations/dimensions we give to the domestic rule of law
2. briefly apply these to the international rule of law
3. apply them to Protection missions which include both.

### **The ‘Domestic’ Rule of Law (the rule of law within sovereign states/at the national level)**

Domestically, the rule of law is a majestic phrase with many largely reinforcing and supportive meanings. It is alternatively characterized as a fundamental value/ideal, an ethic for lawyers and officials, the basic principles of constitutionalism and a set of institutions that supports its attainment. While these multiple meanings and dimensions may occasionally serve to confuse, they are generally congruent and mutually supportive in that the partial achievement of each supports the fuller achievement of all.

- This reflects the multifaceted nature of the rule of law.
- However, it is important to keep the meanings and dimensions distinct to avoid confusion.
- The differences of meaning do not seem to be essentially cultural. We carried out a project for the Open Society Institute comparing governance values in Western and Islamic countries.
  - o Islamic/western comparison showed that there was no fundamental difference with ‘congruent’ if not necessarily identical meanings.
  - o However, there are differences within cultures based on emphasis and position. Liberal Muslims and liberal westerners have a great deal in common. Fundamentalist Muslims and fundamentalist Christians have more in common than either dare admit.
  - o All cultures have rule of law traditions (howsoever called) and contrary traditions.

#### *‘Thick’ and ‘Thin’ theories of the Rule of Law*

One of the biggest distinctions different supporters of the rule of law have is more a matter of classification – of what is included within the rule of law and what is listed under different governance values. Some of the most popular definitions of the ‘rule of law’ mix an expression of an ideal or value with the institutional prerequisites for the achievement of that ideal. Developing ideas found in Hayek, Fuller and others, Raz listed eight basic elements of the rule of law: (1) laws should be prospective, open and clear; (2) laws should be relatively stable; (3) law making should be guided by open, stable, clear and general rules; (4) independence of the judiciary must be guaranteed; (5) principles of natural justice should be observed; (6) courts should have review powers (of the exercise of power by others); (7) courts should be easily accessible; (8) discretion of crime-policing agencies should not be perverted. An overlapping principle is that sanctions (especially involving the use of force) should only be applied to others according to clear rules publicized in advance.

I have characterized this as a ‘thin’ theory of the rule of law. This is contrasted with ‘thick’ theories of law propounded by those who seek to incorporate within the ‘rule of law’ other governance values/virtues concerning the content and provenance of law i.e human rights and democracy.

Those who adhere to such thin theories are generally just as supportive of democracy and human rights but prefer to keep those ‘governance values’ or ‘virtues of law’ distinct, recognizing that they can sometimes conflict and that they are rarely introduced at the same time (with the rule of law generally coming first). They also recognize that it may be possible to secure agreement to the development of the rule of law before

agreement can be reached on democracy (and how it is to be interpreted and institutionally implemented) or what rights are to be incorporated into the content of law.

Chapter V of the Forum Draft refers to the rule of law and human rights separately – recognizing their separate and mutually reinforcing importance – but also their distinctiveness. The UN Secretary General's definition quoted therein is clearly a 'thin theory'.<sup>1</sup>

However, this theoretical/philosophical list does not reflect the degree of embeddedness involved in a state subject to the rule of law. In such states, the rule of law is also seen as a:

- a. A fundamental Governance Value.
- b. A basic Constitutional Principle.
- c. An Ethic for Officials - i.e. that officials should be bound by the law and can only derive their power and authority from law. All such power is held in trust to be used only to the extent permitted and for the purposes authorized.
- d. A set of institutions – independent legislatures and courts, an independent bar etc.
- e. The core of nascent Integrity Systems.

Within sovereign states, each of these dimensions is mutually supportive.

#### *The Rule of Law as a fundamental Governance Value*

The rule of law is now seen as one of the fundamental values underlying modern 'liberal democratic' states – along with human rights, democracy, citizenship and the famous trinity of *liberté, égalité, fraternité*. This was not always so. The Treaty of Westphalia was, in many senses, a tyrants' charter – made largely by and for the absolutist rulers of the day. It recognized a set of formally independent and equal states whose sovereigns were recognized on the basis of their ability to effectively control the territory of a state. Brutal enforcement of their rule was proof of sovereignty rather than a disqualification for it. Internally, absolute rule was frequently justified as the only way of avoiding the chaos of a state of nature in which the life of man would be nasty brutish and short (Hobbes). Once life and civil peace were secure, more was demanded of those states by *philosophes*, lawyers, and revolutionaries who saw themselves as citizens in whose interests sovereigns should rule according to the above-mentioned values. As they sought and gained concessions, the post-Westphalian state was gradually civilized by the institutionalizing of those values. The rule of law was the first of these values and many states were substantially *rechstaats* long before they saw even a modicum of democracy and human rights. The rule of law is not only the longest standing of enlightenment values; it is generally the least controversial.

#### *The Rule of Law as a basic Constitutional Principle*

The rule of law underlies and is supported by basic constitutional principles such as constitutional rule and the separation of powers. However, it does not require a formal or written constitution and the concept clearly pre-dates such instruments. What it does require is a separation of judicial power from legislative and executive power with that judicial power determining what texts are recognized as laws, how they are interpreted and to whom they apply.

#### *The Rule of Law as an Ethic for Officials (of state and other organisations) exercising power.*

The rule of law is primarily addressed to lawyers and officials rather than citizen obedience. The rule of law is the central ethical principle for judges and the legal profession more generally. But it is also central to most officials including civil servants, the military and elected officials. All such power is held in trust to be used only to the extent permitted and for the purposes authorized. The domestic rule of law was built by the efforts of lawyers, soldiers, politicians and dedicated non-government organisations from the *philosophes*, to unions, to the modern NGO.

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<sup>1</sup> Page 69, citing UNSG's 'The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies' (S/2004/616), 2004.

Chapter V of the Forum Draft and the UNSG's definition of the rule of law includes the general acceptance of, and compliance with, the law. This is not such a common approach to the rule of law with good reason. Individuals may obey for a variety of reasons. However, although the ordinary criminal law applies, or should apply, to all, there are a number of laws which are addressed to officials – about what their power is and the purposes for which it is entrusted to them. Civil disobedience is appropriate for individuals within a society under the rule of law but not for officials.

This is particularly true in relation to the use of force – and why acceptance of the rule of law is a critical element in the ethics/honour of the military – and those who deploy the military. Note that this is not just a matter of officials of the state – despite the Weberian notion that the state has a monopoly of violence, even legitimate violence.

In the 17<sup>th</sup> century, the rule of law was as much about controlling the use of force by the local barons and bands of mercenaries as royal officials. Now we should look at other sources of power – corporations, warlords and private military companies. This is where the Forum Draft rightly refers to the importance of 'all institutions and entities (public and private)' being held accountable. The rule of law is about the lawful exercise of power in that the powers themselves and the purposes for which they are exercised are determined and regulated by law.

#### *The Rule of Law as a set of institutions*

Those who value the rule of law recognize that it can never operate effectively as a purely normative phenomenon (be it value, ethic or principle). It requires institutions to make it effective so that the rule of law may be partially defined in terms of common institutional supports for the rule of law – legislatures, courts, police, corrections, independent bar and NGOs – as Ann Livingstone said these are vertically and horizontally linked. Not all those institutions are institutions of the state – traditionally lawyers and the church – now lawyers, NGOs and corporations

#### *The Rule of Law and nascent Integrity Systems*

Since the late 1990s, it has become increasingly accepted that the way to avoid corruption and other abuses of power require an 'integrity system' – a set of norms (formal and informal), institutions and practices that serve to promote integrity (or 'good governance') and inhibit corruption. All effective integrity systems involve some basic institutional arrangements associated with the rule of law – especially courts and a legal profession that are not indebted to the holders of political power and can review the actions of powerful institutions to determine whether or not they are within power. These institutions are the oldest and longest standing elements of the integrity systems of western states. They are supported by newer institutions of democratic governance (parliaments, parliamentary committees) and oversight (ombudsman, auditors-general, anti-corruption commissions, media and NGO watchdogs) which make rule of law mechanisms more effective. Elements of integrity systems also play a crucial role in the protection of civilians so that we can see that the overlapping sets of institutions, norms and practices provide for good governance, the rule of law and civilian protection.

Integrity systems are far less developed in international affairs and, naturally, in the countries in which peace missions occur. They face obstacles that lead some to doubt the possibility of an international rule of law or international law itself. However, legal institutions often existed and were effective long before democratic institutions were formed and became, rightly, the heart of the integrity system.

#### *Case studies*

We are often asked for case studies. Some of the most interesting case studies can be found in the emergence of the rule of law and other governance values within Western countries. We see that the process is not pretty, it is not quick, it involved compromises – some of which worked, some of which did not and that it might not be obvious for years which it was. Sometimes the 'bad guys' stayed in power – they were called 'kings'. Sometimes power holders were executed, securing transitional justice that led to

chaos rather than the rule of law. The difference then, as now, was whether those who had been part of the problem saw it in their interest to be part of the solution.

Past experience and case studies offer some hope. The development of the rule of law generally takes a long time – but huge strides can be made quite quickly when the alignment of political will and public outrage focus on governance.

### **The International Rule of Law**

How much can experience of the rule of law at the domestic level apply to building the international rule of law is a big question which we are addressing in a large project in conjunction with the UN Rule of Law Unit, the UNU and the Centre of International Governance Innovation. While this is not the place to provide a full report of the work in this project, a few points might be usefully made at this stage. At the international level, there are strong arguments for keeping to a ‘thin’ theory of the rule of law and treating democracy and human rights as other values. The application of ‘democracy’ to international affairs is particularly problematic. Even here, this is more a matter of classification and tactics than a fundamental value difference for most supporters of the international rule of law. However, as in the early stage of the development of domestic law, it may only be possible to secure widespread agreement on the international rule of law, leaving democratisation of international institutions and the universal implementation of human rights to other and later battles.

Most other meanings and dimensions can be extended to the international rule of law – though their realisation internationally is much more limited than in most established democracies. This does not detract from their usefulness because they indicate areas where progress towards an international rule of law might be made. I have discussed these at length elsewhere but will here highlight two:

#### *Ethics for officials*

As seen above, the domestic rule of law is built into the ethics of key officials of sovereign states operating under the rule of law – not just judges, prosecutors and lawyers but soldiers, civil servants and elected officials. Most of the key actors within international institutions are committed to international law but codes of ethics for international officials are relatively new and rare with the Burgh House principles for international judges being less than six years old. Most would be imbued with ethical principles from their home states which may well emphasise the domestic rule of law but will say little about the international rule of law and may suggest that loyalty to domestic sovereign power is more important. I have argued elsewhere that international lawyers and soldiers engaged in UN missions should be in the forefront of developing and promulgating codes of ethics to govern their behaviour which respect international and domestic applications of the rule of law.<sup>2</sup>

#### *Institutions*

The largest problems for the international rule of law lie in the lack of institutions that create, interpret and enforce international law. This lack of effective institutionalization inhibits the development of the rule of law in its other senses. The lack of a legislature is not a fundamental problem for the rule of law. It makes change difficult but all that is needed is a set of clearly agreed sources, the means by which those sources generate authoritative legal texts, and the hierarchy of sources in cases of conflict.

There is a court, the International Court of Justice, (ICJ) which can provide authoritative interpretations of those texts and of any conflicts between them. The ICJ is harder to stack than any national appellate court. The problem is the lack of compulsory jurisdiction and the limited number of cases that can therefore be heard before it. This makes it much harder for the law to give clear guidance to those who want to be bound. However, Cassese suggests that the relative weakness of central global institutions means that other

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<sup>2</sup> Professions without Borders, public lecture, Brisbane (Australia) in August 2009 and Waterloo (Canada) in October 2009

institutions and practices may take on a greater role – including self-regulation and standard setting by non-state actors, civil society, business and legal communities.

This comment about the potential institutional supports for the international rule of law reminds us that domestic rule of law is not just about state institutions. States were never the only game in town – whether in the protection of civilians or in internal affairs generally.

### **The Rule of Law in Peace Missions**

Traditionally the goals of peace missions were largely directed to the ending of mass violence. Democracy and the rule of law were initially seen as the business of the relevant state or states in which, or between whom, the mission operated.

Early peacekeeping missions were aimed at keeping the warring parties apart and it was assumed that the relevant sovereign states could and would protect their citizens once the main threat had passed. Over the last twenty years many peacekeeping missions have been mounted in states which lack either the capacity or will to protect civilians and in some cases have constituted a major threat to civilians on their territory. In other missions civilians have been targeted by the combatants. Accordingly, it has been recognized that ‘keeping the warring parties apart’ does little or nothing to protect civilians and Protection of Civilians (PoC) has become a key part of missions.

When the holding of elections became part of UN mandates, the assumption seems to have been that security would come first followed by elections with the governance and the rule of law left to the incoming regime. During the 1990s Dr Mike Kelly and others emphasized that the rule of law had to start with the first troops moving in not after the first elections – as well as the fact that you needed more than troops to re-establish the rule of law. This is critical for the success as well as the legitimacy of missions. This was part of the impetus for research conducted previously with the Australian Defence Force and Australian Federal Police.

If we look at the various aspects of the domestic rule of law, all are highly relevant to Protection Missions and their more limited scope and close relationship. Protection Missions must, of necessity, pursue a thin theory of the rule of law which can be expanded as stability is secured. Protection Missions must be exemplars of respecting human rights in their own activities but generally cannot force the incorporation of human rights into the content of local laws. Some definitions of PoC are very wide – e.g. International Committee of the Red Cross’s (ICRC) ‘all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and spirit of the relevant bodies of law’. This seems to go beyond protection to promoting rights and better societies. The responsibility for promoting human rights in local laws is the primary responsibility of the host state. The primary responsibility of the international community is to support the host state in fulfilling that responsibility when it needs assistance to do so. In rare cases, this involves taking over some aspects of that responsibility when the state is unwilling to do so. In either case, the involvement of the international community in Protection Missions is confined to severe breaches of human rights including threats to physical security. In the absence of such threats, there is unlikely to be any need for a military (or police) component and the assistance of the international community will be through the United Nations Development Programme (UNDP) and other development agencies.

Protection Missions should seek to incorporate as many dimensions of the rule of law as possible. The areas of function and focus listed above might be seen as applicable to the constitution of the mission itself – to make them effective, to serve as an exemplar and to help establish more effective governance measures.

The mission will naturally seek to advise and assist the host country to strengthen the rule of law in its territory – especially those rule of law institutions of most relevance to the protection of civilians.

## Advise

- Rule of law principles and to administer them.

## Promote

- Rule of law as governance value and basic constitutional principle.
- Rule of law as ethic for key officials.

## Help develop

- Set of institutions that support rule of law.
- Integrity systems – especially the legal elements that support PoC.

But the rule of law must not just be the subject of the mission but built into the Protection Mission itself. If you believe in the rule of law, you have to practice it as well as preach it and enforce it. The mission is not just there to preach and assist but to practice the rule of law in its domestic and international forms.

- Standard rule of law principles should be built in:
  - rules under which missions operate should be prospective, open and clear;
  - these rules should be relatively stable;
  - rule making by the Mission should be guided by open, stable, clear and general rules;
  - must be an independent judiciary to judge its actions which must be accessible and have review powers;
  - they should observe principles of natural justice and policing and prosecutions should not be one-sided;
  - sanctions, especially the use of force should only be applied according to clear rules publicized in advance.
- The rule of law (in both domestic and international forms) as a fundamental governance value of the mission itself.
  - Mission should have clear authority.
    - Generally from the host country as national laws are important for the authorization, limitation and governance of civil-military cooperation – as well as providing the substantive laws which should generally rule. In the rare cases where authority is not given by host country, it must be given by UNSC or a body established by a treaty which the host country has signed.
    - This applies to the original authority for the mission itself. However, it should be clear that the Mission has clear continuing authority (cf the use of force in a potentially stale mandate – as in Iraq in the late 1990s is not desirable).
  - That authority and the actions officials take under the mission should be subject to ‘independent adjudication’
    - Not just the International Criminal Court (ICC) but also ICJ.
    - Even if a country does not sign up to compulsory jurisdiction, it should sign up for its jurisdiction to allow independent adjudication of the legality of their actions. I know that this is unlikely now but good international citizens should have nothing to fear and their actions will be more effective.
    - While the need for this is acute if the host country does not authorize the mission, it should be standard fare and I hope to live to see the day when it is.
  - The mission’s dealings with the host country must be subject to international law.
- The mandate (which provides the effective “constitutional” basis for the mission) should include the rule of law as a basic principle.
- The rule of law should be a core part of the ethic of every group of officials within the mission – including military, police and civilian components from all countries contributing to the mission.
- The conduct of police and military forces during the mission and compliance with relevant human rights norms.

- The various institutional components of the mission should mutually support each other in respecting and furthering the rule of law within their mission – and recognize the relationship between the rule of law and protection of civilians.
- Trials of those accused of perpetrating the violence against which the civilians had to be protected should be initiated by truly independent prosecutors before truly independent tribunals. Where these are not before permanent tribunals, the funding and selection should not be from either belligerents nor peace keepers.<sup>3</sup>
- Peacekeepers should never come from belligerents.

These issues apply to missions authorised under UNSC approval, regional (e.g. African Union (AU)) approval, mixed missions and in cases of bi-lateral agreements between a host state and one that provides assistance.

### **Preconditions**

The list of preconditions in Chapter V of the Forum Draft is a very long and daunting list of minimum preconditions for success including:

- UNSC authorisation identifying activities vital to rule of law.
- A peace process ending the conflict.
- All significant parties have signed the peace agreement and shown commitment to its application.
- Donors have agreed to support strengthening the rule of law with adequate resources.
- Unity of effort in mission leadership.
- Host government and all other relevant stakeholders have the will and can develop the capacity to establish a strong system of the rule of law.

While all these conditions are highly desirable and should be insisted on wherever possible. It is a good thing that nobody told those who helped bring about the rule of law in places like England that you needed all these preconditions. If Coke had read this chapter he would have known that even with an intervention force behind his back he should not have decided the three cases that provided the foundation of the rule of law in England (*Prohibitions* 1607, *Dr Bonham's case* 1610 and *Proclamations* 1611). It was a near run thing – and he knew it. He knew he was risking his life and he the intervention of other senior ministers downplaying the effect of the decisions was needed to keep him out of the Tower of London on one occasion but insufficient on another. Nonetheless, he was released and managed to include these cases in the first of the Nominate Reports.<sup>4</sup>

If you wait for all the preconditions to be there, you may never act. In fact, there was a favourable environment for the English judiciary to assert propositions that were prevalent in north western Europe and England during the previous half century but which the English judiciary would never have sought to assert against Tudor monarchs but were prepared to assert against a recently established Scottish king.

Few peace keeping missions will have all these conditions. By definition, some of those preconditions will never be met in peace-making or peace-enforcement operations. However, the rule of law is just as critical there. Indeed, Mike Kelly has argued very forcefully from Australian practice in Somalia, the rule of law

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<sup>3</sup> When Jamie Shea was asked in 1999 whether NATO pilots had committed war crimes he pointed to the funding of the International Criminal Tribunal for the former Yugoslavia (ICTY) and said that they would not be convicted. I do not know if the ICTY had contempt powers but whether or not they were, he should have been instantly suspended and subject to disciplinary proceedings. It is essential that officials appointed by a state should have the rule of law built into their ethics. Not only did Shea appear to have no ethics, he assumed the ICTY had none.

<sup>4</sup> An interesting legal version of the winners writing history.

assists such efforts because the UN mission makes it very clear what actions it will not tolerate and against which it will use force.

### *Resources*

We should always seek to provide our armed forces with adequate resources. Politicians who do not provide adequate resources when they can are rightly vilified as betrayers of those who are willing to risk their lives for the values their country stands for. But the resources are not always available – especially in the time frame required to prevent mass atrocities. In real shooting wars it is rare for even the stronger side to have all the resources it would wish. The weaker side will have even less. In a rapidly developing genocide the number of troops that can be deployed within 24 or 48 hours is likely to be inadequate for many contingencies. Of course, it might be said that soldiers should not be asked to do that for the people of another state – but few would be so clear cut. The value of the lives of civilians does not fall into such a neat hierarchy – especially for those soldiers and police who are fully imbued with the UN spirit.

However, this is where the international community can benefit from a public and credible determination to back up its soldiers. One of the reasons why the Serbian forces did not cross the bridge mentioned by Prince Hussein was the likely retaliation if they killed a UN soldier. The determination will mean that weak UN detachments are at less risk and can be more effective sooner.

This is essentially the principle of policing. Protection of civilians is essentially a police function. Peace Missions generally need more evident military back up and their use for non-believers.

For most of the Roman Empire, Roman citizens felt secure with the statement ‘Civis Romanus Sum’ because it was generally believed (and frequently demonstrated) that violence done to him would bring massive retaliation from Roman Legions. Of course, the security of other peoples was hardly enhanced by this policy. However, if the international community is willing to back its values with its resources and its actions, any person in the world will be able to say: ‘Civis Mundus Sum’ in a thousand living languages. “I am a citizen of the world” – and this will be more effective than masses of ‘blue helmets and blue bayonets’ on the ground. The backing is for the peoples of the world and for those who protect them.

### **Research Questions:**

- The relationship between adherence to the international rule of law and effectiveness and legitimacy of missions – both as a matter of theory (those who enforce the law need to subject themselves to it) and practice in past missions.
- If, as expected, the rule of law at the national and international levels adds to mission effectiveness;
- The extent to which the rule of law can be achieved in the kind of situations in which Protection Missions are formed and the best means of maximizing that extent at each stage of the mission. Given the variety of situations in which Protection Missions operate, is it possible to generalize about priorities in implementing the rule of law.
  - The means for ensuring that those within Protection Missions who are authorized to use force by the UNSC or regional bodies like the AU do not act beyond the authority given them.
  - Identifying how civilian and military components of UN missions can be instrumental for advancing or impeding domestic and international rule of law and vice versa
  - Identifying and addressing rule of law issues affecting Protection Missions
  - Identifying how Protection Missions can comply with, and advance the international rule of law including:
    - Measures by which states can ensure that their civilian and military forces act strictly within the scope of international law through doctrine, training, threats of sanctions and subjecting them to the same laws and institutions through which the perpetrators are tried.

- The co-ordination between military, police and civilian officials of the countries providing assistance and the countries assisted.
- Identification of clear rules (wherever possible firmly based on the laws and culture of the country or region being assisted by the mission) that apply to all and effective institutions for law enforcement.
- The best ways of building the rule of law into missions themselves – making it a fundamental governance value, a basic ‘constitutional’ principle and an ethic for officials.
- What contribution can be made by the various professions involved in Protection Missions (lawyers, soldiers, police, doctors, nurses). Lawyers and the military were critical in the development of the domestic rule of law. They have a critical role in the development of the international rule of law. Along with the police and other professions, they have a similarly critical role in building the rule of law into the heart of Protection Missions.
- Identifying how Protection Missions can comply with and assist in the development of the domestic rule of law within the host country
- To support force contributing states to take a more effective role in future Protection Missions by developing and disseminating understanding of how, and in what ways, adherence to the domestic and international rule of law can make PoC missions more effective.

### **A larger integrative approach to RoFL and PoC – Civilian Protection Systems**

The first duty of a state is generally supposed to be the protection of its civilians from internal and external threats to their security and is the principal justification cited for having and exercising sovereign powers. When a state is having difficulty in fulfilling that function it calls on other states and/or the UN. In very rare cases, the UNSC or a body that has relevant authority based on treaty (such as AU) may do so without such a request because the relevant state is unable or unwilling to seek assistance.

However, this does not mean that PoC can or should be entirely the responsibility of such missions. When citizens are protected (in the sense of being relatively secure from major threats) in the majority of states, it is not purely because of the actions of the state. While the formal security forces and state institutions (such as courts and prisons) play an important role, important contributions frequently come from tribe and kinship groups, neighbours, social norms and physical factors such as having locks on doors. By the same token, the civil and military components of PoC missions play an important role but do so alongside the host government, state institutions, UN agencies, local civil society actors, NGOs, and the Red Cross/Red Crescent. Unfortunately, the perceived need for international assistance often overlooks the potential contribution of those being protected so that the mission is seen as solely responsible for civilian protection. This approach makes the mission far more difficult and extensive than it need be and also creates a huge transition problem.

This new approach to understanding the ways that civilian protection is secured under a range of conditions (from ‘normal’ pre-conflict stages, through the mission and in the post-conflict stages) and the role that a UN mission can play in contributing to PoC during the mission and in the transition leading up to withdrawal.

This approach applies integrity systems methodology to the more narrow issue of civilian protection.

Our work on integrity systems suggests that:

- 1) There are significant variations in integrity systems and there is no one model, western or otherwise.
- 2) While integrity systems tend to perform similar functions, the institutions that perform them may vary
- 3) Even where similar institutions occur in different integrity systems, they may perform different functions or a combination of functions.

- 4) The strength and effectiveness of integrity systems is not merely a function of the strength of the component institutions but of their interactions with each other (what makes it a system).
- 5) The primary function of an integrity system is to promote a positive value (integrity) rather than merely preventing its opposite (corruption).
- 6) Each institutional element within an integrity system has to understand its own roles and the roles of others with which the institution interacts.
- 7) Outcomes such as reduced corruption or increased transparency are rarely achieved by a single actor alone but are generally the result of the work of several actors who support each other when they are doing their job but will tend to check each other when they do not.
- 8) Integrity institutions are rarely completely absent but vary from state to state. Accordingly, the best way to build an integrity system is not to try to implant a foreign model but build on what there is. That process may involve significant changes in existing institutions, some new institutions and building links between them. Foreign assistance is most useful in assisting host nations to identify gaps and weaknesses and addressing them rather than bringing in an entirely new system or attempting to 'do it themselves'.

A similar approach could be extremely fruitful in the protection of civilians. The mixture of institutions, agencies, norms and arrangements that afford a measure of security for civilians can be understood as 'civilian protection systems' (CPS). It would seem that most of the propositions about integrity systems would apply to civilian protection systems – though this hypothesis need to be tested

- 1) Significant variations in civilian protection systems – no one model.
- 2) CPS perform similar functions, the institutions that perform them may vary.
- 3) Even if similar institutions occur in different CPSs, they may perform different functions.
- 4) The strength and effectiveness of CPSs is not merely a function of the strength of the component institutions but of their interactions with each other (what makes it a system).
- 5) The primary function of a CPS is to promote a positive value (security) rather than merely preventing its opposite (violence).
- 6) Each institutional element within a CPS has to understand its own roles and the roles of others with which the institution interacts.
- 7) Reduced violence is not achieved by a single actor alone but is generally the result of the work of several actors who support each other when doing their job but check each other when they do not.
- 8) Civilian protection institutions are rarely completely absent but vary in effectiveness and reach.

One comment on the applicability of point (8) above is that international assistance through peace-keeping missions should not be seen as creating new civilian protection systems but as fixing and enhancing existing civilian protection systems. This is both a more achievable goal and makes the transition and gradual withdrawal less problematic. This allows us to focus, limit and make possible effective protection missions and assist in strengthening the rule of law. It also allows us to deal with some major problems afflicting UN missions: the greater the role of the UN in dealing with the problem the less local ownership and the greater the difficulties of transition

It also avoids the common mistake that is made in providing assistance for governance reform in developing countries – that existing institutions can be ignored and a new integrity system introduced on the basis of a models that work elsewhere. In civilian protection as well as good governance/corruption prevention, it is never the case that there is 'nothing there' on which to build.

Civilian Protection Systems can be understood at *four different stages*.

1. Pre conflict civilian protection systems – the institutional arrangements under which the majority of residents in the relevant region felt personally secure. This information will provide a backdrop to

understanding the ways in which conflict disrupted the pre-conflict protection system leaving citizens without adequate protection

2. Pre mission civilian protection systems – the arrangements by which civilians secured whatever measure of protection they had during the conflict (even if rudimentary and exploitative measures such as armed gangs in refugee camps which may provide a measure of protection). This reflects the fact that there will always be a gap between the emergence of the conflict and the arrival of the international mission.
3. Civilian protection systems during the mission – including the assistance provided by civil and military elements.
4. Post mission civilian protection systems – institutional arrangements under which civilians can regain a level of security equal to, or often better than, the pre-conflict level.

*Subsystems:* It may be useful to see civilian protection systems divided into ‘formal’ and ‘informal’ protection systems with the former sometimes breaking down completely or ‘turning feral’ and becoming a threat to the very civilians they were supposed to protect. Another form of subsystem might be found when a mission specifically focuses on particular risks to civilians then the work on civilian protection systems for that mission would concentrate on how the civilian protection systems at the four different stages operate for the identified risk.