

Inventing the Rule of Law for the United Nations

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“The rule of law as a concept refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.

(The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General to the Security Council, 2004)

I. The Secretary-General’s 2004 Report to the Security Council: Rule of Law as Concept and Common Language

When Secretary-General Kofi Annan, in his now famous 2004 report to the Security Council entitled *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* that contained the language above, set out to articulate a “common language of justice for the United Nations,”¹ he quickly found broad acclaim. The report and the concepts developed therein were welcomed as incorporating a “seachange”² in the way the United Nations was doing business in sup-

¹ *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies*, Report of the Secretary-General, Doc. S/2004/616 of 23 August 2004.

² C. Bull, *No Entry without Strategy. Building the Rule of Law under UN Transitional Administration*, 2008, 45; see also R. Kleinfeld, “Competing Definitions of the Rule of Law: Implications for Practitioners”, Carnegie Paper No. 55, Carnegie Endowment for Peace, 2005; A. Hurwitz, “Civil War and the Rule of Law: Towards Security, Development and Human

port of strengthening the rule of law, particularly in war-torn societies emerging from years and decades of conflict. The report, in the eyes of many, provided the first formulation of a common concept where no coherent policy direction had existed before.³

The report had come in response to activities of the Security Council,⁴ which had in a very general way “underline(d) ... the need for respect for human rights and the rule of law” already in its high-level meeting on the occasion of the Millennium Summit in 2000,⁵ but discussed the specific role of the United Nations in establishing justice and the rule of law in post-conflict societies for the first time ever, and right at ministerial level, on 24 September 2003. At the end of that meeting the Council noted the “abundant wealth of relevant experience and expertise that exists within the United Nations system and in the Member States”, considered that it would be appropriate to examine further “how to harness and direct this expertise”, and accepted the offer of the Secretary-General to provide a report that could “guide and inform further consideration” of these matters.⁶ In another debate on 26 January 2004, this time on post-conflict national reconciliation, the Council invited the Secretary-General to include the views expressed in that debate in his envisaged report on the previous debate.⁷

Rights, in: A. Hurwitz/ R. Huang (eds), *Civil War and the Rule of Law. Security, Development and Human Rights*, 2008, 1 et seq.

³ Bull, see note 2; see also S. Carlson, *Legal and Judicial Rule of Law Work in Multi-dimensional Peacekeeping Operations: Lessons Learned Study*, Department of Peacekeeping, 2006, 2: “a definition that is notable both for its breadth as well as the specificity with which it identifies elements”.

⁴ On the role of the Security Council in promoting the rule of law see the article by K. Bühler, in this Focus; see also Letter dated 18 April 2008 from the Permanent Representative of Austria to the United Nations, Doc. A/63/69-S/2008/270 of 7 May 2008, Annex: The UN Security Council and the Rule of Law, Final Report and Recommendations from the Austrian Initiative “The Role of the Security Council in Strengthening a Rules-Based International System” 2004-2008.

⁵ S/RES/1318 (2000) of 7 September 2000, Section I.

⁶ See the statement of the President of the Security Council dated 24 September 2003, Doc. S/PRST/2003/15.

⁷ See the statement of the President of the Security Council dated 26 January 2004, Doc. S/PRST/2004/2.

1. Towards a Common Understanding of the Rule of Law for the United Nations

In his landmark report the Secretary-General pointed out that recent years had seen an increased focus by the United Nations on questions of transitional justice and the rule of law in conflict and post-conflict societies and attempted to “highlight key issues and lessons learned from the organisation’s experience”. And the report continued:

“Concepts such as ‘justice’, ‘the rule of law’ and ‘transitional justice’ are essential to understanding the international community’s efforts to enhance human rights, protect persons from fear and want, address property disputes, encourage economic development, promote accountable government and peacefully resolve conflict”.

But even though these concepts “serve both to define our goals and to determine our methods”, there was no agreement on what they meant. Instead, as the report deplored, there was a multiplicity of definitions and understandings even among the UN’s partners in the field. What was “essential” in the eyes of the Secretary-General in order to work together effectively, was to achieve a “common understanding of these concepts”.⁸

a. Elements of the Rule of Law

Having made the case for developing a common understanding, the Secretary-General embarks on setting out the details. In the “concept” paragraph quoted above the Secretary-General identifies no less than fifteen elements that are decisive for his understanding of the rule of law:

- it is a principle of governance in which
- all persons, institutions and entities, public and private, including the state itself, are accountable to laws, which for their part must be
 - publicly promulgated,
 - equally enforced,
 - independently adjudicated,
 - in terms of substance they must be consistent with international human rights norms and standards,

⁸ *Ibid.*, Fn 1, para. 5.

- furthermore, the rule of law requires measures to ensure adherence to a number of additional principles, namely:
 - supremacy of law,
 - equality before the law,
 - accountability to the law,
 - fairness in the application of the law,
 - separation of powers,
 - participation in decision-making,
 - legal certainty,
 - avoidance of arbitrariness,
 - procedural and legal transparency.

It should be noted, however, that nowhere in this concept of the rule of law is any reference being made to the particular situation of post-conflict societies. It is clear that here the description supplied by the Secretary-General is general and applies to all societies, whether war-torn and post-conflict or stable and affluent.

The report then sets out briefly the parameters of the other two core concepts (“justice” being described as an “ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs”, whereas for the purposes of the report “transitional justice” was meant to comprise “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation”).

b. The Normative Basis for the United Nation’s Work on the Rule of Law

Finally, the report does not fail to mention the legal sources of the United Nation’s work in these fields:

“The normative foundation of our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. This includes the wealth of United Nations human rights and criminal justice standards developed in the last half-century”.

Because these standards are “universally applicable standards adopted under the auspices of the United Nations”, they must therefore “serve as the normative basis for all United Nations activities in support of justice and the rule of law”.⁹

In 2005 the Secretary-General, in his follow up report to the outcome of the Millennium Summit entitled “In Larger Freedom: Towards Development, Security and Human Rights for All”, again made the rule of law a central issue by stating, in a Chapter on the “Freedom to Live in Dignity”, that “the protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability”.¹⁰ To improve the coordination of rule of law activities within the organisation, the report proposed the establishment of a special rule of law assistance unit.

c. The Rule of Law at the 2005 World Summit

In the 2005 World Summit Outcome,¹¹ Member States subscribed to the views of the Secretary-General by recognising “the need for universal adherence to and implementation of the rule of law at both the national and the international levels” and reaffirming their “commitment to an international order based on the rule of law and international law which is essential for peaceful coexistence and cooperation among states”. They also supported establishing a rule of law assistance unit within the Secretariat “so as to strengthen United Nations activities to promote the rule of law”.¹²

It would be somewhat far-fetched, however, to assume that this has meant any kind of acceptance of the concept of the rule of law as developed by the Secretary-General in his earlier report of 2004. As can be seen from the ensuing debate in the General Assembly’s Sixth (Legal) Committee under the new agenda item “The Rule of Law at the National and International Levels”,¹³ which had been established in the

⁹ Doc. S/2004/616, see note 1, para. 9.

¹⁰ *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the Secretary-General of the United Nations for Decision by Heads of State and Government, Doc. A/59/2005, para. 137.

¹¹ A/RES/60/1 of 16 September 2005, para. 134.

¹² *Ibid.*

¹³ A/RES/61/39 of 4 December 2006; for the debate see Doc. A/C.6/61/SR.6, 7, 20 and 22; A/RES/62/70 of 6 December 2007, debate in Doc.

wake of the Summit Outcome,¹⁴ and in the various statements submitted by governments for the 2007 report of the Secretary-General to the General Assembly under that agenda item,¹⁵ there is hardly a common understanding of this issue.¹⁶

As Simon Chesterman has rightly pointed out, the content of the term “rule of law” remains contested over time and geography, and it was exactly a *dissensus* as to the concrete meaning of the “rule of law” that allowed the consensus on this issue at the Summit.¹⁷ The same can probably be said of the drafting of the United Nations Millennium Declaration in 2000 in which the heads of state and government had solemnly resolved to “strengthen respect for the rule of law in international and national affairs” (in the Chapter on Peace, Security and Disarmament) and to “spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms” (in the Chapter entitled Human Rights, Democracy and Good Governance).¹⁸

A/C.6/62/SR.14-16; on the background see also S. Barriga/ A. Alday in this Focus.

¹⁴ For the justification of this new item on the agenda of the 6th Committee see the memorandum submitted by Mexico and Liechtenstein, Doc. A/61/142 of 22 May 2006, Annex, where the co-sponsors of the new item state that “despite the importance attached to the concept of the rule of law in the Summit Outcome (...) the United Nations still lacks the appropriate tools to promote it in a coherent manner”, on the background see S. Barriga/ A. Alday in this Focus.

¹⁵ *The Rule of Law at the National and International Levels: Comments and Information received from Governments*, Doc. A/62/121 of 11 July 2007, and Add.1 of 6 September 2007.

¹⁶ For reasons and consequences see R. Mani, “Exploring the Rule of Law in Theory and Practice”, in: Hurwitz/ Huang, see note 2, 21 et seq. See also *Promoting the Rule of Law and Strengthening the Criminal Justice System, Working Paper prepared by the Secretariat for the Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders*, Vienna 10-17 April 2000, Doc. A/CONF.187/3, para. 5: “there is no universal agreement as to what the term ‘rule of law’ actually means”.

¹⁷ S. Chesterman, “An International Rule of Law?”, *American Journal of Comparative Law* 56 (2008), 331 et seq.

¹⁸ A/RES/55/2 of 8 September 2000.

d. Concept, Definition or Common Language?

The Secretary-General for his part was so far careful enough not to elaborate the issue any further and to leave the character of his description of terms in his 2004 report open. He strictly avoids even to suggest that what he has termed a “concept” for internal use by the United Nations was meant to define the rule of law¹⁹ in a way that could apply also outside the Secretariat. In his subsequent report to the Security Council he has underlined once again the centrality of the rule of law to the work of the organisation while playing down his terminology as nothing more than an attempt to come up with a “common language of justice” for the work of the United Nations that “incorporates”, *inter alia*, the concept of the rule of law.²⁰ In another report, this time on the rule of law and development submitted to the Commission on Crime Prevention and Criminal Justice in 2006, the concept of the rule of law as “defined” in the 2004 report is repeated, but with the explicit *caveat* that “it should be noted, however, that the above explanation is one among many definitions of the rule of law”.²¹

Whether or not the Secretary-General has only drafted “language” on the rule of law or has actually defined it,²² one can say that his 2004 report in response to the request by the Security Council has sparked a lively discussion within and outside the United Nations. By underlin-

¹⁹ A report by the UN High Commissioner for Human Rights to the Human Rights Council, however, treats the three concepts in the SG’s report as “definitions”, *Human Rights and Transitional Justice*, Report of the Office of the United Nations High Commissioner for Human Rights, Doc. A/HRC/4/87 of 23 December 2006, para. 3.

²⁰ *Uniting our Strengths: Enhancing United Nations Support for the Rule of Law*, Report of the Secretary-General, Doc. A/61/636-S/2006/980.

²¹ Commission on Crime Prevention and Criminal Justice, 15th Sess., *The Rule of Law and Development: Strengthening the Rule of Law and the Reform of Criminal Justice Institutions, including in Post-Conflict Reconstruction*, Report of the Secretary-General, Doc. E/CN.15/2006/3, para. 6. For a broader concept the report quotes from R. Kleinfeld, “Competing Definitions of the Rule of Law: Implications for Practitioners”, Carnegie Paper No. 55, Carnegie Endowment for Peace, 2005.

²² S. Carlson, *Legal and Judicial Rule of Law Work in Multi-Dimensional Peacekeeping Operations: Lessons-Learned Study*, Department of Peacekeeping Operations 2006, applauds the paragraph as “a definition of the rule of law that is notable both for its breadth as well as for the specificity with which it identifies the elements encompassed within the term”.

ing the centrality of the rule of law for the work of the organisation he has certainly given the rule of law a much higher profile and has taken the conceptual thinking about it to a new level.

The sudden emphasis on the term as such, the precision with which the Secretary-General has outlined its core elements, and the undisputed “centrality” for the very mission of the organisation that the Secretary-General has claimed for the rule of law, stands in sharp contrast to the difficulties that Member States still have in coming to terms with it. In the work of an international organisation such as the United Nations good ideas – or, for that matter, ideas in general – always take time to seep into the system. Progress here is more often a not-so-new idea whose time has come. By referring to the normative foundations of the United Nations work in the field of advancing the rule of law, and by identifying areas of international law that he regards as its pillars, the Secretary-General has already indicated some of the sources of the organisation’s new thinking. If indeed the rule of law today is considered to be so central to the United Nation’s mission, it may be of interest to trace some of the origins of that concept in the political work of the organisation and to describe how the new language on the rule of law was formed.

II. To Whom it Does Concern: The Rule of Law and Human Rights

1. The Normative Foundation of the Rule of Law in the Universal Declaration of Human Rights, the Covenants and Other Human Rights Instruments

Unlike the UN Charter, the Universal Declaration of Human Rights of 1948 does contain the term “rule of law”, albeit only in its preamble. Here the Declaration declares it essential that “human rights should be protected by the rule of law”. The term is not defined in the text, but by juxtaposing the desired protection of human rights through law to “tyranny and oppression” – against which man may only have recourse, as a last resort, to “rebellion” – the language seems to suggest that the rule of law is the formal and procedural safeguard against violations of human rights, whereas under the rule of tyrants and oppressors no proper way to seek redress against human rights violations short of rebellion is available. In the operative part the notion is not used any more, but a number of articles do contain, in their outline of the inal-

inable rights that everyone has, explicit references to the law or laws of a state;²³ other core human rights provisions deal with procedural rights of the individual without such reference. But the key requirement in the preamble that “human rights should be protected by the rule of law” makes it clear that according to the Declaration the other human rights listed therein shall be equally grounded in, and guarded against violations by, (the rule of) law.

Subsequent human rights treaties follow the same logic, although generally without using the term “rule of law”. Article 2 of the 1966 International Covenant on Civil and Political Rights requires states parties to adopt such laws or other measures that may be necessary to give effect to the rights recognised in it and to ensure that any person shall have an effective remedy against violations, and that the respective right shall be determined by competent judicial or other authorities. Many other provisions prescribe explicitly that the rights they contain shall be protected by law.²⁴ Under article 4 of the 1966 International Covenant on Economic, Social and Cultural Rights, states parties may subject the rights contained therein only to such limitations as are determined by law. The Convention on the Elimination of All Forms of Discrimination Against Women of 1979 requires states, in article 2 (a), to embody the principle of the equality of men and women in their constitution or other legislation and to ensure, through law and other appropriate means, the practical realisation of this principle. The International Convention on the Elimination of All Forms of Racial Discrimination of 1965, is based on the consideration, in the preamble, that all human be-

²³ Article 6 on the right to recognition as a person before the law; article 7 on equality before the law and on the right to equal protection of the law without discrimination; article 8 on the right to an effective remedy by the competent national tribunals for acts violating fundamental rights granted by the constitution or the law; article 11 para. 1 on the right to be presumed innocent unless proved guilty according to law; article 11 para. 2 on the principle of *nulla poena sine lege*; article 12 on the protection of the law against arbitrary interference of privacy and attacks upon honour and reputation.

²⁴ See, for example, article 6 on the right to life which shall be protected by law, article 9 para. 1 on the right to liberty and security except on grounds and in accordance with procedures as are established by law; article 14 para. 1 on the right to a fair and public hearing by a competent independent and impartial tribunal established by law; article 16 on the right to recognition as a person before the law; article 15 on the principle of *nulla poena sine lege*.

ings are equal before the law and are entitled to protection of the law against any discrimination. Article 5 guarantees the right of everyone to equality before the law, notably in the enjoyment of a number of rights listed therein. Many other instruments contain similar provisions. It is interesting to note, though, that despite these numerous references to national laws as the means through which human rights are being given effect, none of these instruments has referred to “the rule of law” as such.

2. The 1993 World Conference on Human Rights in Vienna: Strengthening Institutions that Uphold the Rule of Law

It was not before the World Conference on Human Rights, held in Vienna in June 1993, that language on the rule of law appeared at the highest official level. A preambular paragraph of the Vienna Declaration and Programme of Action, adopted by the Conference on 25 June 1993 gives us an indication why: after noting “the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter”²⁵ – which is a very understated way of referring to the democratic revolutions in Eastern Europe, the end of the East-west confrontation in international relations and in its wake the strong moves towards democratisation in many regions – the Conference lists a large number of aspects that have come back into focus. Among the principles that all peoples aspire for we find, *inter alia*, the promotion and encouragement of respect for human rights, peace, democracy, justice, equality, self-determination, pluralism, development and, finally, “rule of law”. In para. 30 of the operative part of the Vienna Declaration and Programme of Action, the Conference expresses its dismay at, and condemns, gross and systematic violations of human rights and other “situations that constitute serious obstacles to the full enjoyment of all human rights”. The list of such violations and obstacles to the enjoyment of human rights is long and includes everything from torture and summary executions to arbitrary detention, racism and racial discrimination, apartheid, foreign occupation, xenophobia, poverty and hunger to terrorism, discrimination against women and then, last but not least, “lack of the rule of law”.

²⁵ World Conference on Human Rights, *Vienna Declaration and Programme of Action*, Doc. A/CONF.157/23 of 12 July 1993, preambular para. 9.

Based on this analysis, the Vienna Declaration and Programme of Action sets out to recommend measures to change the picture: countries which so request should be assisted to create the conditions whereby each individual *can* enjoy all human rights, and governments and the UN system are urged to increase the resources they provide to programmes aiming at the “strengthening of national legislation, national institutions and related infrastructures which uphold the rule of law and democracy”. In the Chapter on cooperation, development and strengthening of human rights, this call is further refined: special emphasis is to be given to the strengthening and building of institutions relating to human rights and for the conduct of elections; “equally important”, however, “is the assistance to be given to the strengthening of the rule of law and the administration of justice”.²⁶

And finally the Conference gives the signal for a broad-based engagement of the United Nations itself in this field, by strongly recommending “that a comprehensive programme be established within the United Nations in order to help states in the task of building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the rule of law”. The task of this programme – to be coordinated by the Centre for Human Rights – was to provide assistance to national projects in reforming penal and correctional establishments, education and training for lawyers, judges and security forces in human rights and “any other sphere of activity relevant to the good functioning of the rule of law”.²⁷

3. The General Assembly after Vienna: The Rule of Law as Essential Factor in the Protection of Human Rights

The General Assembly reacted immediately to the new emphasis which the Vienna World Conference had laid on the role of the rule of law in securing the full enjoyment of all human rights. In a new resolution en-

²⁶ The importance of the administration of justice is addressed separately in para. 27 of the Declaration, but unfortunately without a reference to the rule of law: “The administration of justice, including law enforcement and prosecutorial agencies, and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development.”

²⁷ Vienna Declaration and Programme of Action, see note 25, para. 69.

titled “strengthening of the rule of law” the Assembly expressed its conviction that “as stressed in the Universal Declaration of Human Rights, the rule of law is an essential factor in the protection of human rights” and endorses the recommendations by the Conference to set up a programme which would help states in building and strengthening adequate national structures which have a direct impact on the overall observance of human rights and the maintenance of the rule of law.²⁸ The Assembly also supports that such programmes should help states to carry out certain projects in the field of penal reforms and training of judges “and in any other sphere of activity relevant to the good functioning of the rule of law”.²⁹ In the following year the General Assembly speaks once again of the rule of law as “an essential factor in the protection of the rule of law” and calls for the support of projects that have a direct impact on “the realization of human rights and the maintenance of the rule of law”.³⁰ Since then, these two elements have become the linguistic backbone of all General Assembly resolutions on the strengthening of the rule of law,³¹ which in their remaining parts deal mostly with issues of cooperation and assistance. Here the provisions vary according to the practical needs of the times, as for example the welcoming of contacts initiated by the High Commissioner for Human Rights with other bodies on cooperation in providing assistance for the strengthening of the rule of law in 1995; the call for high priority to be given to technical cooperation provided by the High Commissioner – as the focal point for coordination – with regard to the rule of law in 1996; the taking note of cooperation between the High Commissioner and UNDP in providing technical assistance, at the request of states, in the promotion of the rule of law in 1998; the inclusion of attention to institution-building in the area of the rule of law in 2000; or the welcoming of the assistance given by the High Commissioner in the design of human rights components of UN peace opera-

²⁸ *Strengthening of the Rule of Law*, A/RES/48/132 of 20 December 1993, para. 1; this is an exact quote of para. 69 of the Vienna Declaration and Programme of Action, see note 25.

²⁹ A/RES/48/132, para. 2, which again is a quote from para. 69 of the Vienna Declaration and Programme of Action.

³⁰ *Strengthening of the Rule of Law*, A/RES/49/194 of 23 December 1994, paras 5 and 6.

³¹ *Strengthening of the Rule of Law*, A/RES/50/179 of 22 December 1995; A/RES/51/96 of 12 December 1996; A/RES/52/125 of 12 December 1997; A/RES/53/142 of 9 December 1998; A/RES/55/99 of 4 December 2000; A/RES/57/221 of 18 December 2002.

tions and in providing advice once they are formed, including in the field of the rule of law,³² as well as promoting better inter-agency cooperation and complementarity of action concerning assistance to states in strengthening the rule of law in 2002.³³ It is interesting to note that the number of players mentioned in these resolutions with whom the High Commissioner is supposed to cooperate gradually expands, reflecting the growing practical importance of rule of law activities for the United Nations. Towards the beginning of the new millennium the promotion of the rule of law has indeed become a priority in the technical assistance programmes carried out by the High Commissioner, in recognition of the link between the rule of law and the respect for human rights.³⁴ It is therefore regrettable that the resolution entitled “strengthening of the rule of law” was discontinued at the 59th session in 2004.

4. The Rule of Law as Conceptual and Operational Framework for the United Nation’s Human Rights Programme – Another Description of the Rule of Law

This growing importance of the assistance through the United Nations to rule of law activities worldwide prompted another report of the Secretary-General which also came out in 2004 and was somehow overshadowed by the paper that was sent to the Security Council – a report which is even more elaborated on the components of the rule of law and provides a deeper analysis of the characteristics of the “rule of law”. In his standard bi-annual report to the Third Committee on “Strengthening the Rule of Law”, under the agenda item entitled “human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms”, the Secretary-General emphasises that the rule of law provides a:

“particularly appropriate conceptual and operational framework for the UN’s human rights programme, as it equally accommodates

³² See the new series entitled “Rule-of-Law Tools for Post-conflict States” published by the Office of the High Commissioner, which includes the following titles: *Vetting an Operational Framework*; *Mapping the Justice Sector*; *Monitoring Legal Systems*; *Prosecution Initiatives*; *Truth Commissions*, 2008.

³³ All sources see note 31.

³⁴ *Strengthening of the Rule of Law*, Report of the Secretary-General, Doc. A/57/275 of 5 August 2002, para. 1.

both the requirements for implementation of all human rights and concerns itself with the substantive and the procedural, the national level and the international level, and with the quality, content and objectives not only of laws, but also of processes, institutions, practices and values.”³⁵

Less apodictic and normative in style than the other report, it tries to describe rather than prescribe certain features of a well-run society governed by the rule of law, thus transcending a lot better the fact that the rule of law is not so much a norm or a certain way of organising a justice system, but a many-faceted cultural achievement that also includes certain values and practices in everyday societal life. To be able to appreciate fully the specific tone, a longer quote from the text³⁶ seems entirely appropriate:

“The rule of law presumes that a law is in place and encompasses its content, particularly its consistency with international human rights standards, its certainty of application, its supremacy in the hierarchy of power, the institutions and procedures for its implementation and enforcement, and the fairness with which it is applied in any given case. A system of government established under the rule of law ensures the availability of mechanisms for conflict resolution, whether judicial or non-judicial, and adequate remedies to address possible violations and transgressions. The system must also ensure that such mechanisms and remedies are accessible to all, function in respect of international standards and are backed by the State’s commitment to accountable government. At the institutional core of systems based on the rule of law is a strong independent judiciary, adequately empowered, financed, equipped, and trained to uphold human rights in the administration of justice. Also essential is an effective justice sector including adequate facilities and national training regimes for lawyers, judges, prosecutors, police and prison officials. Ending impunity is a fundamental aspect of furthering the rule of law. (...) The good functioning of the rule of law necessitates a strong legal framework, under the Constitution, which upholds human rights and democracy, and which provides for the effective protection, implementation and redress in key areas at domestic level that relate to all human rights, be they civil, cultural, economic, political or social rights. Transparency of institutions, policies, practices and pro-

³⁵ *Strengthening of the Rule of Law*, Report of the Secretary-General, Doc. A/59/402 of 1 October 2004, para. 4.

³⁶ *Ibid.*, paras 5-11.

grammes affecting all aspects of life is essential for any properly functioning society. Transparency helps to foster stability and predictability of government. Transparency is essential for the realization of rights, whether they relate to the exercise of emergency powers, the protection of civil and political rights or the allocation of available resources in the context of achieving progressively the full realization of economic, social and cultural rights. Under the transparency principle, society at large is able to monitor a State's compliance with its obligations. This requires a strong civil society and effective non-governmental organizations committed to ensuring respect by the state of human rights standards and vigilant in its demands that the rule of law be rigorously observed".

III. The Rule of Law in the Administration of Justice

1. The Normative Basis: Standards without a Term

As the Secretary-General had pointed out in his 2004 report, one of the normative pillars of the modern international legal system that forms the basis of the United Nations' work for the rule of law is international criminal law, including the wealth of United Nations criminal justice standards developed in the last half-century. These standards, as the Secretary-General had added, "also set the normative boundaries of United Nations engagement (...). United Nations-operated facilities must scrupulously comply with international standards for human rights in the administration of justice".

Based on the principles of the Charter, the Universal Declaration of Human Rights and the other international human rights instruments as far as they relate to criminal justice matters, the United Nations had very early on started to flesh them out and develop standards and norms in crime prevention and criminal justice. These standards cover basically every aspect of criminal justice from the treatment of offenders to the right to remedy for victims of gross violations of human rights. Many of these standards and norms have emanated from the quinquennial UN Congresses on Crime Prevention and the Treatment of Offenders, the first of which was held in 1955; others came from the former Commission on Human Rights or the Commission on Crime Prevention and Criminal Justice; most have been adopted by the General Assembly or the Economic and Social Council. A recent report by the Secretariat of the Eleventh Congress on Crime Prevention and

Criminal Justice, 2005 in Bangkok³⁷ that looks back at fifty years of standard-setting, lists dozens of such standards in the order in which they were adopted; the full text of the earlier ones can be found in a compendium that was published at the request of the Economic and Social Council³⁸ in 1992.³⁹ Many of the standards have also been compiled and re-edited for specific topical training purposes in the area of human rights.⁴⁰ The standards do not impose enforceable obligations on Member States; they embody a common ideal of how the criminal justice system should be structured and how criminal policy strategies should be devised, by providing practical guidance to states.

What is of interest for the purpose of this article is the question whether and to what extent these standards, or the bodies that have adopted them, have put the standards themselves or any of their considerations explicitly in a larger context of the rule of law, which would allow us to deduce from there an eventual common understanding of the latter concept. It is striking that this was almost never the case. In the cover resolutions whereby the standards were adopted and in the standards themselves one finds all kinds of cross-references to human rights concerns, the Universal Declaration and the international human rights instruments as well as the Charter and the principles for the administration of justice embodied therein, but the concept of “rule of law” simply does not appear.⁴¹

³⁷ Eleventh United Nations Congress on Crime Prevention and Criminal Justice, *Making Standards Work: Fifty Years of Standard-Setting in Crime Prevention and Criminal Justice*, Working Paper prepared by the Secretariat, Doc. A/CONF.203/8 of 1 April 2005.

³⁸ E/RES/1989/69 of 24 May 1989.

³⁹ *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, United Nations publication, Sales No. E.92.IV.1 and Corr. 1.

⁴⁰ Office of the High Commissioner for Human Rights, *Human Rights in the Administration of Justice. A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9, 2003; *Human Rights and Pre-Trial Detention: A Handbook of International Standards Relating to Detention*, Professional Training Series No. 3, 1994; *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, Professional Training Series No. 5, 1996.

⁴¹ See for example the *Code of Conduct for Law Enforcement Officials*, adopted by A/RES/34/169 of 17 December 1979; the *UN Standard Minimum Rules for the Administration of Juvenile Justice*, adopted by A/RES/40/33 of 29 November 1985; the *Declaration of Basic Principles of*

One attempt to have the rule of law in this context confirmed by the General Assembly was made in 2005 when the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which had been adopted by the Commission on Human Rights⁴² and had been endorsed by the Economic and Social Council,⁴³ were sent to the General Assembly for adoption. Whereas the text that was recommended to the Assembly contained a paragraph “recognizing that, in honouring the victims’ right (...) the international community (...) reaffirms the international legal principles of accountability, justice and the rule of law”, the respective part in A/RES/60/147 of 16 December 2005 reads differently: here the General Assembly, after equally recognizing the victims’ rights, went on simply to reaffirm “international law in this field”.

2. The General Assembly and Human Rights in the Administration of Justice: The Rule of Law as Latecomer to the Scene

Besides the resolutions whereby the General Assembly had taken note of the outcomes of the various UN Crime Congresses and adopted the standard rules on criminal justice proposed by them, the Third Committee had run for a long time a resolution entitled “human rights in the

Justice for Victims of Crime and Abuse of Power, adopted by A/RES/40/34 of 29 November 1985; the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by A/RES/43/173 of 9 December 1988; the *Basic Principles for the Treatment of Prisoners*, adopted by A/RES/45/111 of 14 December 1990; the *UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)*, adopted by A/RES/45/112 of 14 December 1990; the *UN Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)*, adopted by A/RES/45/110 of 14 December 1990; the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, adopted by A/RES/45/113 of 14 December 1990; the *Model Treaty on Extradition and Model Treaty of Mutual Assistance in Criminal Matters*, adopted by A/RES/45/116 and 45/117 of 14 December 1990; the *International Code of Conduct for Public Officials*, A/RES/51/59 of 12 December 1996, annexed to the Resolution.

⁴² CHR/RES/2005/35 of 19 April 2005.

⁴³ E/RES/2005/30 of 25 July 2005.

administration of justice”, i.e. criminal justice. Early resolutions had always referred extensively to the standard rules and other decisions concerning criminal law and procedure as well as various sources for human rights norms, but just as in the resolutions mentioned above, the rule of law as reference point was not to be found in any of them.⁴⁴ That changed in 1993, precisely after the Vienna World Conference on Human Rights. Resolution 48/137⁴⁵ made the inroad by recognising, for the first time in this series of resolutions, “that the rule of law and the proper administration of justice are prerequisites for sustainable economic and social development”. In the next resolution, two years later, that part read a little different and came out somewhat bolder: in its resolution 50/181, the rule of law and the proper administration of justice are “important elements” for development “and play a central role in the promotion of human rights”.⁴⁶ Another four years later the text receives further improvement when the preamble of resolution 54/163 makes the rule of law and human rights concrete and equal goals: this time the General Assembly is “mindful of the importance of establishing the rule of law and promoting human rights in the administration of justice, in particular in post-conflict situations, as a crucial contribution to building peace and justice”.⁴⁷ In the 2001 version that preambular paragraph takes in a cross-reference to the growing importance in the work of the United Nations on the fight against impunity (“... crucial contribution to building peace and justice and ending impunity”).⁴⁸ Furthermore a paragraph is added saying that “the right to access to justice (...) forms an important basis for strengthening the rule of law through the administration of justice” – so here it is the other way round: certain features in the administration of justice strengthen the rule of law. And for the first time ever the rule of law appears also in

⁴⁴ See *Human Rights in the Administration of Justice*, A/RES/40/146 of 13 December 1985; A/RES/41/149 of 4 December 1986; A/RES/42/143 of 7 December 1987; A/RES/43/153 of 8 December 1988; A/RES/44/162 of 15 December 1989; A/RES/45/166 of 18 December 1990; A/RES/46/120 of 17 December 1991.

⁴⁵ *Human Rights in the Administration of Justice*, A/RES/48/137 of 20 December 1993.

⁴⁶ *Human Rights in the Administration of Justice*, A/RES/50/181 of 22 December 1995.

⁴⁷ *Human Rights in the Administration of Justice*, A/RES/54/163 of 17 December 1999.

⁴⁸ *Human Rights in the Administration of Justice*, A/RES/56/161 of 19 December 2001, preambular para. 5.

the operative part, where the General Assembly underlined the “importance of rebuilding and strengthening structures for the administration of justice and respect for the rule of law and human rights in post-conflict situations” and suggested certain reforms “in order to establish and maintain stable societies and the rule of law in post-conflict situations”.⁴⁹ These four paragraphs remain basically unchanged in resolution 60/159.⁵⁰ The latest text of 2007, however, loses most of the earlier gains through a dramatic shortening of both parts of the resolution. Only the preambular paragraph on the “importance of ensuring respect for the rule of law and human rights in the administration of justice, in particular in post-conflict situations, as a crucial contribution to building peace and justice and ending impunity” was kept.⁵¹ On the whole the question arises whether the trend towards focusing solely on questions of the rule of law in post-conflict situations does the concept any good – as if the general obligation to uphold human rights and the rule of law in the administration of justice was somehow not a permanent challenge for *all* states.

3. Close Encounter: The Tenth UN Congress on Crime Prevention and Criminal Justice in Vienna 2000

The political changes during the nineteen-nineties finally allowed also the Congresses on Crime Prevention and Criminal Justice to approach the rule of law. When the General Assembly decided, in 1997, upon a recommendation of the UN Commission on Criminal Justice, to include in the agenda of the Tenth UN Congress on Crime Prevention and Criminal Justice to be held in Vienna in the year 2000 an item entitled “promoting the rule of law and strengthening the criminal justice system”, it did so because developments during that decade seemed to allow to take a “fresh look”⁵² at the issue. At a time where many states all over the world had embarked on processes of constitutional reform,

⁴⁹ A/RES/56/161 of 19 December 2001, paras 13 and 14.

⁵⁰ *Human Rights in the Administration of Justice*, A/RES/60/159 of 16 December 2005.

⁵¹ *Human Rights in the Administration of Justice* A/RES/62/158 of 18 December 2007, preambular para. 2.

⁵² Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Discussion Guide*, Doc. A/CONF.187/PM.1 of 22 September 1998, para. 7.

promotion of and respect for human rights and democracy, and where widespread transition to a market economy happened in Eastern European states and Asia, the time seemed ripe for the development of new activities aimed at the strengthening of the rule of law.⁵³ A preparatory paper noted that in the past decade the international community, aware of the importance of a stable legal framework for development, had increasingly included activities focusing on justice and the rule of law in its development assistance. Now that a debate between Western and the Socialist countries over the rule of law would no longer turn into “a battleground of the cold war”,⁵⁴ the discussion of the topic at the Congress was expected to centre on efforts to strengthen the rule of law and criminal justice systems “under new conditions”.⁵⁵

a. Some Elements or Requirements of the Rule of Law: A Working Paper by the Secretariat to Stimulate Discussions

In order to stimulate the discussion about the rule of law and criminal justice, the Secretariat produced a most remarkable working paper⁵⁶ that attempted to lay out a modern understanding of the rule of law in criminal justice. In it we find many of the elements which later turned up in the 2004 report of the Secretary-General. But whether this extensive background paper had any influence at all on the delegations who negotiated the outcome of the Congress is hard to tell.

At the very outset of its Chapter on the “nature of the rule of law” the paper emphasises that indeed “there is no universal agreement as to what the term rule of law actually means”. The paper then goes on to describe the rule of law as a “system of principles that relate to the legal governance of societies, but is not in itself primarily a legal system”. The rule of law “anchors and stabilizes legality” without freezing it in any given state; to the contrary, it allows change and adaptation of the law to changing legal practices. What the paper considers “essential” for the rule of law is not only a developed legal infrastructure, but also “social and cultural traditions of legitimacy, acceptance of legal authority

⁵³ On the background see Tenth United Nations Congress, see note 52.

⁵⁴ Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Promoting the Rule of Law and Strengthening the Criminal Justice System: Working Paper prepared by the Secretariat*, Doc. A/CONF.187/3, para. 2.

⁵⁵ Working Paper, see note 54, para. 9.

⁵⁶ Working Paper, see note 54.

and respect for law”. The paper then develops “some elements of the rule of law” – freely formulated and without any references or legal sources – as follows:

“A. The law must be comprehensive

The essence of judicial decision-making is that it involves the application of legal rules and not other less-tangible considerations to whatever facts are at hand. To replace purely ad hoc decision-making, the law must provide rules on which decisions can be based. (...)

B. The law must be clear, certain and accessible

Criminal law must be sufficiently clear to guide both executive and judicial decision-making. It must also be understood by the general population, which is generally presumed to know it and expected to comply with it. (...) Accessibility is also a requirement for legislative and judicial proceedings. Openness and transparency in legislative proceedings support the popular legitimacy of the legislation that results. The same is true for judicial proceedings in which precedents are set or law is made. (...)

C. The law must be legitimate: consent and compliance

In any society, the rule of law depends on the fact that the majority of people confronted with legal rules, whether in official functions or private life, will comply with them, thereby keeping the cases of non-compliance within manageable levels. This depends to a large degree on what has been described as the “legitimacy” of the law, which in turn depends on several key factors, including:

- (a) Legislative legitimacy (...)
- (b) Legitimacy of policy (...)
- (c) Legitimacy of application (...)
- (d) Legitimacy of support structures (...)

D. The law must balance stability and flexibility

The rule of law elements such as accessibility and legitimacy also depend to some degree on a satisfactory balance between stability and flexibility in both laws and law-making. (...)

E. Equality before the law

Originally, equality before the law meant that individuals and the State must be equal before the law. This remains an important prin-

ciple, but modern concepts⁵⁷ have expanded it to encompass the general equality of everyone concerned with the law. What is important for the rule of law is that everyone should be equal before the law, regardless of power, wealth, individual or corporate status or other characteristics not directly relevant to the issues at hand. In individual-State matters, the State and its officials should be bound by their own laws, subject to the same scrutiny and sanctions for non-compliance, and stand on an equal footing with individuals in legal disputes between the two. (...) Equality is essential to ensuring that legal determinations are made on the basis of legal rules as opposed to the status of the parties involved.

F. Institutional independence and the separation of powers

The integrity of the rule of law and legal structures is commonly protected by distributing powers among disparate actors or agencies that can then act as controls on one another. (...)

The rule of law is itself a form of power dispersion because it sets up legal principles as a control on social, economic or other pressures in society and vice versa.

G. Legal rights as elements of the rule of law

Human rights in general can be distinguished from the rule of law, but some legal rights are necessary elements. Laws can govern behaviour and settle disputes only if those who have legal concerns have meaningful access to accurate information and competent advice about the law. Individuals can use the rule of law as a control on State acts only if those affected have meaningful access to the courts and effective remedies against the state. (...) Legal rights that are important to ensuring the rule of law in criminal justice systems include the following:

- (a) The right not to be prosecuted for offences that did not exist in law when committed or that are too vague or uncertain to inform individuals as to what is a crime and what is not;
- (b) The right to be informed about the nature and substance of any criminal charges and the status of criminal proceedings;
- (c) The right to competent and independent counsel and, more generally, the right to mount a full and fair defence to criminal charges;

⁵⁷ Here and elsewhere throughout the text the reader would have appreciated a reference.

- (d) The right not to be subject to arbitrary arrest, detention, search or seizure in the course of criminal proceedings;
- (e) The right of access to independent courts, in interim proceedings, at trial and while incarcerated, in order to question actions taken by the State;
- (f) The right to effective remedies, including meaningful appeals, against the State, in interim and final proceedings and while incarcerated;
- (g) The right to have proceedings dealt with expeditiously, in particular if liberty of other significant interests are prejudiced or curtailed while proceedings are pending or ongoing. (...)"

b. The Congress Debates

The agenda item on promoting the rule of law was discussed in Congress Committee I, and from the Committee's report it is not quite clear whether in the debate delegations actually referred to the paper, but a number of its key findings actually reappear in the report and the conclusions of the Committee. The report notes that in the discussions a number of key components of the rule had been identified, including the following:⁵⁸

"law should conform to the standards enshrined in the Universal Declaration of Human Rights and other international instruments; law should be applied fairly and equally to all and should be accessible to all; law should respect the separation of powers of different branches of government; law should be capable of being accepted and obeyed; law should be drafted clearly and comprehensively".

And since delegations were aware that the mere adoption of laws alone does not necessarily result in the desired changes in the criminal justice system, it was also said that law needed "effective implementation whereby the law would be accepted and respected by both civil society and those administering criminal justice". In addition, "a balance between the efficiency of administering the criminal justice system and the protection of the basic rights of those involved in the criminal process, such as fairness and equality before the law", needed to be maintained. Having made all these observations, the report boils them down,

⁵⁸ Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Report of Committee I on Topic I, Conclusions*, Doc. A/CONF.187/L.3 of 14 April 2000, paras 13-23.

with almost aphoristic brevity, to no more than “two prerequisites for the rule of law: an effective and impartial justice system, and open, transparent and accountable government”. These key components identified in the Chairman’s summary are fairly sketchy, but they do contain a number of the factors that keep returning in later work on the issue, both substantive and procedural; and the references to the separation of powers and accountability of governments in general go even beyond the mere internal procedures within a justice system.

c. The “Vienna Declaration on Crime and Justice”: A Missed Opportunity

But for reasons that could not be ascertained in the context of this article, none of this survived the level of Committee discussions and made it into the final document of the Congress. The “Vienna Declaration on Crime and Justice: Meeting the Challenges of the 21st Century”⁵⁹ which was supposed to lead the work of the United Nations in the criminal justice field into the next century, is completely silent on the rule of law. Despite the fact that it had been one of the four substantive items on the agenda, the text does not mention the term “rule of law” even once. It does reaffirm, however, the goal of “more effective and efficient law enforcement and administration of justice, respect for human rights and fundamental freedoms, and the promotion of highest standards of fairness, humanity and professional conduct” as well as the “responsibility of each state to maintain a fair, responsible, ethical and efficient criminal justice system”⁶⁰ – both of which captures at least some of the requirements of the rule of law that had been identified by the Committee and the working paper. But the very notion of the rule of law is absent from the text.

⁵⁹ Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century*, Doc. A/CONF.187/4/Rev.3 of 15 April 2000.

⁶⁰ *Ibid.*, para. 2-3.

4. Rule of Law as a Prerequisite for Successful Crime Prevention: The Eleventh UN Congress on Crime Prevention and the Treatment of Offenders

When international experts on crime prevention met for the Eleventh Congress in 2005 in Bangkok, Thailand, the rule of law was again one of the points of reference for their work that could not be ignored. But due to the traditional reluctance to refer to the rule of law in this area, the reference were rather non-committal. In the debates it was pointed out that key principles of strengthening the rule of law, respect for human rights and good governance were “basic ingredients for effective crime prevention”. The rule of law was said to be “a prerequisite for the trust of people in the state and its institutions”. Rule of law and integrity of the justice system were also qualified as “prerequisites to ensuring the development of fair, effective and efficient criminal justice systems”, which had to enshrine due process, the independence of the judiciary and an effective and impartial police and prison system and also to provide for transparency and public participation.⁶¹ In the Declaration adopted at the end of the Congress⁶² states declare their conviction that “upholding the rule of law and good governance and proper management of public affairs and public property at the local, national and international levels are prerequisites for creating and sustaining an environment for successfully preventing and combating crime” and their commitment to the “development and maintenance of fair and efficient criminal justice institutions”. It becomes clear that the crime prevention and criminal justice experts see no need any more to define or further develop the concept of the rule of law for their purposes. By downgrading the rule of law to a “prerequisite” or “ingredient” for the effectiveness of national criminal justice systems, the concept loses its normative character.

⁶¹ Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok 18-25 April 2005, Doc. A/CONF.203/18, para. 84-85.

⁶² *Bangkok Declaration, Synergies and Responses: Strategic Alliances in Crime Prevention and Criminal Justice*, in: Report of the Eleventh United Nations Congress, see note 61, pp. 1-6.

IV. The Road not Taken: Rule of Law and Democracy

Another field of activity that was opened up only after the political changes in the early nineteen-nineties was democracy. The Vienna World Conference had mentioned both the rule of law and democracy as some of the factors necessary for the full enjoyment of human rights, and with all the calls for transparency of judicial procedures the link between the two seems to be evident. The Second International Conference of New and Restored Democracies in Managua, Nicaragua in 1994, which had adopted a Declaration and an Action Plan,⁶³ called for the support of governments struggling to promote and consolidate new or restored democracies, and the United Nations was of course one of the key sources for that kind of support. In Resolution 49/30 of 7 December 1994 the General Assembly requested the Secretary-General to submit a comprehensive report on the ways the United Nations system could support such efforts by governments. In his report that was forwarded to the General Assembly in the following year the Secretary-General identified three areas of United Nations support,⁶⁴ and one of the four items in the Chapter entitled “building institutions for democracy” was called “enhancing the rule of law”. Here the rule of law is set out not as a goal in itself, but as a necessary precondition for democracy: “For democracy to become a reality, the rule of law must prevail.”

The proposals that follow, however, are rather procedural and vague, still a far cry from the comprehensive lists of elements we find in later years:

“Policies and regulations should be developed and implemented according to an institutionalized process with opportunities for review. The use of discretion must not result in arbitrary and capricious exercise of power. In short, a set of rules must be known in advance, rules must be enforced and should provide room for conflict resolution, and known procedures for amending the rules must exist”.⁶⁵

⁶³ Text in Doc. A/49/720, Annexes I and II.

⁶⁴ Promoting a Democratic Culture, Electoral Assistance, Building Institutions for Democracy, see *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/59/332 of 7 August 1995.

⁶⁵ *Ibid.*, para. 94.

One year later the Secretary-General submitted, again at the request of the General Assembly,⁶⁶ yet another report in which, once more under the heading “enhancing the rule of law”, he repeated his view that the rule of law was one of the conditions conducive to democracy, but with a slight twist: now it is “democratization”, i.e. the process rather than – as in the previous report – “democracy” as the final goal or a given state of things, that needs the rule of law to become a reality: “Political pluralism cannot prosper until efficient legal institutions are established”. The report leaves it open, however, in what sense those legal institutions ought to be efficient. It again takes a purely technical approach to the rule of law by stating that in order to function effectively a legal system must include not only “adequate legislation”, but also an “efficient institutional infrastructure for the design of and administration of the law” – institutions and procedures that can “ensure the proper conception, administration and enforcement of legislation”.⁶⁷ The report continues by recalling that “efforts to enhance the rule of law” for their part would only “prove effective if they are undertaken in tandem with measures that ensure the provision of security, through adequate crime control and effective justice”.⁶⁸

Later that year saw the appearance of another document by the Secretary-General on democracy that was submitted under the same agenda item, but on the Secretary-General’s own initiative in the form of a letter addressed to the President of the General Assembly: Boutros Ghali’s famously ill-fated “Agenda for Democratization”.⁶⁹ Encouraged by the success of his two earlier concept papers – his “Agenda for Peace”,⁷⁰ submitted in 1992 at the request of the Security Council, and

⁶⁶ A/RES/50/133 of 20 December 1995.

⁶⁷ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/51/512 of 18 October 1996, paras 44 – 45.

⁶⁸ *Ibid.*, para. 47.

⁶⁹ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Letter dated 17 December 1996 from the Secretary-General to the President of the General Assembly, Doc. A/51/761 of 20 December 1996.

⁷⁰ *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-Keeping*, Report of the Secretary-General pursuant to the Statement adopted by the Summit Meeting of the Security Council on 31 January 1992, Doc. A/47/277-S/24111 of 17 June 1992.

the 1994 “Agenda for Development”⁷¹ at the request of the General Assembly, Boutros Ghali had ventured to come up with a third “agenda” in the form of a supplement to the two earlier reports, but with an entirely different structure and political content. Submitted, in the absence of a specific request by any main organ of the United Nations, in the form of a letter by the Secretary-General to the President of the General Assembly, and characterised by Boutros Ghali himself as not much more than “a paper”, it was meant to complete his earlier reflections in the other two submissions and to offer a “deeper consideration of the idea” of democratization “in all its ramifications and possibilities”, including almost philosophical considerations on the linkage between peace, development and democracy that no other United Nations organ had ever undertaken. The fate of this – probably Boutros Ghali’s most audacious – effort to find a response to the massive political changes in the 1990s needs no discussion in the confines of this article. For the purpose of our topic it may suffice to note that the rule of law has obviously not played any role whatsoever in his thinking. Apart from a factual statement that democratic countries are “more likely to respect the rule of law”⁷² and a short reference to the work of certain United Nations departments in this field, the term is nowhere to be found.

When the General Assembly took the item up again in its 52nd session 1997, it had before it the first report on the item under the new Secretary-General Kofi Annan, who took a different approach and distanced himself clearly from his predecessor. The new paradigm was now good governance, and the Chapter on the rule of law disappears. The three reports of the former Secretary-General, in the words of the new one, “contribute significantly to the process of providing a solid foundation for the eventual formation of a new and flexible framework for the United Nations system in the fields of democratization and governance, two key concepts which I believe should stand together.”⁷³

⁷¹ *An Agenda for Development*, Report of the Secretary-General, Doc. A/48/935 of 6 May 1994.

⁷² Letter, see note 69, para. 17.

⁷³ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/52/513 of 21 October 1997, para. 6.

In the following report⁷⁴ the Chapter on “enhancing the rule of law” stages a short comeback as the chapeau for some information on UN activities “for establishing or re-establishing a fair, effective and efficient justice system based on the rule of law”. But the report to the 54th session of the General Assembly is again completely silent,⁷⁵ whereas its successor report at least recalls, in passing, that good governance “promotes the rule of law and equal justice under the law”.⁷⁶ In the report to the 56th session of the General Assembly the rule of law is once again called “another essential element of democracy”, but the reasoning is somewhat opaque:

“Democracy must encompass those principles, rules, institutions and procedures that ensure representation and accountability and protect the individual or groups against arbitrary behaviour, injustice or oppression by the State or other actors”.⁷⁷

And finally, in the report to the 58th session, a Chapter heading “enhancing the rule of law” gets coupled with “accountable public administration”, but actually no rule of law activities are being reported.⁷⁸

V. Rule of Law in Peacekeeping Operations

The changing character of UN peacekeeping in the past fifteen years or so – away from the classical blue helmet type of “keeping the peace” and towards, in many local conflicts, a more complex challenge of building or rebuilding the peace, whether in support of a government or as part of the entire takeover of the administration of a country by

⁷⁴ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/53/554 of 29 October 1998.

⁷⁵ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/54/492 of 22 October 1999.

⁷⁶ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/55/489 of 13 October 2000, para. 14.

⁷⁷ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/56/499 of 23 October 2001, para. 26.

⁷⁸ *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, Report of the Secretary-General, Doc. A/58/392 of 26 September 2003, para. 18.

the United Nations⁷⁹ – has given rise to numerous questions about the goals to be pursued and the guidelines to be followed. The Panel of Experts on United Nations Peace Operations, in its report of 2000 (“Brahimi Report”), had deplored a limited understanding of the role of UN civilian police and judicial experts in peacekeeping missions and called for a better focus on the strengthening of rule of law institutions; it recommended a:

“doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to inflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post conflict environments”.⁸⁰

Current peace operations try to include rule of law elements in their activities, but often on an *ad hoc* basis and without precise guidance from the Security Council as to what exactly needs to be done in a given situation, and how.⁸¹ The Security Council has been called upon to give greater weight to establishing or re-establishing the rule of law⁸² and to include rule of law elements more consistently in his mandates. The Council has responded by stating that it considers “the enhancement of the rule of law activities as crucial in the peacebuilding strategies in post-conflict societies.”⁸³ There is, as the Security Council itself has stated in his debate in September 2003, such a wealth of experience – but unfortunately often buried in internal studies and reports of the various peacekeeping operations – that it was impossible in the confines of this article to search for definitions or concepts there.⁸⁴ This is what

⁷⁹ On this see the articles on the topic *Restructuring Iraq, Possible Models based upon Experience gained under the Authority of the League of Nations and the United Nations*, in: *Max Planck UNYB* 9 (2005).

⁸⁰ *Report of the Panel on United Nations Peace Operations*, Doc. A/55/305-S/2000/809 of 21 August 2000, paras 39-41 and 47.

⁸¹ Bull, see note 2, 2-8; see also B. Oswald, *Addressing the Institutional Law and Order Vacuum: Key Issues and Dilemmas for Peacekeeping Operations*, Department of Peacekeeping Operations, 2005; Carlson, see note 22. C.L. Sriam, “Prevention and the Rule of Law: Rhetoric and Reality”, in: Hurwitz/ Huang, see note 2, 71 et seq.

⁸² Letter dated 18 April 2008, see note 4, Recommendation 3.

⁸³ Statement by the President of the Security Council of 22 June 2006, Doc. S/PRST/2006/28.

⁸⁴ For two recent overviews see International Society of Military Law and Law of War (ed.), *La règle de droit dans les opérations de la paix / The rule of law in peace operations*, 2006; J. Howard/ B. Oswald (eds), *The Rule of*

the Secretary-General's report of 2004 has tried to synthesize.⁸⁵ The recent establishment of the Office of Rule of Law and Security Institutions within the Department of Peacekeeping Operations in September 2007, was meant to make the Department more responsive and agile in providing support in the areas of police, justice and corrections, mine action and security sector reform, and is proof of the growing role and responsibility of United Nations peace operations in this area. Its Criminal Law and Judicial Advisory Section covers legal and judicial systems and corrections or prison systems – two distinct rule of law areas that are of immediate practical relevance to peace operations on the ground.

But the rule of law is a concept that applies to *all* states, so we can probably assume that what has been developed in the other areas will also serve as a yardstick and guideline in the field of peace operations, at least in principle. It is thus quite correct that the Secretary-General, in his 2004 concept paper, does not differentiate between two groups of states – post-conflict states on the one hand and all others on the other – without denying, however, the huge differences in practice.

VI. Conclusion

With the two concept papers submitted by the Secretary-General – or three, if we also count in the Working Paper submitted to the Tenth Crime Congress – the Secretariat now has indeed a wealth of conceptual thoughts at hand on which to base its activities. As the United Nations is duty-bound to apply and follow the normative standards in the areas of human rights, criminal law and other fields of international law which serve – as the Secretary-General has put it – as the normative basis for all United Nations activities in support of the rule of law, all three concepts follow a rights-based approach and represent not merely procedural, but deeply political and normative concepts of the rule of law.⁸⁶ Whether all Member States of the United Nations, despite the

Law on Peace Operations: A Conference of the "Challenges of Peace Operations" Project, Conference 2002; cp. also Department for Peacekeeping Operations, Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law, 2006.

⁸⁵ For issues involving the Security Council see the article by K. Bühler in this Focus.

⁸⁶ Bull, see note 2, 44-46.

myriad of general references to the importance of the rule of law in protecting human rights and strengthening the administration of justice in the resolutions of the General Assembly, would subscribe to all or even most of the elements provided in those reports, remains doubtful. It is therefore probably wise for the Secretariat and all “friends of the rule of law” among Member States not to force the General Assembly as the main political organ of the United Nations to recognise or “adopt” any of the concepts in circulation within the Secretariat, or to suggest that these are a “definition” that is somehow indicative or even binding for activities outside the United Nations in this field. Pragmatically applied as “common language” or conceptual framework, they and the numerous standards and instruments on which they draw may indeed serve as a most welcome guidance and be used by those who work “on the ground” and those who support their activities. In this sense the rule of law as laid out by the Secretary-General may indeed be considered to have established its proper place among the guiding principles of the work of the United Nations.⁸⁷

⁸⁷ Mani, see note 16, 22.