

# Issue Brief

## Advancing the Rule of Law Agenda at the 67<sup>th</sup> General Assembly

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This Issue Brief was drafted by Alberto Cutillo, Visiting Senior Fellow at the International Peace Institute (IPI).

It provides background information on the upcoming high-level meeting on the rule of law scheduled to take place at the opening of the 67<sup>th</sup> United Nations General Assembly. The brief concludes with four realistic goals for the outcome of the event.

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*Since 2004, the rule of law has gained solid attention in the UN community. This year, on September 24<sup>th</sup>, there is an opportunity to mark a milestone in enhancing its role in the global effort to rebuild societies after conflict, support transitions and economic growth, and strengthen state institutions. For the first time, the United Nations General Assembly will devote its opening high-level event to the topic.*

*Over the course of the last twenty years, attention around the rule of law has increased in many different contexts and fora. While its precise definition remains elusive, a sizable “industry” on the rule of law has developed, with its agencies, programs, and scholars. Different views on the precise notion and scope of the rule of law, however, are emerging as we approach the high-level event, making the attempt to adopt a consensual political declaration a painful exercise. A breakthrough is still possible, if additional political effort is made in the final steps.*

### Defining the Rule of Law

For a long time the concept of rule of law belonged solely to the legal world, particularly in countries ruled by the common law system.<sup>1</sup> Only in relatively recent times has the notion of the rule of law become a prominent component of international relations.

While the term rule of law is widely used in many contexts as if its meaning were unequivocal, there is no agreement concerning its definition and contents. This ambiguity probably explains, at the same time, the popularity of the term among experts and scholars belonging to very different areas and sharing at times different—if not diverging—priorities and interests, as well as the considerable amount of confusion and misunderstanding that surrounds it.

At the very heart, the rule of law affirms the supremacy of the legal system over all individuals and organizations, including the state. It is also accepted that this basic concept implies a number of other features, including adherence to the principles of legality, accessibility of justice, and the independence of the judiciary.<sup>2</sup>

However, beyond this common ground, views on the nature and the

1 For a brief history of the concept of the rule of law, see Simon Chesterman, “An International Rule of Law?” *American Journal of Comparative Law*, 56 (2008): 331-361; NYU Law School, Public Law Research Paper No. 08-11, available at <http://ssrn.com/abstract=1081738>.

2 Chesterman proposes a three-element core definition “applicable and acceptable across cultures and political systems,” which he summarizes as “a government of laws, the supremacy of the law, and equality before the law.” Chesterman, “An International Rule of Law?” p. 15.

boundaries of the rule of law diverge in many respects. The most crucial distinction identified in the literature is a dichotomy between a larger and a smaller definition, described by some authors as a maximalist versus a minimalist approach, or as thick versus thin. While the precise criteria and boundaries between the two opposite interpretations of the rule of law vary at times quite substantially, the most consistent dividing line appears to be between form and substance, or “between the formalistic and institutional dimension of the rule of law, and the normative and substantive dimension.”<sup>3</sup>

This divide appears particularly acute around the inclusion or not of a human rights perspective; in fact, human rights advocates are very firm in dismissing the “thin” version as basically irrelevant.

Another major difference between the two approaches lies in the technical versus political nature of the rule of law. While adherence to the “formalistic” definition allows describing rule of law programs as “purely technical,” any attempt at including “substance” is likely to turn them into political issues.

Absent a unanimous understanding of the meaning of the rule of law, the UN has come out with its own interpretation. In a 2004 report, the Secretary-General offers the following definition:

The rule of law is a concept at the very heart of the Organization’s mission. It 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.<sup>4</sup>

This definition is largely regarded by scholars and practitioners as an important step forward in clarifying the nature and the boundaries of the rule of law. Given its strong reference to adherence to human rights norms and standards, it represents an effort to move towards a thick interpretation, and not solely an effort to consolidate the least common denominator. It remains, however, a conceptual definition with no legal value, and one which has not been endorsed by the UN membership.

In fact, some scholars believe that a realistic approach should aim at adopting a minimalist definition:

To conceive the rule of law in a manner coherent across the many contexts in which it is invoked requires a minimalist understanding, which does not seek substantive political outcomes—democracy, promoting certain human rights, redistributive justice or laissez-faire capitalism, and so on—in its definition.<sup>5</sup>

In recent years the notion of rule of law has been expanded from the national to the international dimension. Although the precise definition of its international dimension remains—again—an area of debate, it is generally understood “as the application of rule of law principles to relations between states and other subjects of international law.”<sup>6</sup>

As for its first component—relations between states—the international dimension of the rule of law is focused on the adherence to international legal instruments and their implementation. Its second component—relations with other subjects of international law—refers to the question of the adherence of international organizations to international law, especially the UN and its organs.

Even if we apply a minimalist definition of the rule of law, such as the one suggested by Chesterman as “a government of laws, the supremacy of the law, and equality before the law,”<sup>7</sup> it is highly questionable that those basic principles are fully applied within the UN and its organs.<sup>8</sup>

3 Rama Mani, “Exploring the Rule of Law in Theory and Practice,” in *Civil War and the Rule of Law*, edited by Agn s Hurwitz with Reyko Huang (Boulder, CO: Lynne Rienner, 2008), p. 24.

4 United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, August 23, 2004, para 6.

5 Chesterman, “An International Rule of Law?” p. 38. Chesterman also believes that “these substantive goals may properly be seen distinct from the rule of law—folding them into its robes reduces it to a rhetorical device at best, a disingenuous ideological device at worst.”

6 *Ibid.*, p. 32.

7 *Ibid.*, p. 15.

8 Attention has focused mainly on the Security Council. See UN document A/63/68 on the UN Security Council and the rule of law, which contains the final report and recommendations from the Austrian Initiative. For a critical assessment of rule of law in UN Security Council action, see Balakrishnan Rajagopal, “Invoking the Rule of Law: International Discourses,” in Hurwitz, *Civil War and the Rule of Law*, p. 60.

Raising the issue of the rule of law within international organizations is perfectly legitimate, particularly on moral grounds: how can the UN (or any other organization) retain its legitimacy in prescribing rule of law reforms at the national level if they do not conform to the main tenets of the rule of law themselves? However, in addressing this issue one should keep in mind the different nature of domestic and international law.<sup>9</sup>

In practice, tackling the rule of law at the international level generates a number of new and complex issues, some of them requiring reform in very crucial and delicate areas. For instance, supremacy of the law raises the question of universal and compulsory jurisdiction of international tribunals, as well as of full application of international law to international organizations, including the UN organs. For example, applying the principle of equality before the law at the UN might suggest the need to reform the Security Council membership and the veto power.

## The Rule of Law at the UN

According to many authors, it was in the wake of decolonization that the rule of law first gained popularity in the international arena. The main rationale for its promotion was fostering economic growth, through the creation of a solid, transparent, and modern legal framework, particularly in areas more directly linked to economic activities (trade, investment, banking, properties, etc.). It was with this perspective that the rule of law became a common tool for development cooperation programs.

The 1960s wave of rule of law programs in the developing world is often associated with the “law and development movement.” This “was premised on the notion that law reform was essential for economic development, and furthermore that legal reform and education could serve as a vector for change and development.”<sup>10</sup>

Interest in the rule of law in the development field faded after a decade or more, following a generally negative evaluation of rule of law

programs’ effectiveness in achieving their stated goals. The attempt to export Western—and particularly US—models without sufficient concern for local needs and specificity was identified as one of the main explanations for the poor results.<sup>11</sup>

Two distinct developments generated by the end of the Cold War, brought new attention to the rule of law: the sudden expansion of efforts to put an end to long-standing conflicts worldwide; and the move of several countries from autocratic governments and centralized economies to democracy and market economics.

Postconflict and transition societies offered the opportunity to develop a broader concept of rule of law, as the basis for rebuilding states on more solid foundations. Broad consensus emerged in the 1990s regarding the huge potential of the rule of law to address many (if not most) of the challenges facing peacebuilding and statebuilding processes.

In the second (and still running) wave of attention on the rule of law, emphasis moved beyond economic growth to the maintenance of international peace and security, as the rule of law started to be seen as a tool for conflict resolution and prevention.

The Security Council “first used the words ‘rule of law’ in the operative paragraph of Resolution 1040 (1996), where it expressed support for the Secretary-General’s effort to promote national reconciliation, democracy, security and the rule of law in Burundi.”<sup>12</sup> Subsequently, reestablishing the rule of law has become a routine part of the mandate of UN-led peacekeeping operations.

In addition to international peace and security, in the fifteen years following the fall of the Berlin wall, the major focus of the rule of law was on human rights promotion.

The link between the rule of law and human rights can be traced back to the preamble of the *Universal Declaration of Human Rights*, which states: “It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”<sup>14</sup>

9 For a discussion on this issue, see Chesterman, “An International Rule of Law?,” p. 35.

10 Mani, “Exploring the Rule of Law,” p. 35.

11 *Ibid.*, p. 36.

12 Chesterman, “An International Rule of Law?,” p. 22.

13 United Nations, *Universal Declaration of Human Rights*, 1948, Preamble.

In such a perspective, the rule of law is instrumental to the protection of human rights within national legal systems. Reflecting the prominence of human rights in the UN discourse on the rule of law the topic was debated for over a decade within the General Assembly's Third Committee, the one responsible for human right issues. From 1993 to 2002, the General Assembly passed yearly resolutions on the theme "strengthening the rule of law" on the basis of the work of the Third Committee.<sup>14</sup> The Office of the High Commissioner for Human Rights was requested to coordinate system-wide activities. There was no reference to the international dimension of the rule of law, since all efforts were focused on support at the national level.

Besides the new focuses on peace and security and human rights, the old linkage with development was found to be still relevant, and it was actually acknowledged in the 1994 Secretary-General's report, "An Agenda for Development."<sup>15</sup> While the report never uses the expression rule of law, it lists under the then fashionable label of "good governance" a number of activities—such as constitution drafting, instituting administrative and financial reforms, strengthening domestic human rights laws, enhancing judicial structures, training human rights officials—which belong to the rule of law domain.

A large number of UN agencies and programs soon started promoting activities and programs in the area of rule of law reform, at the intersection between development, security, and human rights, in partnership or in competition with a wide number of other major international organizations and development agencies.

While the convergence of support on the part of disparate actors allowed for a dramatic expansion of funds and programs on the rule of law, many authors expressed concern over turning the rule of law into a sort of panacea for all kinds of complex and long-standing problems affecting entire

societies, especially when different actors have different (and potentially conflicting) agendas and even diverging definitions of the rule of law.

As noted in an often quoted article written in 1998:

The concept is suddenly everywhere—a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization. Unquestionably, it is important to life in peaceful, free, and prosperous societies. Yet its sudden elevation as a panacea for the ills of countries in transition from dictatorships or statist economies should make both patients and prescribers wary.<sup>16</sup>

A new twist at the UN occurred in the post-9/11 context, with the growing emphasis on failed states as a source of transnational threats. Attention to the rule of law as a tool to address state failures moved to the Security Council, which held its first debate on the rule of law in 2003 and subsequently requested the Secretary-General to present a report to it on the rule of law and transitional justice in conflict and postconflict societies.<sup>17</sup>

The report "was a milestone in the recognition of the rule of law as a concept of normative and operational significance in the work of the United Nations."<sup>18</sup> It opened the way to political recognition at the 2005 UN World Summit, whose outcome document, adopted by the heads of state and government, solemnly affirms the collective commitment to strengthening the rule of law.<sup>19</sup>

As a consequence of this institutional repositioning and in parallel to the ongoing debate within the Security Council, discussion on the rule of law within the General Assembly was transferred from the Third to the Sixth Committee (legal affairs), which in 2006 started holding a yearly debate on the theme "the rule of law at the national and international level."

At the organizational level, another development took place in 2006.<sup>20</sup> Following a proposal of the Secretary-General, the 2005 UN World Summit

14 UN Documents A/Res/48/132, A/Res/49/194, A/Res/50/179, A/Res/51/96, A/Res/52/125, A/Res/53/142. Subsequently resolutions were passed every two years: A/Res/55/79, A/Res/57/221.

15 United Nations Secretary-General, *An Agenda for Development*, UN Doc. A/48/935, May 6, 1994.

16 Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77 (March/April 1998): 95-106, p. 95.

17 United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616, August 23, 2004.

18 Agnès Hurwitz, "Civil War and the Rule of Law: Toward Security, Development, and Human Rights," in Hurwitz, *Civil War and the Rule of Law*, p. 1.

19 United Nations, *2005 World Summit Outcome*, UN Doc. A/Res/60/1, October 24, 2005, para. 134. This text is relevant also for its reference to the international level of the rule of law, in addition to its national dimension.

20 For a history of institutional developments at the UN in the area of the rule of law, see K.G. Bühler, "The Austrian Rule of Law Initiative 2004-2008," in *Max Planck Yearbook of United Nations Law* 12, 2008.

decided on the creation of a UN coordination mechanism (the UN Rule of Law Coordination and Resource Group), chaired by the Deputy Secretary-General and assisted by a rule of law unit, whose large and diversified membership reflects the interdisciplinary nature of the rule of law and its diverse strands.<sup>21</sup> Members of the group are the principals of the Department of Political Affairs (DPA), Department of Peacekeeping Operations (DPKO), Office of the High Commissioner for Human Rights (OHCHR), Office of Legal Affairs (OLA), United Nations Development Programme (UNDP), Office of the United Nations High Commissioner for Refugees (UNHCR), United Nations Children's Fund (UNICEF), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), and United Nations Office on Drugs and Crime (UNODC). The group serves a coordination function, while the operational role remains squarely with the individual UN entities.

In 2007, the establishment of OROLSI—the Office for Rule of Law and Security Institutions—within DPKO highlighted the growing importance of the rule of law within the mandates of UN-led peacekeeping operations. The core of its work is to strengthen police, justice, and correction institutions, as well as the institutions that can hold them accountable, mainly by deploying civilian police, justice, and correction officers. OROLSI has recently developed a stand by capacity, in order to deploy first response staff within the shortest time frames.

All these developments represent important advances in the ability of the UN system to play a meaningful role in the promotion of the rule of law. According to a recent report, however,

the UN's rule of law support agenda rests on shaky foundations: unstable political settlements; a weak empirical base; and a decision-making architecture and culture, that has proved unable to clarify confusion, make decision, or present member states

with a roadmap toward more streamlined arrangements.<sup>22</sup>

The report sets out several short- and medium-term steps to move rule of law efforts forward, including a “flexible” use of the different definitions of the rule of law, according to the particular context. For instance, in post conflict settings, the UN should refrain from using the thick version, which is instead considered appropriate in post-authoritarian transitions.

Many authors have been critical of the effectiveness of rule of law programs over the last twenty years. Such critics stress the gap between ambitious objectives expressed in terms of broad and somewhat abstract categories (such as “fighting corruption” or “empowering women”) and actual measurement of achievements in rather bureaucratic terms (number of judges or correction officers trained, number of tribunals refurbished or computers supplied, etc.), which, when taken out their context, bear little significance.<sup>23</sup>

While it is undeniable that in some places rule of law programs have largely missed their target, it is important not to underestimate the remarkable success they have achieved in others—for example, in Eastern Europe and Latin America.<sup>24</sup> Criticism should also be tempered by consideration of the extremely difficult surrounding circumstances under which some of the programs are run, especially in postconflict and fragile countries, where basic security and public services are not guaranteed.

Besides the quality of specific programs, it can be argued that ambiguity over the scope of the rule of law agenda, combined with different and at times diverging goals pursued by different actors working in the same context, contribute to a globally mixed performance and call for a thorough debate on the issue. This year's high-level event offers a timely opportunity to take stock of progress achieved and to set the basis for future action.

21 United Nations, *World Summit Outcome*, para. 134 (e).

22 Camino Kavanagh and Bruce Jones, “Shaky Foundations. An Assessment of the UN's Rule of Law Support Agenda,” Center on International Cooperation, New York, 2011, p. 7.

23 Mani, “Exploring the Rule of Law.”

24 For a brief overview of success and failure of rule of law programs, see Carothers, “The Rule of Law Revival.”

## Preparing for the High-Level Meeting

The idea of having a high-level meeting on the rule of law at the General Assembly originated within the UN Secretariat in 2008-2009 and, once endorsed by the Secretary-General, was cautiously sounded out with a small number of member states who were known for their interest in the subject. On the basis of positive feedback, it was then decided to raise it in the context of the informal consultations of the General Assembly's Sixth Committee in early 2010. The proposal quickly found itself in the middle of a polarized debate, largely along the lines of the North-South divide that dominates UN politics.

Schematically (and keeping in mind that within both camps there are diverging views), countries belonging to the non-aligned movement maintain that the discussion on the rule of law should center on its international dimension; that programs managed by the UN and other actors to strengthen the rule of law at the national level should be conceived and implemented upon request of interested member states; and that those programs should focus on economic growth and development.

For countries in the industrialized world, the national dimension should be at the center, with special attention paid to countries with weak or ineffective institutions, in order to promote justice and security-sector reform in full adherence with international human rights norms and standards.

Despite this divergence over the ultimate goals of the rule of law, the General Assembly agreed in December 2010 “to convene a high-level meeting of the General Assembly on the rule of law at the national and international levels during the high-level segment of its sixty-seventh session.”<sup>25</sup>

In the absence of agreement on the format and outcome of the high-level event, the definition of the modalities of the event was postponed to the

next year.<sup>26</sup> Eventually, one year later, the General Assembly decided that the one-day event would be held exclusively in plenary meetings.<sup>27</sup> This formula—as opposed to the combination of plenary and panel meetings that is more common in similar situations—limits considerably the number of delegations to take the floor and sets the stage for a rather abstract debate, whereas panel discussions make it possible to focus on specific sub topics.

It was also decided “that the high-level meeting will result in a concise outcome document” on the basis of a draft to be submitted by the president of the General Assembly and subsequently discussed within “inclusive informal consultations [to be convened] at an appropriate date in order to enable sufficient consideration and agreement by Member States prior to the meeting.”<sup>28</sup>

The same resolution requested “the Secretary-General to submit a report for the consideration of Member States in preparation for the high-level meeting.”<sup>29</sup>

## The Secretary-General's Report

Typically, reports submitted by the Secretary-General in preparation for UN conferences play a crucial role in setting the tone of the event, as well as in offering the membership a set of possible options for its outcome.

This specific report was no exception. Its very title, “Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels,” revealed a far-reaching and ambitious approach.<sup>30</sup> As the title suggests, the report is action-oriented; it identifies a number of “key commitments to be made by Member States and the United Nations.”

The commitments are grouped in four categories.

1. **International:** The first category aims at strengthening the rule of law at the international

25 UN General Assembly Resolution 65/32 (January 10, 2011), UN Doc. A/Res/65/32, para. 13.

26 Ibid.

27 UN General Assembly Resolution 66/102 (January 13, 2012), UN Doc. A/Res/66/102.

28 Ibid., para. 16.

29 Ibid., para. 18.

30 United Nations Secretary-General, *Delivering Justice: Programme of Action to Strengthen the Rule of Law at the National and International Levels*, UN Doc. A/66/749, March 16, 2012.

level. It requests member states and UN organs to increase compliance with international law (starting from the UN Charter). It also requests an effort to strengthen international dispute resolution, including through compulsory acceptance of the jurisdiction of the International Court of Justice, and through a wider adherence to existing tribunals and other judicial mechanisms.

2. **National:** The second—and most demanding—group of commitments is aimed at strengthening the rule of law at the national level. Four different areas of action are identified.

a) In the first place, member states are required to improve the delivery of public services—particularly in the administration of justice—in terms of efficiency, accountability, and transparency. Other commitments under this heading include allocating adequate resources within national budgets to rule of law institutions; reinforcing data collection and analysis related to the rule of law; reinforcing the role of civil society; and requiring member states that have traditional and informal justice mechanisms to ensure their compliance with international norms and standards.

b) The second group of commitments under this heading is aimed at member states in conflict and post conflict situations. It asks member states to increase contributions devoted to restoring the rule of law in such situations (both in human and financial terms), especially when this is part of a UN peacekeeping operation's mandate.

c) The third group is a long list of recommended commitments to foster an enabling environment for sustainable human development. It ranges from growth and employment-friendly legislation in the areas of trade, investments, and labor; to fighting corruption and protecting housing, land and property rights; to creating and maintaining civic records.

d) The final set of commitments at the national level concerns women's and children's empowerment, particularly through repelling discriminatory legislation and securing

equal access to justice.

3. **Transnational:** The third category of commitments identified in the report falls in between national and international levels, addressing transnational threats and crimes. States' efforts should concentrate on investigation and prosecution; support for victims; strengthening national capacities; and support for other accountability mechanisms, such as fact-finding missions, international and hybrid accountability mechanisms established by the UN, as well as the International Criminal Court. On the preventive side, efforts should focus on universal adherence to the international normative framework in this area and its full implementation at the domestic level, coupled with increased international cooperation, including in the area of information sharing.

4. **Multilateral and Bilateral:** The final strand of commitments is focused on strengthening support to member states. It concerns both multilateral organizations (and prominently the UN) and bilateral donors, and is focused on the concepts of greater coordination and larger, more predictable, and consistent funding for the different initiatives, coupled with joint assessments and more accurate and standardized monitoring and evaluation.

This impressively detailed list of commitments, according to the report, should form a plan of action, which the Secretary-General proposes for adoption at the high-level meeting of the General Assembly.

Looking ahead, the report proposes that the high-level meeting launch a process to set common goals for the rule of law, with corresponding benchmarks and indicators to measure the progress achieved. The rule of law goals should be harmonized with other existing processes, including the development of the Millennium Development Goals post-2015.

Interestingly, the report mentions another, non-UN-led, ongoing process, namely the one led by the International Dialogue on Peacebuilding and Statebuilding, to set indicators for the five peacebuilding and statebuilding goals that were endorsed by some forty states and international organizations at the Fourth High-Level Forum on

Aid Effectiveness, held in Busan at the end of 2011.<sup>31</sup>

The report also suggests the creation of a consultative forum on the rule of law, open to all member states, intergovernmental, and nongovernmental organizations, academic institutions, think tanks, and the private sector, which would meet periodically to discuss specific thematic issues and to report to the General Assembly.

In addition, the report suggests that member states hold periodic discussions on the rule of law in plenary meetings of the General Assembly. The combined expected outcome of these two proposals would be to have a 360-degree discussion on the rule of law, capable of bringing together all relevant voices and topics, therefore allowing for better informed and comprehensive deliberations at the political level.

Finally, the report proposes that member states take the occasion of the high-level event to make individual pledges related to the program of action, according to their national priorities.

To sum up, the follow-up proposed by the Secretary-General to the membership is based on four elements:

- 1) the adoption of a program of action;
- 2) the broadening of the rule of law debate, including through the establishment of a consultative forum, open to civil society;
- 3) the launching of a process to set common goals for the rule of law, with corresponding benchmarks and indicators to measure the progress achieved;
- 4) the creation of a mechanism of voluntary pledges on the rule of law to be made by member states, based on national priorities and linked to the program of action to be adopted.

## The Draft Declaration

The first draft of the outcome document was presented in June 2012 by the two co-facilitators appointed by the president of the General Assembly to lead the process of adoption of the text, the ambassadors to the UN of Denmark and Mexico. In

its first version, the document followed quite closely the structure of the Secretary-General's report, and expressed support for all its four main goals. It also endorsed the articulated definition of the rule of law, as provided by the UN Secretary-General's report of 2004.

The document received mixed appreciation. While "northern" countries seemed overall pleased and hinted at possible requests for only limited "clarifications and improvements" in the text, the Non-Aligned Movement (NAM), backed by Russia and to a certain extent China, criticized the document for being: (1) too lengthy and detailed; (2) too far-reaching in advancing a definition of the rule of law; (3) unbalanced, with too much stress on the national dimension; and (4) too prescriptive in suggesting follow-up measures that, at best, were deemed premature and inappropriate to the context of a political declaration.

Specifically, the proposal to adopt a program of action on the rule of law by 2015, and to do so through negotiations to be held within a consultative forum, was bluntly turned down.

Successive versions of the draft were circulated in July and late August, each followed by a fresh round of consultations. The co-facilitators have gone a long way in trying to accommodate the various requests by member states to shorten the declaration and make it less far-reaching in terms of follow-up; specifically, they removed any reference to a program of action on the rule of law to be adopted by the General Assembly, as well as to the creation of a consultative forum.

They have also removed the paragraphs containing elements for a definition of the rule of law, while they have introduced new language to address the international dimension, specifically through references to the Security Council and the reform of the international financial institutions, as well as on unilateral measures and on sanctions. These new elements, however, have been criticized by other members.

The current draft declaration retains a reference to voluntary pledges by states to be made in the context of the high-level meeting. While this reference might be dropped in the final version (since several members expressed some dissatisfac-

<sup>31</sup> The International Dialogue is an independent initiative, which groups some forty donors and aid recipient countries, as well as a number of international organizations. The OECD provides the secretariat for the process.



tion with it) the pledging process seems likely to be put in place, based on the intention expressed by some members to make some pledges during the event. The UN would then likely adopt a soft follow-up mechanism to monitor implementation and politely remind members—likely, on purely bilateral relations, with no external publicity—of their promises, should they tend to forget.

Despite the significant changes introduced, member states' criticisms have not been completely addressed, and negotiating positions remain close to those expressed at the first meeting.

A fourth version of the text is expected in these days, followed by another round of informal consultations. It remains to be seen whether the consultations will succeed in addressing all pending issues, or if they will require further negotiations, possibly in the form of a joint drafting exercise, as already requested by several delegations.

## Conclusion

Just a few weeks before the high-level meeting, views differ on the nature of its expected outcome and whether it is going to be labeled as a success or a failure.

Overall, the most contentious points remain those concerning the follow-up, both in terms of substance and mechanisms.

As of today, each of the four ambitious goals set out in the Secretary-General's report appear to be at risk. This should not be a reason for surprise, or even for despair. Scaling back the initial ambitions were part of the plan, and the final version of the declaration will likely need to go a step further in this direction.

One may draw an analogy with what happened in 2006 when the high-level dialogue touched upon migration and development, though the roles were somewhat reversed—at the time, the South wanted a robust follow-up, while the North regarded the event as a single shot. In the end, those vetoing any substantive and institutional change prevailed, but they also accepted welcoming language in support of initiatives outside the UN. The resolution noted “with interest the offer of the Government of Belgium to convene a state-led initiative, the Global Forum on Migration and Development,” and postponed “possible options for appropriate follow-

up” to 2008, when, eventually, it was decided to hold a second high-level dialogue, scheduled for 2013.

This scenario might repeat itself, also given the lack of enthusiasm inside the North for some of the proposals. For instance, some members are rather wary of creating a new forum over which they will have no control, not to mention the financial cost attached to any new bureaucracy.

At the end of the day, giving up formal follow-up mechanisms might not represent a major setback, but rather the recognition that times are not ripe yet for them.

In the short time remaining before the event, the true friends of the rule of law (including, but not limited to, members of the informal group of states meeting under this name) should focus on four realistic, though far from guaranteed, goals:

- 1) Ensuring high-level participation to the event. The number and geographic coverage of heads of state and government and senior ministers taking part in the event is meaningful not only for the protocol; it is a tangible sign of participation and political commitment to sustain the rule of law.
- 2) While formal follow-up mechanisms are probably premature, it needs to be made clear that the incoming meeting is not a “one-shot event,” nor the end of the road, but rather a new step into a longer term process, aimed at clarifying existing ambiguities and misunderstandings surrounding the rule of law, and at rallying political support for its further development. This process should lead, sometime in the future, to adjustments in the current UN architecture, in order to make the rule of law concept a cross-cutting notion that permeates the work of the organization in a number of different areas.
- 3) A summit meeting without a final declaration would be extremely disappointing; therefore all efforts need to be made in order to reach a compromise on the still numerous divergences surrounding several paragraphs. The co-facilitators have so far done an excellent job, but they should be open to seeking support from all possible sources, including at the highest political level, should

they sense the risk of missing the opportunity for a final agreement.

- 4) An even grimmer scenario than a summit meeting without a declaration would be a summit meeting that results in a step backward. A declaration that casts doubts on the *acquis* of the rule of law's normative and operational agenda would endanger the core values that, even in the absence of a universally agreed definition, it encapsulates today. This is a scenario that should be avoided. This is particularly true in the human rights

dimension, where many positive steps have been made in the last twenty years, through scores of resolutions and declarations. The coordination committee of the Special Procedures of the Human Rights Council, in a recent open letter sent in view of the high-level meeting, wrote: "The rule of law is of little value without the promotion and protection of human rights, which are the normative foundation of the United Nations and its work." The high-level event should echo this message loudly and clearly.



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