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Taking the Rule of Law Seriously:

More Legal Certainty for UN Police in Peacekeeping Missions

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GCSP

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About the Author

Dr Thomas Fitschen is a lawyer by training and currently the Deputy Permanent Representative of Germany to the Office of the United Nations (UN) and the other International Organizations in Geneva. He joined the German Foreign Service in 1990, with assignments, inter alia, as the legal adviser to the Permanent Mission of Germany to the UN in New York and as Head of the Division for General Assembly Affairs as well as Deputy Head of the Foreign Office's Task Force Rule of Law Promotion.

From November 2011 to July 2012 he was seconded to the GCSP as Faculty member.

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NB: The views presented in this paper are personal ones of the author and do not necessarily reflect positions of neither the German Foreign Office nor the GCSP.

List of Acronyms

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CCPR	International Covenant on Civil and Political Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Convenant on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DFS	Department of Field Support
DPKO	Department of Peacekeeping Operations
ECHR	European Convention on Human Rights
FPU	Formed Police Unit
ILC	International Law Commission
Max Planck UNYB	Max Planck Yearbook of United Nations Law
MOU	Memorandum of Understanding
OHCHR	Office of the High Commissioner for Human Rights
OROLSI	Office for Rule of Law and Security Institutions
ROL	Rule of Law
SC	Security Council
SOFA	Status-of-Forces Agreement
UDHR	Universal Declaration of Human Rights
UNMIK	United Nations Mission in Kosovo
UNODC	United Nations Office on Drugs and Crime
UNTAET	United Nations Transitional Administration in East Timor

Executive Summary

Modern UN peacekeeping operations almost inevitably contain a civil police and justice component. UN police and justice elements are regularly called upon to help re-establish law and order and rebuild the rule of law in societies whose civil infrastructure has been destroyed by years of internal conflict. Where their mandate charges them to secure law and order, however, UN police often has difficulties in establishing the law to be applied. As a consequence, UN police often cannot act with the necessary clarity and decisiveness in their early phase of deployment. The ensuing legal vacuum may allow crime to flourish, nurturing doubt about the capacity of the UN to act in accordance with the rule of law.

As promulgated by the Secretary-General in 2004, the rule of law requires legal certainty, predictability of the content of the law, fairness and equality in its application and full accountability of all state agents to the law. Whereas it is undisputed today that UN personnel must abide by international human rights standards, current legal guidance for UN police is unclear about which norms of criminal law and procedure are to be applied where the local law is unknown or does not meet these international standards.

This paper argues that for reasons of their own accountability and that of the Organization, UN police cannot be left alone with the task of establishing the applicable norms in an ad-hoc way. From a rule of law perspective, the current practice of basing UN police work on not more than a general reference to the human rights compatibility of the local law – in the agreements between the UN and the host country or the police contributing states – is insufficient. Falling back on the national laws and police practices of the respective police officer or contingent equally does not meet the requirements of the rule of law. More precise guidance is needed on what should replace any insufficient law, at least in the areas where UN police work directly affects the rights of citizens of the host state. The paper therefore calls on the UN and member states to improve the framework for UN police in post-conflict peace operations. It recommends that the apparent void be filled by adopting a set of basic interim norms through the General Assembly to govern police work and criminal procedure, which can be made applicable and legally binding at the local level until the local law has been brought into full conformity with applicable international human rights law.

Introduction: Rule of Law Challenges for UN Police Missions

The character of United Nations (UN) peacekeeping has changed remarkably since the 1960s – away from the classical blue helmet type of "keeping the peace" between warring states, and towards the hugely complex challenge of rebuilding a peaceful society after years of protracted intra-state conflicts, in what today is called multi-dimensional peacekeeping. One significant consequence of this development is the sharp increase in police and justice components of UN peace missions over the past decade. Whereas in 1994 no more than 1,677 UN police officers were deployed, in 2012 the police presence amounts to 14,335 uniformed police officers working in ten of the sixteen peacekeeping operations.[1] UN police is one of the fastest growing sectors in the UN's work, and it is by far the largest section of UN involvement in support of the rule of law. Over the same period, the mandates issued by the Security Council in support of the rule of law have grown increasingly complex. The growth in scale and complexity has led to a "paradigm shift" for UN police.[2]

Over time, three broad types of mandates for UN police have evolved:[3]

- The traditional (or "passive"[4]) mandates in the early years of UN policing which were mostly limited to monitoring local police forces and compliance with the peace agreements, respect for human rights, and providing training and guidance for host state police;
- A more pro-active group of mandates has been labelled "transformational" (or "active"[5]): here, UN police and justice experts provide advice and guidance on restructuring and reforming the law enforcement sector, but

1 Compared to 82,549 troops, 2,033 military observers and 5,493 international civilian personnel, see DPI, *UN Peacekeeping Operations Fact Sheet* – 30 April 2012 (DPI/1634/Rev.132/Corr.1, May 2012).

2 *United Nations Police*, Report of the Secretary-General, A/66/615, 15 December 2011, para.10.

3 *Ibid.*, para.11-18; see also the chart in W.J. Durch and M.L. England, *Enhancing UN Capacity to Support Post-conflict Policing and Rule of Law,* 2nd ed., Oxford University Press, 2010, p.20; DPKO, *Handbook on Multidimensional Peacekeeping Operations,* 2003, pp.83-100.

4 See J. Sherman, B. Tortolani, and J.Nealin Parker, "Building the Rule of Law: Security and Justice Sector Reforms in Peace Operations", *Annual Review of Global Peace Operations* 2010, Center on International Cooperation, New York, 2011, p.14.

5 Durch and England, *op.cit.*, p.20.

also give operational support[6] to law enforcement agencies of the host state where the latter's capacities are inadequate. Typical areas of such direct UN engagement are riot control, security management of refugee installations, the provision of security for elections, the protection of UN facilities, securing the freedom of movement of UN personnel or humanitarian workers, and protecting civilians under threat of violence. Under these types of mandates, UN police often perform genuine executive functions that go beyond counselling local authorities, and get into direct contact with the local population. Particularly the larger missions with a considerable share of Formed Police Units (FPU) and an explicit mandate to secure law and order – such as in Darfur (5,318 police) or Haiti (3,189 police) – as well as the missions in the Democratic Republic of Congo, Côte d'Ivoire, Liberia and Timor Leste with more than 1,200 police each,[7] clearly have such an enforcement function of their own;

- In the third category – so far only in the cases of Kosovo and Timor Leste – the UN was given its most authoritative, "executive" role, including the primary responsibility for providing law and order, full law enforcement, and even legislative functions.

This categorization does not exclude new types of mandates for UN police. The debate on transnational organized crime and drug trafficking as "serious threats to international security"[8] in the wake of the 2011 World Development Report[9] may one day lead to peacekeeping mandates expressly including the investigation and prosecution of organized crime. In any case, it remains to be seen whether the Department of Peacekeeping Operations' (DPKO) hope will hold true that missions such as the UN Mission in Kosovo (UNMIK) and the UN Transitional Administration in East Timor (UNTAET), where the UN was charged to administer an entire territory, are really a thing of the past.[10]

The rapid expansion of UN police since the late nineteen-nineties has been a tremendous challenge for the UN, both in terms of DPKO's practical capacity to deploy and its conceptual approach to law enforcement through peacekeeping missions. In 2001, at a time when the UN was in its second year of the unprec-

6 Currently 8 out of the 16 missions are mandated to provide operational support to host state police.

7 All figures as of 30 April 2012, see DPI, *Fact Sheet*, *op.cit.*

8 Statement of the President of the Security Council, 19 January 2012, PRST/2012/1; see also *United Nations Police*, *op.cit.*, p.1, para.2.

9 World Bank, *World Development Report 2011: Conflict, Security and Development*, Washington, DC, 2011, pp.2-8.

10 See *UN Peacekeeping Operations. Principles and Guidelines*, New York, 2008, pp.93-94; DPKO, *Handbook on Multidimensional Peacekeeping Operations*, *op.cit.*, pp.93-94.

edented missions in Kosovo and Timor Leste, the Panel of Experts on United Nations Peacekeeping Operations chaired by Lakhdar Brahimi had been charged with a review of UN peace operations. In its final report, the Panel called for reforms in the field of police and justice support, including the strengthening of rule of law institutions, and for a modernization of the conceptual side of rule of law work.[11] Ten years later, the UN has made some significant progress on the practical and institutional side.[12] The creation, in 2007, of the Office of Rule of Law and Security Institutions (OROLSI), its Police Division (including the Office of the Police Adviser and, since 2010, the Standing Police Capacity[13]) and the Criminal Law and Judiciary Advisory Section with its Justice and Corrections Standing Capacity have clearly improved the DPKO's institutional capacity, and reflect the importance of the rule of law in today's peacekeeping.

On the conceptual side, however, one of the problems identified in the Brahimi Report as a "pressing issue" has been set aside for quite a while and is only slowly resurfacing in the current debate about new policy guidance and framework for UN peacekeeping: the question of the applicable law in a mission area where the local law is unclear or of dubious quality. The first chapter describes the legal and practical problems arising out of the lack of clarity of the rules and regulations currently in place. The second chapter looks at the UN's own rules and guidelines and explains how its new rule of law concept (as laid out by the Secretary-General in 2004) has changed, in quite a fundamental way, in particular the legal requirements for the work of the UN in general and for its police working in post-conflict missions. The paper then explains why the principles of legality, predictability of the law and accountability of the UN and its agents call for a more precise legal basis. Looking at the examples of Kosovo and East Timor in 1999, the paper elaborates on the reasons why drawing on the national law of the respective police officer or contingent is no longer compatible with the UN's own rule of law standards. Two sets of criminal justice standards developed in the past few years with the help of UNODC point in the right direction, but are not enough, from a rule of law perspective, to solve the problem. The concluding chapter presents options on how to fill the legal vacuum. It recommends that UN General Assembly-approved interim guidelines on core police competences in the field of criminal justice be developed, and applied temporarily within the context of the agreements with the peacekeeping operation's host state.

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11 *Report of the Panel on United Nations Peace Operations*, A/55/305-S/2000/809, 21 August 2000.

12 On the institutional learning process within the Secretariat, see T. Benner, S. Mergenthaler, and P. Rotmann, *The New World of UN Peace Operations – Learning to Build Peace?,* Oxford University Press, 2011, pp.66-145.

13 *Report of the Panel of Experts on the Standing Police Capacity's first year of operations*, Note by the Secretary-General, A/63/630, 19 December 2008.

After the War: UN Police Operations in a Legal Vacuum

The Brahimi Panel had drawn attention to the fact that, in Kosovo and Timor Leste, where UN operations had been charged with full law enforcement responsibility, the UN had found local judicial and legal capacity "to be non-existent, out of practice or subject to intimidation by armed elements".[14] In both places the legal system and the law predating the conflict were questioned or rejected by parts of the population that had fallen victim to the conflict. But even where the law to be applied seemed to be clearer, newly dispatched UN police had a hard time learning the codes and procedures well enough to prosecute cases professionally, as differences in language, culture, custom and experience took months to overcome.[15] Until that moment, a sort of legal vacuum occurred where crime flourished and powerful local actors could set up their own power structures. For cases like these, the Brahimi Panel recommended to evaluate the utility of developing "an interim criminal code, including any regional adaptations potentially required [...] pending the re-establishment of local rule of law and local law enforcement capacity."[16]

In his reply to the Brahimi Report, the Secretary-General admitted that the missions in Kosovo and Timor Leste had not had a common set of criminal procedures on which to rely for arrests, detentions, searches and seizures.[17] The ensuing confusion on the part of the UN law enforcement personnel had indeed shattered the local populations' confidence in the ability of the UN to uphold the rule of law in a fair and consistent manner. But as far as the Panel's proposal for an interim legal code was concerned, the Secretary-General's rejection of any such idea came in no uncertain terms: rebuilding a legal system and promulgating substantive rules of criminal law "would be a long-term exercise" that would require extensive consultation with local legal communities. It was to be "doubted

14 Report A/55/305-S/2000/809 (Brahimi Report).

15 For an overview of the legal problems, see H. Strohmeyer, "Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor", *AJIL*, Vol.95, 2001, pp.46-48.

16 Report A/55/305-S/2000/809, (Brahimi Report), para.83 and Annex III, recommendation No.6.

17 Report of the Secretary-General on the Implementation of the Report of the Panel on UN Peace Operations, A/55/502, 20 October 2000, para.31.

whether it would be practical, or even desirable given the diversity of country-specific legal traditions, […] to try to elaborate a model criminal code."[18]

What were UN missions supposed to do then in a case of legal vacuum? Early concepts were less than clear. In the section on applicable law of its 2003 Handbook on UN Multidimensional Peacekeeping Operations, DPKO acknowledged that "in some post-conflict environments there may not be agreement between the parties on the applicable legal code, whether substantial or procedural". But DPKO did not see this as a problem for the mission or for the UN to resolve, as it was "essentially a political issue". Instead, DPKO recommended to leave it to "agreement among the parties".[19] The Handbook provides no answer for either what the mission should do until such agreement is forthcoming, or in case no such agreement emerges at all over longer periods of time. The Handbook raises another dimension of the issue: UN advisers in a given country who conclude[20] that existing legal standards do not meet international standards may nevertheless find that authorities, the local legal community and the population do not wish to change their law because they see it as legitimate and "in harmony with traditional values and customs". But here, too, the envisaged solution is mid-term at best when UN justice personnel are advised to initiate a "process that would encourage the evolution of a legal order" in keeping with international standards, "but in a culturally acceptable manner".[21]

In much the same vein, DPKO's 2006 "Primer for Justice Components" conceded that "after years of conflict there could be confusion about which laws are applicable". Legal provisions contained in peace agreements, executive decrees, old statutes, interim constitutions, international instruments, customary laws, religious laws, etc., may be overlapping, or even contradictory. On top of this, the respective state's legal obligations under international law may also be unclear. However, once again the Primer leaves it to the peacekeepers on the ground to achieve "agreement on the applicable provisions among legal professionals, opposing parts of the society or former warring fractions" – a task which may be, as it somewhat dryly admits, "a major challenge".[22]

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18 *Ibid.*, para.31, emphasis added.

19 DPKO, *Handbook on Multidimensional Peacekeeping Operations*, *op.cit.*, p.97.

20 For UN methods to evaluate justice systems, see UNODC, *Criminal Justice Assessment Toolkit*, New York, 2006; DPKO/OHCHR, *The United Nations Rule of Law Indicators*, New York, 2011; OHCHR, *Mapping the Justice Sector*, New York and Geneva, 2006, HR/PUB/06/2.

21 *Handbook on Multidimensional Peacekeeping Operations*, *op.cit.*, p.97.

22 DPKO, *Primer for Justice Components in Multidimensional Peace Operations: Strengthening the Rule of Law*, New York, 2006, p.3.

So for a number of years after the Brahimi Report, and despite strong support in much of the literature for some sort of off-the-shelf, ready-made "justice packages" to be applied transitionally[23] where no other suitable law was at hand, the Secretariat was reluctant to embrace the idea. The Secretariat was convinced that pre-designed or imported projects, however well-reasoned, were doomed to fail; in police and justice reforms, the UN and the international community should play a role of "solidarity, not substitution".[24] Peace operations, as the Secretary-General saw it, were to "assist national stakeholders to develop their own reforms vision". The Security Council got explicitly warned against "the imposition of externally imposed models".[25] Instead, support should be based on the needs and preferences of the country. This line of thinking was certainly in keeping with the overall maxim of peacekeeping as acting in consent with the authorities of the given state. But it is based on the premise that there are indeed legitimate local actors on the ground that can be shown such solidarity. The question of what to do in severe cases of judicial "vacuum", and how to fill it in the absence of any such actors, remained unaddressed.[26]

23 For an overview, see B. Oswald, "Model Codes for Criminal Justice and Peace Operations. Some Legal Issues", *Journal of Conflict and Security Law*, Vol. 9, 2004, p.254.

24 *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, Report of the Secretary-General, S/2004/616, 23 August 2004, para.17.

25 Report S/2004/616, *op.cit.*, para.64, lit.h.

26 C. Trenkov-Wermuth, *United Nations Justice: Legal and Judicial Reform in Governance Operations*, UN University Press, 2010, p.156.

The Rule of Law as New Normative Parameter of UN Work

This hands-off approach is in striking contrast to the Secretary-General's own emphasis on the need for the UN to abide by the rule of law in all its activities, outlined for the first time in his 2004 report to the Security Council on the rule of law in conflict and post-conflict societies.[27] Referring to the increasing focus by the UN on questions of transitional justice and the rule of law in conflict and post-conflict societies, the Secretary-General explains that concepts such as "justice", "the rule of law" and "transitional justice" serve both to define the UN's goals and to determine its methods, but there was no agreement on what they meant. Instead, there was a multiplicity of definitions and understandings even among the UN's partners in the field.[28]

A New "Common Language" on the Rule of Law

To overcome this lack of orientation, the report sets out to identify, in one sweeping paragraph,[29] fifteen elements that are decisive for a modern understanding of the rule of law. For the UN, the rule of law is, in the words of the report, a concept "at the very heart of the organization's mission". The document refers to a "principle of governance in which all persons, institutions and entities, public or 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".

Furthermore, the rule of law requires "measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the

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27 Report S/2004/616; on the development of the rule of law terminology at the UN, see T. Fitschen, "Inventing the Rule of Law for the United Nations", *Max Planck UNYB*, Vol.12, 2008, pp. 347-380; see also W. O'Neill, "UN Peacekeeping Operations and Rule of Law Programs", in A. Hurwitz (ed.), *Civil War and the Rule of Law: Security, Development, Human Rights*, Lynne Rienner, 2008, pp.91-113.

28 For the Council of Europe, see Committee of Ministers, *The Council of Europe and the Rule of Law – An Overview*, Doc.CM(2008)170, 21 November 2008, para.29-59; F. Evers, *OSCE Efforts to Promote the Rule of Law – History, Structures, Survey*, Centre for OSCE Research, Hamburg, 2010; Hague Institute for the Internationalisation of Law, *Rule of Law Inventory Report*, The Hague, 2007; for the historical background, see also B. Tamanaha, *On the Rule of Law – History, Politics, Theory*, Cambridge University Press, 2004.

29 Report S/2004/616, para.6; see also *Strengthening the Rule of Law*, Report of the Secretary-General, A/59/402, 1 October 2004.

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."

As to the legal sources for this understanding of the rule of law, the report recalls that the "normative foundation" of the UN's work in advancing the rule of law is the UN Charter, "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 UN human rights and criminal justice standards developed in the last half-century."[30]

The paragraph concludes with a statement of particular legal significance. Because these standards "represent universally applicable standards adopted under the auspices of the United Nations", they "must therefore serve as the normative basis for all UN activities in support of justice and the rule of law". In a Guidance Note, the Secretary-General has later decreed that these "guiding principles and framework for UN rule of law activities shall apply in all circumstances, including crisis, post-crisis, conflict prevention, conflict and post-conflict" contexts; all UN approaches to rule of law issues "should take their guidance from, and be developed in conformity with, the applicable international standards".[31]

Despite some criticism that the Secretary-General's list of elements went either too far, at least for fragile post-conflict states,[32] or not quite far enough,[33] the report immediately found broad acclaim. The new language on the rule of law was welcomed as a "milestone"[34] and a "sea change"[35] in the way the UN was doing business in support of strengthening fledging justice systems, particularly in war-torn societies emerging from years of conflict. The report provided, in the eyes of many, the first formulation of a common concept where there was no coherent policy direction before.[36]

30 Report S/2004/616, para.9.

31 Guidance Note on the UN Approach to Rule of Law Assistance issued by the Secretary-General, 2008.

32 C. Kavanagh and B. Jones, *Shaky Foundations – An Assessment of the UN's Rule of Law Support Agenda*, Center on International Cooperation, New York, November 2011, Policy summary, para.3-18.

33 R. Mani, "Exploring the Rule of Law in Theory and Practice", in Hurwitz (ed.), *op.cit.*, 2008, p.21.

34 A. Hurwitz, "Civil War and the Rule of Law: Towards Security, Development and Human Rights", in Hurwitz (ed.), *op.cit.*, 2008, p.1.

35 C. Bull, *No Entry without Strategy. Building the Rule of Law under UN Transitional Administration,* UN University Press, 2008, p.2.

36 C. Bull, *op.cit.*, p.45.

The importance of this new language for UN peacekeeping in general and the work of UN police as law enforcers can hardly be overestimated. Whereas it was already established that national contingents of UN and other peacekeeping missions are bound by the international human rights instruments to which their governments have signed up (even when acting outside the territorial jurisdiction of the sending state),[37] the report and the Guidance Note have cut short the long legal debate on whether or not the UN itself can be "bound" by, and can thus eventually violate, international human rights law. Unlike states that sign and ratify, or accede to, a human rights treaty, the UN cannot become a regular party to any of them.[38] However, by confirming that the four-pillared rule of law framework "must serve as the normative basis" for all UN activities, the UN has clearly committed itself to abiding by them. It would seem outright impossible for the UN today to maintain that it could, in whichever situation, not be obliged to respect international human rights law. This does not affect, however, the fact that the UN does not have the same obligations under international human rights law as a state party. As the UN does not have jurisdiction over any territory or people, it cannot "implement" a human rights treaty in the way a state party can, namely by adopting legislative, judicial or other measures to integrate it into a national legislation.[39]

The Question of "Applicable Law" in Police Operations' Legal Bases

Despite this official recognition of the rule of law as the new normative framework for UN peacekeeping missions and their police and justice elements, the question of which law UN police have to apply in case of uncertainty has remained largely unanswered. The question, however, needs to be answered, because UN peace operations – as the rule of law report had pointed out – are subject to, and can thus be held accountable for, the proper implementation of at least four partly overlapping, but different legal orders:

- the UN Charter and UN laws, regulations and guidelines for UN peacekeeping operations;
- the law of the contributing state as far as police or justice personnel is concerned that remains under the (partial) command and jurisdiction of the sending state;

37 J.K. Kleffner, "Human Rights and International Humanitarian Law: General Issues", in D. Fleck and T.D. Gill (eds.), *The Handbook of the International Law of Military Operations*, Oxford University Press, 2010, pp.68-72.

38 F. Megret and F. Hoffmann, "The UN as a Human Rights Violator? Some Reflections on the UN Changing Human Rights Responsibilities", *Human Rights Quarterly*, Vol. 25, 2003, p.314.

39 See Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13, 26 May 2004.

- other international law that binds the UN and/or the host and the contributing state, such as the agreements concluded between them as well as international human rights law, international humanitarian law, etc.;
- the law of the country in which a mission operates, with the consent of government.

The relationship between these four orders and how to reconcile one with the other in case of doubt is far from evident. As mentioned before, recent Security Council resolutions have given UN missions ever broader mandates to perform active law enforcement tasks and to help ensure the protection of human rights.[40] But the Security Council, apart from authorizing all "necessary measures" to fulfil the mandate, has never mentioned with any specificity the law(s) to be applied in such an undertaking in a given mission area.

The bulk of the legal relationship between the UN and the host state is governed by the status-of-forces agreement (SOFA) concluded at the beginning of each operation. The UN has, since 1990, a model SOFA[41] that applies provisionally until the specific agreement has been negotiated and concluded. It states that the operation and its members "shall respect all local laws and regulations" (para.6). This crisp and plain provision comes without any qualifiers or any guidance for cases where law is missing or, in the view of the mission, inapplicable. It was utilized in most SOFAs concluded in recent years. Only the SOFA for the UN-AU Mission in Darfur (UNAMID) has a formula that also refers to international law when it says that the operation "shall respect relevant rules and principles of international law as well as all local laws and regulations".[42]

The relationship between the UN and the troop or police contributing state on the other hand is governed by a memorandum of understanding (MOU) concluded between the two sides. It spells out the terms and conditions that govern the contribution of personnel and other resources, and specifies the standards of conduct and other rules applicable to the performance of the mission's members.[43] The UN has developed a Model MOU[44] endorsed by the General Assembly in 2007 that has been utilized in all recent missions. As to the legal basis for the conduct of mission personnel, it mirrors the formula that is also used in the

40 For an overview, see Security Council Report, *Cross-Cutting Report on the Rule of Law*, 2011, No.3, 28 October 2011, pp.18-32.

41 Reprinted in B. Oswald, H. Durham, and A. Bates, *Documents on the Law of UN Peace Operations*, Oxford University Press, 2010, p.39.

42 *Ibid.*, p.40.

43 For a fuller description, see B. Oswald *et al.*, *op.cit.*, pp.51-52.

44 *Ibid.*, p.51.

Model SOFA: under art. 7bis, members of the national contingent are "required to comply with" the UN standards of conduct that are contained in an annex entitled "We Are United Nations Peacekeeping Personnel". Here, the national peacekeepers undertake to "respect local laws, customs and practices" while at the same time complying "with the Guidelines on International Humanitarian Law for forces undertaking UN peacekeeping operations and the applicable portions of the Universal Declaration of Human Rights as the fundamental basis of our standards".

Individual civilian police officers seconded to the UN and employed to serve on UN peace operations are "experts performing missions" and are subject to the terms of the agreement that they enter into with the UN. In the agreement, they undertake to comply with all UN rules and regulations, directives and any other issuance by the Secretary-General. The 2003 "Directive for Disciplinary Matters Involving Police Officers and Military Observers" spells out, inter alia, the standards of conduct which a police officer is supposed to comply with. According to para.5, police officers shall "refrain from any action incompatible with the impartial and independent nature of their duties and inconsistent with the letter or spirit of the [...] mandate of the operation, the status of forces agreement, and other applicable legal norms and standards. Civilian police officers [...] shall respect all local laws and regulations."

All of the above texts – which predate 2004 as the year of the Secretary-General's new approach to the rule of law – require that UN police strictly respect local laws in their entirety. Other (international) norms that might apply are either not mentioned at all, or referred to in such a general way as to be of no practical guidance in case of doubt.

That overall framework became slightly more differentiated with the updated and re-issued "Policy for Formed Police Units" that became effective in 2010.[45] According to the new policy, FPUs must exercise their functions strictly according to the Security Council mandate resolution, and other official issuances applicable to the mission and "in strict accordance with international human rights and criminal justice norms and international policing standards", including the Basic Principles on the Use of Firearms and the Code of Conduct for Law Enforcement Officials. In addition, the work of FPUs shall "always be based on the principles of necessity, proportionality/minimum level of force, legality and accountability". The importance of human rights and criminal justice standards is very strong

45 DPKO/DFS, *Policy (revised): Formed Police Units in United Nations Peacekeeping Operations*, Ref.2009.32, effective as of 1 March 2010.

here, and the principle of legality as a core element of the rule of law gets a specific mention. Unfortunately, any reference to local law gets dropped altogether, so the problem of how to weigh one against the other in cases of doubt remains once again unresolved.

This approach is also reflected at the conceptual level of UN peacekeeping. The 2003 Handbook on United Nations Multidimensional Peacekeeping stated that, as all other UN personnel, civilian police officers "must abide by local laws and are expected, at all times, to promote internationally accepted principles of ethical, legal and democratic policing as well as to ensure compliance with human rights standards".[46] The more recent United Nations Peacekeeping Operations – Principles and Guidelines set a somewhat different tone. The document recalls the importance of the consent of the host state as one of the core principles of present-day peacekeeping, but the chapter on the normative framework for UN peacekeeping operations contains no reference to local law anymore. Instead, there is a rather sweeping statement saying that "international human rights law is an integral part of the normative framework" for UN peacekeeping operations, which "should be conducted in full respect of human rights and should seek to advance human rights through the implementation of their mandates". Peacekeeping personnel, whether military, police or civilian, "should act in accordance with international human rights law and understand how the implementation of their tasks intersects with human rights".[47]

This new – but still rather general – emphasis on the importance of protecting human rights is certainly very welcome, as it adds some normative precision to the legal basis for UN police work. The problem for the individual law enforcer of how to reconcile his/her triple duty to abide by the national law of the host country, his/her own law and international human rights standards, remains, as none of the documents gives clear guidance on how to do it in practice.

Accountability of the UN

In addition, issues of accountability arise for the UN itself. The UN as the organization responsible for running a peacekeeping operation can be held accountable for misconduct of any of its agents due to its own responsibility under international law. In the past few years, numerous courts have been seized by individuals claiming that certain acts of peacekeeping and other military forces

46 *Handbook*, *op.cit.*, p.84.

47 DPKO, *Principles and Guidelines*, *op.cit.*, p.14.

on the ground were violations of human rights.[48] Even though the cases did not go through due to the immunity of the UN, some courts have confirmed that individual contingent members seconded to an international organization are indeed bound by human rights treaties to which their country is a state party, and that these acts may be attributable to the organization that carries out the operation if the latter retains complete control. The draft articles on the responsibility of international organizations for any breach of their own obligations under international law, completed by the International Law Commission (ILC) at its 63rd session in 2011, go in the same direction. Draft Articles 4 and 7 on the attribution of acts performed by seconded personnel to the organization in whose name they act were written precisely with UN peacekeeping operations in mind.[49]

48 For an overview, see ILC, *General commentary on the draft articles on international responsibility of international organizations*, in Report of the ILC on the work of its 63rd session, UN doc. A/66/10, pp.69-70, para.5.

49 Report of the ILC, *op.cit.*, para.37.

The Rules and the Exception: Kosovo and East Timor as Cases in Point

It is instructive to compare the considerations for the standard situation where the UN acts on the basis of an agreement with the host state with situations where the UN had full legislative power, and was thus in a position to prescribe any kind of standard or rule that it considered necessary. Such an exceptional situation had existed in Kosovo and East Timor in 1999. In both cases, the UN had been called upon to administer a justice system in places where there was basically "no system left to be administered", where the personnel needed to run it had left or were not trusted, where courthouses and archives had been destroyed and where the law that was on the books was "politically charged" and no longer acceptable to the population and the new political leaders.[50] In both situations, the overall responsibility for the administration of the two territories as well as the power to exercise all legislative and executive authority, including the administration of justice and the responsibility to maintain law and order, was vested in an interim UN administration.[51] The point of raising these two cases is not to re-evaluate their performance. What is of interest is the question of how the UN dealt with the issue of which law(s) to apply in a situation where it actually had full power to change the local law.

UNMIK in Kosovo

In Kosovo,[52] UNMIK Regulation No.1 decreed that "in exercising their functions all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards" and shall not discriminate on any grounds. In its section entitled "applicable law in Kosovo", the

50 H. Strohmeyer, *op.cit.*, p.46.

51 For UNMIK, see UNSC Res.1244, 10 June 1999, para.9-10; for UNTAET, see UNSC Res.1272, 25 October 1999, para.1-2.

52 For a fuller account see US Department of State, *Kosovo Judicial Assessment Mission Report*, Washington, DC, 2000, p.6; C. Stahn, "The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis", *Max Planck UNYB*, Vol.5, 2001, pp.149-153. C. Rausch, "The Assumption of Authority in Kosovo and East Timor: Legal and Practical Implications", in R. Dwan (ed.), *Executive Policing: Enforcing the Law in Peacekeeping Operations,* SIPRI, 2002, p.11; D. Marshall and S. Inglis, "The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo", *Harvard HRJ*, Vol.16, 2003, p.95; M. Benzig, "Midwifing a New State: The United Nations in East Timor", *Max Planck UNYB*, Vol.9, 2005, pp.295-372; S. Chesterman, *You, the People. The United Nations, Transitional Administration and State-Building*, Oxford University Press, 2004, pp.165-168.

Regulation declared that "the laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply insofar as they do not conflict" with standards referred to earlier. This immediately generated widespread opposition from Kosovar judges and politicians, and led to a near-paralysis of the judicial system. Kosovars saw the old Yugoslav criminal law, the application of which the UN had just declared to "continue", as a tool of repression and discrimination, and they demanded that the applicable laws should be those in force before the date when the Yugoslav government had revoked Kosovo's autonomy status in 1989. As for UNMIK, the choice had been mostly for pragmatic reasons, and so the Administrator gave in and issued a new regulation[53] that declared applicable "the law in force in Kosovo prior to March 22, 1989".

UNTAET in East Timor

In East Timor, where the physical conditions after the systematic destruction of the country and its infrastructure by Indonesian troops was even worse than in Kosovo, the transitional authority faced a similar challenge. As UNTAET could already draw on UNMIK's initial experience, its instructions were already somewhat clearer. UNTAET Regulation No.1999/1[54] takes a three-step approach to establishing the law in force. Section 2 promulgates that in the exercise of their functions, all office-holders "shall observe internationally recognized human rights standards". The UNTAET regulation mentions the most important ones directly: "[…] as reflected, in particular, in the UDHR, the CCPR and its Protocols, the CESCR, the CERD, the CEDAW, the CAT and the CRC".[55] It is clear from the qualifier ("in particular") that this list was not meant to be exhaustive, but here we have at least a clear enumeration of no less than seven concrete "standards" which were to be found in international treaties. The regulation goes on to declare that all "laws that applied in East Timor"[56] before a certain cut-off date in October 1999 "shall apply[57] insofar as they do not conflict" with these human rights standards, and until replaced by future UNTAET regulation or new legislation passed by the future democratically elected institutions of the country. Furthermore, six laws altogether were declared "not [to] comply with the standards referred to" in the

53 UNMIK Regulation No.1999/24 (12 December 1999) on the Law Applicable in Kosovo; it was later amended again in UNMIK regulation 2000/59 which re-introduced the applicability of post-1989 law if the latter was deemed not discriminatory.

54 On the Authority of the Transitional Administration in East Timor, 27 November 1999.

55 See List of acronyms.

56 "The law *applied*" instead of "Indonesian law" was chosen to avoid giving the Indonesian occupation and its law any legitimacy, see H. Strohmeyer, *op.cit.*, p.46.

57 Not "shall *continue* to apply", to avoid repetition of the dispute experienced in Kosovo.

section on human rights, and were therefore "no longer [to] be applied". In the same vein, capital punishment also got "abolished".

Problems on the Ground

What looked like a pragmatic effort to avoid a legal vacuum in the early phase of the UN administration proved to be quite difficult in its application. For the first year of the operation in Kosovo, UNMIK's regulations led to confusion. The failure to specify exactly which provisions of the formerly applicable law were being replaced, and how the human rights test was to be carried out led to long periods of legal uncertainty.[58] As there was no clarity as to which parts of the law did or did not comply with the human rights law, and because there was also little awareness among local lawyers about their content, some courts refused to hold trials. Other judges determined for themselves what to apply, and how.

The apparent lack of clear guidance about the applicable law also severely impeded the work of civilian police in East Timor. Here the reference to previous (i.e. Indonesian) law created less of a problem than in Kosovo, and was by and large accepted by the population. But in practice, both the UN personnel and the newly-hired local police and justice personnel had little knowledge about those parts of the Indonesian law they were supposed to apply. Textbooks, law gazettes and court decisions were hard to trace or did not exist in translation. As a consequence, the law that should have been implemented did not get fully applied for a considerable period of time. The legal situation improved only after UNTAET issued in 2000 its own interim criminal and procedural legislation.[59] UNMIK later followed the UNTAET example in Regulation No. 2001/28 on the Rights of Persons Arrested by Law Enforcement Authorities.

The Benefits and Limits of Pragmatism

In these and other cases, peacekeepers who faced uncertainty about the applicable law often seem to have fallen back on their own country's norms – including that country's human rights obligations as part of the national law – and the professional practices and standards they were used to and trained in.[60] While this may have been a pragmatic, "good enough" solution for the individual peace-

58 UNMIK Regulation No.1999/24 had copied the UNTAET approach by referring to seven international human rights treaties – including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms to which Yugoslavia had been a party – as reflecting "in particular" the internationally recognized standards which all persons undertaking public duties "shall observe".

59 Regulation No.2000/30 on "transitional rules of criminal procedure" was supposed to provide for "a fair and expeditious application of penal law".

60 C. Rausch, *op.cit.*, pp.19-20.

keeper in a situation where some decision was immediately required, it can hardly be the general way out.

Looked at from a rule of law perspective, three problems occur. Firstly, it is not compatible with the general requirement of legal clarity, certainty and predictability if different UN police contingents who operate in a given mission area (at some point UNMIK had more than 50 contributing countries, UNTAET had 41) interpret and apply human rights standards in different ways, depending on their national law and legal culture. If this was accepted, it would depend on the coincidence of which contingent intervenes whether a certain human rights guarantee gets interpreted and applied in one way or the other.

Secondly, the host country and the police contributing countries may not be bound by the same human rights treaties in the same way. Some may not even be a state party to a certain treaty in the first place, whereas others may have lodged reservations. In other constellations, different regional human rights treaties may apply to the host and/or the sending states in addition to, or in the place of, universal treaties. Here again, the individual citizen becoming the object of a police measure can hardly know in advance which law is being applied against him and which safeguards he can count on.

Thirdly, even where all police contingents from different countries working in a mission area are bound by identical human rights obligations, most treaties require the implementation of their provisions – especially where possible limitations are concerned – to be regulated by law, i.e. the law of the state party. Where this implementation legislation differs, citizens living in the mission area may once again find themselves subjected to various ways of applying the same human rights obligations, depending on which country's police officer they are confronted with.

Hoping that in practice the difference may not be very large does not help either. That may be the case for some of the core human rights such as habeas corpus, the prohibition of torture or arbitrary arrest and detention. But one only needs to think of the freedom to manifest one's religion (art.18.3 of the International Covenant on Civil and Political Rights (ICCPR)), the right of peaceful assembly (art.21 of ICCPR) and the right to freedom of expression (art.19.2 of ICCPR) in their relationship with norms concerning the protection of public order and safety to appreciate that variations in the application of these rights by police coming from different legal backgrounds may indeed matter. Therefore, the fact remains that pragmatically drawing on the national human rights obligations of the respective police officer as the fallback law would (re-)introduce a measure of legal uncertainty that is not in conformity with the rule of law.

Recent New UN Guidance Material

In the past ten years, different UN agencies have tried to address the problem. One helpful collection of sources concerning norms and standards in the field of criminal justice has been assembled by the UN Office on Drugs and Crime (UNODC). The Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice,[61] contains fifty-five texts from a vast array of UN bodies. They cover a wide area of criminal justice matters that include issues of particular relevance for peace missions such as the use of force, detention and arrest, the treatment of prisoners, the question of capital punishment, the conduct of law enforcement officials or in general the integrity of criminal justice personnel. In terms of form, these texts range from standard or minimum rules to guidelines, declarations, (basic) principles, codes of conduct, to action plans and model treaties. All of them were meant as recommendations for further consideration and eventual implementation by states, and are of a soft-law nature at best.

Another effort to pull together standards for police conduct – in a form that is more easily applicable in practice than the unwieldy Compendium – is the recent DPKO/UNODC publication UN Criminal Justice Standards for UN Police,[62] referred to by practitioners as the "Blue Book". The purpose of the Book is to "summarize the international human rights and criminal justice principles that United Nations police must know, abide by and promote" when deployed in special political or peacekeeping missions. The handbook was meant as "a code of conduct for police operating under the UN flag" and a reference source to advise national police authorities to improve their own ways of policing.[63] In terms of content, the "Blue Book" is an amalgamation of different rules, standards, and other provisions drawn up in a normative language, detailing duties and obligations of police and law enforcement officers ("a police officer must […]") and/or rights of individuals vis-à-vis state agents ("a person […] has the right to […]") in fields such as investigation, arrest, detention and imprisonment, trials, the prohibition of extra-legal and arbitrary execution, or the protection of victims, wit-

61 UNODC, *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, 2nd ed., New York, 2006.

62 UNODC and DPKO, *United Nations Criminal Justice Standards for United Nations Police*, 2nd ed., New York, 2009.

63 *Ibid.*, preface, p. iii.

nesses, children and refugees. The 207 standards are drawn from, or based upon, 47 international treaties and other internationally adopted or endorsed standards for police and law enforcement work.

As practical and useful this summary of standards reads, it is not legally binding as such. And it does not address the question of their applicability in relation to national law of the mission area. Whereas its standards are supposed to apply to missions where UN police support national law enforcement agents in the execution of their functions, there may be other situations – for example when providing security for other UN personnel, or facilities of UN police – where UN police is not considered as law enforcement officially under the legislation of the host country. Here, the Book replicates the problem of uncertainty: by considering UN police not subject to the legislation of the host country in this type of mission, while at the same time emphasizing that they are "public officials under national law" who must "fulfil the duty imposed upon them by law" and "act in the interests of their county",[64] the code refers back to the law of the police contributing state as the law to be applied.

64 *Ibid.*, rules 2 and 3.

Conclusion: Towards More Legal Certainty

What the Rule of Law within the UN Requires

Whereas these latest promulgations of norm-like regulations have at least added a level of clarity to the obligations owed by law enforcement personnel and police contributing states, they fail to provide their own applicability at the national level of the host state. As the Secretary-General's "language on the rule of law" emphasized, the whole point about the rule of law is to avoid arbitrariness, and to offer individuals effective protection against it: "If the rule of law means anything at all, it means that no one, including peacekeepers, is above the law".[65] The very notion of law and lawfulness requires that domestic law is sufficiently foreseeable and accessible to be complied with, and sufficiently precise to be equally enforced and independently adjudicated. In addition, a contemporary understanding of the rule of law requires measures to ensure the separation of powers and "participation in decision-making". This reference in the Secretary-General's report underlines that there is more to the rule of law than the managerial application of norms that are considered to be generally good. Hidden behind the inconspicuous notion of participation lies the question of legitimacy and the authority to legislate, of "authorship"[66] as opposed to the replication of someone else's best practices – issues which the Secretary-General did not want to raise in the context of his "common language", for very good political reasons.

Seen from this perspective, it has to be doubted whether the rules and instructions so far enacted by the Secretariat provide sufficient authorization to UN police to take executive and enforcement measures based on law other than the local law. From a rule of law perspective, neither the standards and principles nor the Policy for FPUs carry the necessary clarity, authority and legitimacy to replace and supersede as such the local law, without any additional legislative act. Neither the Security Council nor the Secretary-General has made them "law publicly promulgated" in the mission area. Even if a police contributing state has

65 Secretary-General Report, S/2004/616, para.33.

66 F. Kratochwil, "Has the 'Rule of Law' Become a 'Rule of Lawyers'?", *The Puzzles of Politics. Inquiries into the Genesis and Transformation of International Relations*, Routledge, 2011, p.126. On the vagueness of the popular concept of "ownership", see also S. Chesterman, "Ownership in Theory and Practice: Transfer of Authority in UN Statebuilding Operations", *Journal of Intervention and Statebuilding*, Vol.1, 2007, p.3.

adopted all the necessary legislation for the full implementation of human rights that binds its own police working for the UN, that does not make it "applicable law" in the mission area either. That legislation was never meant to form any legal order other than that of the sending state, and for lack of jurisdiction it could not have done so in the first place. These norms are addressed to the law enforcement personnel of that state, but they do not give that personnel the authorisation to take measures that affect the human rights of the citizens of the host state, or the right to replace or disregard parts of the latter's legal order.

What the UN Should Do

The more than a decade-old debate about whether or not pre-conceived "model laws" could be applied temporarily to fill an eventual vacuum (until the legal order in the host state of a UN mission has been reformed[67]) shall not be repeated in the confines of this paper. However, some twelve years after the Kosovo and East Timor experience and only a few years after the rule of law as laid out by the Secretary-General has been accepted as the new framework for all peacekeeping and other UN activities, it is time to take a fresh look at a legal problem that has not gone away. The work on new "guidance material for operational rule of law issues"[68] that has begun recently in the Secretariat and the Special Committee on Peacekeeping Operations provides a good opportunity. If the UN wants to take its own language on the rule of law seriously, it cannot leave its peacekeepers alone on the issue of which laws and rules they are authorized to apply in a legal vacuum, and how.

To provide clearer authorization and guidance to UN police in situations where the local law provides a standard of protection inferior or contrary to international human rights law, the UN should draw up an interim legal framework or interim guidelines for criminal procedure which cover at least the core enforcement competencies of UN police that touch upon human rights. Clear rules are needed in particular for issues concerning:

- the right to a fair trial and the right to be heard;
- the basics of the investigation of criminal offences and trial procedure;

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67 For an overview, see B. Oswald, 2004, *op.cit.*, p.254, in favour of model codes, among others, M. Fairlie, "Affirming Brahimi: East Timor makes the case for a Model Criminal Code", *American University International Law Review*, Vol.18, 2003, p.1059; V. O'Connor, "Rule of Law and Human Rights Protection through Criminal Law Reform: Model Codes for Post-conflict Criminal Justice", *International Peacekeeping*, Vol.13, 2006, pp.517-530; for instant justice packages, see also H. Strohmeyer, *op.cit.*, 2001, p.62.

68 Report of the Special Committee on Peacekeeping Operations, 2011 substantive session, GAOR sixty-fifth session, Suppl.19, para.139.

- the basics of judicial review;
- the rights of victims in criminal procedure;
- the use of firearms;
- the provision of legal counsel;
- the treatment of prisoners and detainees.

With the 2009 Criminal Justice Standards for UN police, some of the principles contained in the 2010 Policy for Formed Police, and many of the existing standards for police work and law enforcement, the UN has a lot of "normative language" at hand on which it can build. The Transitional Rules of Criminal Procedure promulgated by UNTAET as well as the Model Codes for Post-Conflict Criminal Justice, developed in the meantime by the US Institute of Peace[69], can also serve as interesting examples of what a "model" could look like. In addition, one could draw on the work of the Office of the High Commissioner for Human Rights (OHCHR) which has developed, over the past 15 years, an extensive set of training materials on almost every aspect of the role of human rights in police work and the administration of justice.[70]

Options to Be Explored

What are the options in terms of procedure? Given the fact that any sort of text would need, in order to be considered legitimate and authoritative, some sort of endorsement by member states, four possibilities come to mind.

Basing UN police work in the early days of a mission on some kind of martial law, as has been proposed,[71] or drawing on an analogy to the law of belligerent occupation – which allows the occupying power to suspend existing penal laws and enact provisions of its own to maintain an orderly administration[72] – is of theoretical interest only. Despite the fact that the UN forces are bound by international humanitarian law when being engaged as combatants in situations of

69 V. O'Connor and C. Rausch (eds.), *Model Codes for Post-Conflict Criminal Justice,* Vol.I*: Model Criminal Code*, Washington, DC, 2007, Vol.II: *Model Code of Criminal Procedure,* Washington, DC, 2008.

70 UNHCHR, *Human Rights and Law Enforcement*, Professional Training Series No.5/Add.2, 2002; *Human Rights Standards and Practice for the Police*, Professional Training Series No.5/Add.3, 2004; *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No.9, 2003.

71 Chesterman, *op.cit.*, pp.181-182.

72 See art. 64, para.2 of the Geneva Convention (IV) relative to the Protection of Civilians in Times of War; H.P. Gasser, "Belligerent Occupation", in D. Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, 1999, section 573.

armed conflict,[73] it is highly unlikely that member states – or the UN itself, for that matter – would accept any suggestion that would be tantamount to equating the law and concept of post-conflict, civilian UN peacekeeping with that of belligerent occupation.

Drafting a convention on criminal law and procedure for the purpose – with all the rigidities of an international legal instrument – may be the most authoritative solution. But it does not seem feasible. It is difficult to imagine how on an issue as sensitive as national criminal law and procedure, a general "default law" could be negotiated and ratified that would become generally binding for all states.

Bearing in mind the political sensitivities, a case-by-case approach is therefore preferable. One option could be a text, the applicability of which would be secured through inclusion in the Security Council resolution that mandates a UN mission. But here again, some member States may have difficulties in accepting any text that could be perceived as being forced down on the host country by the Security Council.

Yet another way could lead through approval by the General Assembly of normative guidelines, which are then incorporated in the model SOFA and subsequently in each individual SOFA concluded between the UN and the host state. In the SOFA, the host state would undertake to enact legislation as required to ensure its immediate applicability ad interim until a full review of the local law has been undertaken, and new law can replace the UN-inspired law. This option would fully conform to the principle of host country consent, one of the conceptual pillars of any type of UN peacekeeping.

Whichever option gets discussed, it is to be hoped that the debate does not get caught up in the all-too-common arguments about a perceived "foreignness" of legal standards that are being "imposed" by the UN. The UN, and particularly those states which regularly and generously provide police contingents to UN peace missions, should understand that they share a common interest. Rather than looking at the eventual differences between national criminal laws, they should bear in mind that international policing as part of a UN mission differs from law enforcement in a national context, and should base their work on the practical challenges of creating legal certainty and accountability in an area where different legal orders overlap. With that in mind, and on the basis of the universal human rights obligations, it should be possible to come up with a suitable framework which steps in to secure the rule of law in places where otherwise there would be hardly any law at all.

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73 See Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, ST/SGB/1999/13, 6 August 1999.

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GCSP
avenue de la Paix 7bis
P.O. Box 1295
CH - 1211 Geneva 1
T +41 22 906 16 00
F +41 22 906 16 49
info@gcsp.ch
www.gcsp.ch

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Geneva Centre for Security Policy
Centre de Politique de Sécurité, Genève
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