
VISITING EXPERTS' PAPERS

THE RULE OF LAW AS A CONCEPT IN DISCUSSIONS AT THE UNITED NATIONS

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*“When I use a word”, Humpty Dumpty said, in rather a scornful tone, “It means just what I choose it to mean – neither more nor less.” “The question is, said Alice, “whether you can make words mean so many different things.” “The question is”, said Humpty Dumpty, “which is to be master – that’s all.” (Lewis Carroll, *Through the Looking Glass*, chapter 6)*

I. INTRODUCTION: ON WHAT LEVEL DOES THE ‘RULE OF LAW’ APPLY: NATIONAL OR INTERNATIONAL?

The concept of the rule of law has a lengthy but uneven history in the work of the United Nations. The path from a brief reference in the preamble to the 1948 Universal Declaration of Human Rights to incorporation into one of the Sustainable Development Goals in 2015 was anything but smooth. As often happens with concepts in the United Nations, there have been considerable disagreements over what is meant by the rule of law, and in what way it is relevant to the work of the UN.

This paper examines how the concept has been used and understood within the context of the United Nations. Words are used to convey specific meanings, and the assumption is that the audience – in this connection those involved in the work of the United Nations – have a shared understanding of these meanings. This is not always the case. When different speakers use a key word or phrase in a different way, difficulties arise in seeking consensus. And if consensus is reached despite disagreement over what key words or phrases actually mean (a situation which, in UN jargon, has at times been jocularly referred to as ‘constructive ambiguity’), it will be equally difficult to decide what consequences that consensus should have, what action should be taken, what priorities should be set.

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In 1948, the General Assembly of the United Nations proclaimed the Universal Declaration of Human Rights (GA resolution 217 A). The third preambular paragraph states that ‘... 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...’

A second, indirect, early reference to the rule of law can be found in the preamble to the UN Charter, which states that one of the aims of the United Nations is ‘to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.’ Presumably, one condition under which justice and respect for legal obligations can be maintained is that they can be recognized and enforced; hence, the rule of law.

The reference in the Universal Declaration of Human Rights, in particular given that the language of this Declaration focuses largely on the rights of the individual, points to the role of the rule of law in protecting the individual against the state. The indirect reference in the Charter, in turn, points to sources of international law. At the time the Charter was drafted, the primary actors under international law were the individual states. For this reason, this latter reference points to the role of the rule of law in ensuring respect for sovereignty and non-intervention in the affairs of other states.

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The seeds for disagreement over how the 'rule of law' should be understood had been sown: should the concept be understood to apply on the national level (protecting individuals against the state) or on the international level (protecting one state or people against another)?

The ambiguity of the concept was fostered through many years of disuse in the discourse in the halls of the United Nations. Despite the early recognition given to the importance of the rule of law, the phrase was not in very wide usage during the first decades of the work of the United Nations. For example, it is not to be found in any subsequent major human rights instrument, such as the International Covenant on Civil and Political Rights, or the International Covenant on Economic, Social and Cultural Rights. 'Rule of law' did not really begin to become an everyday working term for the UN until in the immediate aftermath of the massive geopolitical changes in Europe at the end of the 1980s and the beginning of the 1990s.

When the fall of the Berlin Wall and the advent of the era of *perestroika* and *glasnost*, Western powers triumphantly asserted the importance of human rights and democracy. The 1993 World Conference on Human Rights, held in Vienna, made reference to the rule of law, after which the phrase began making regular appearances in General Assembly resolutions, in which the rule of law was regarded as an essential factor in the protection of human rights.¹ Promoting the rule of law also became a priority in United Nations technical assistance activities carried out by the High Commissioner for Human Rights, and in the work of the United Nations Development Programme.

At the same time, the phrase gained wider use in the context of UN peacekeeping operations. Before the 1990s, 'blue helmets' were generally deployed to observe and maintain ceasefires, as with the first missions in connection with the 1948 Arab-Israeli war, the Indo-Pakistani wars of 1947 and 1965, and the Suez crisis in 1957. The Security Council resolutions that established the mandates for these missions saw no reason to refer to the rule of law (or, for that matter, to human rights). Following the end of the Cold War, however, UN peacekeeping missions began to involve more non-military elements. As noted by Hans Corell, the Under-Secretary-General for Legal Affairs, the conflicts that these missions were addressing 'are but symptoms of the absence of a system under the rule of law'.² The resolution that adopted the so-called Brahimi Report on UN Peacekeeping expressly stated that the Security Council

'Emphasizes that the biggest deterrent to violent conflict is addressing the root causes of conflict, including through the promotion of sustainable development and a democratic society based on a strong rule of law and civic institutions, including adherence to all human rights - civil, political, economic, social and cultural',

and that the Security Council

'Welcomes the Secretary-General's intention to spell out more clearly, when presenting future concepts of operations, what the United Nations system can do to help strengthen local rule of law and human rights institutions, drawing on existing civilian police, human rights, gender and judicial expertise'.³

Four years later, in 2004, the Secretary-General delivered on his promise to provide an outline of what could be done in the context of UN peacekeeping operations. This came in the form of a report entitled 'The rule of law and transitional justice in conflict and post-conflict societies'.⁴

Despite this increased reference to the rule of law, there is no authoritative definition of the rule of law in the UN context. Perhaps the closest to an authoritative definition of the rule of law in the working of the United Nations is the description given by the Secretary-General in a report published in 2004, in which he

¹ See, for example, Thomas Fitschen, *Inventing the Rule of Law for the United Nations*, in A. von Bogdandy and R. Wolfrum (eds, 2008), *Max Planck Yearbook of United Nations Law*, pp. 347-380, at pp. 358-361.

² Hans Corell (2000), '*The Role of the United Nations in Peacekeeping - Recent Developments from a Legal Perspective*', presentation at the Conference National Security Law in a Changing World, Washington DC, available at: http://legal.un.org/ola/media/info_from_lc/washingtonDec00.pdf

³ Security Council resolution 1327 (2000).

⁴ Report of the Secretary-General, S/2004/616.

described the rule of law as '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.'⁵

One phrase in the Secretary-General's description raises again the issue of whether the rule of law should apply on the national or the international level: his assertion that also the State itself is accountable under the rule of law. This is a far cry from the Justinian concept that what pleases the prince is law, which in time led to Blackstone's famous assertion that 'the king can do no wrong'. As noted in the Secretariat working paper for the Tenth Crime Congress (2000), the rule of law was seen as a remedy for human rights abuses. The working paper stresses one fundamental reason why the rule of law should be a particular concern in criminal justice: 'The very nature of the criminal justice systems and sanctions makes them the ultimate instrument for turning the rule of law itself into a mechanism of repression for political, social, economic or other purpose.'⁶

This, indeed, appears to be the primary source of the contention: some saw the concept 'rule of law' as a tool to be used in advocating for democratic reforms, while others regarded such advocacy as intervention in matters which are essentially within the domestic jurisdiction of states, intervention which is prohibited under art. 2(7) of the UN Charter.

II. DISCUSSIONS ON THE RULE OF LAW IN THE CONTEXT OF THE SUSTAINABLE DEVELOPMENT GOALS

The debate during the 1990s over whether and how the concept of the rule of law is of relevance in the work of the United Nations continued into the work on the Millennium Development Goals (MDGs). In adopting these goals, the member states of the United Nations resolved to 'strengthen respect of the rule of law in international as in national affairs', and to 'spare no effort to promote democracy and strengthen the rule of law', but were unable to reach agreement on any specific goals in this respect.⁷

In the process of formulating the 2030 Agenda for Sustainable Development, a strong argument was made that the implementation of the MDGs had been hampered by poor governance, conflict, and absence of legal rights: essentially, the absence of the rule of law.⁸ The point was made, for example, by the UN System Task Team on the Post-2015 UN Development Agenda,⁹ the High Level Panel of Eminent Persons advising the UN Secretary-General on the Post 2015 Agenda,¹⁰ and the Open Working Group on Sustainable Development Goals.¹¹

⁵ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, para 6. Fitschen argues that this 'report, in the eyes of many, provided the first formulation of a common concept where no coherent policy direction had existed before' (Fitschen, op.cit., p. 350 and the literature cited therein). He notes, however, that subsequent debates in the UN showed that 'there is hardly a common understanding of this issue'; *ibid.*, p. 354.

⁶ A/CONF.187/3, paras 2 and 4.

⁷ GA A/RES/55/2, para 9 and 24.

⁸ This was the conclusion, for example, of the UNDP in an analysis of a compilation of country reports on implementation of the MDGs. UNDP, *The Path to Achieving the Millennium Development Goals: A Synthesis of Evidence from Around the World*, New York, 2010. See e.g. pp. 51-53, 57-59 and 66-67.

On the discussion on the rule of law in the context of the SDGs more generally, see also Per Bergling and Sophie Tim (2015), *The New Black on the Development Catwalk: Incorporating rule of Law into the Sustainable Development Goals*, Washington International Law Journal, available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1493/24WILJ0435a.pdf?sequence=4&isAllowed=y> pp. 437-439

⁹ *Realizing the Future We Want for All* (2012), Report to the Secretary General – UN System Task Team on the Post-2015 UN Development Agenda, New York.

¹⁰ *A New Global Partnership: Eradicate Poverty and Transform Economies Through Sustainable Development. The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda*, available at <http://www.post2015hlp.org/wp-content/uploads/2013/05/UN-Report.pdf>

¹¹ GA resolution A/68/970.

This sense that the rule of law is fundamentally important in development was strengthened by the adoption of the Declaration of the high level meeting of the General Assembly on the rule of law at the national and international level.¹² Several paragraphs in this lengthy Declaration make an explicit connection between rule of law and development. Paragraph 7 can be cited in particular, as it looks forward to the formulation of the post-2015 agenda:

'7. We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and internal levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.'

The recognition that the various UN task forces and the Declaration of the General Assembly gave to the importance of the rule of law, however, did not end the debate over whether or not the rule of law should be incorporated into the SDGs. The difficulties had to do with (1) the politicized debate over whether the rule of law, in the UN context, should be seen at the national or the international level, (2) disagreement over the relationship between governance and the rule of law, and (3) the more technical issue of how to measure the rule of law.¹³

The national versus international aspect of this debate has already been mentioned. Most developed countries, and a number of developing countries, were of the view that the United Nations should be concerned with the rule of law also on the national level, with national compliance with human rights norms, and with issues such as access to justice. The Non-Aligned Movement, in turn, emphasized that the focus in the UN should be on the international level (for example with the status of Palestine), and countries in this group made reference to the fact that article 2(7) of the UN Charter prohibits the Organization from interfering in essentially domestic matters. The Non-Aligned Movement also stressed that because of the diversity of legal, political and economic systems, there was no 'one size fits all' for the rule of law; the national context should be respected.¹⁴

A second difficulty referred to above had to do with the concept of 'good governance' and its relationship to the rule of law. The Western industrialized countries, which at the same time are often the donor countries in development aid, tend to be of the view that economic development and poverty reduction can be promoted by reducing the role of the state, breaking up the dominance of corrupt political elites, and encouraging private enterprise and foreign investment (the so-called 'Washington Consensus' that prevailed during the 1980s and the early 1990s).¹⁵ This would imply an agenda that emphasizes the transparency of decision-making in national and local government, liberalization of the economy, and encouragement of grass-roots democratic movements. It would also imply what has been referred to as conditionality in technical assistance: donors would provide assistance only on condition that the recipients undertake certain structural and political reforms which, in the eyes of the donors, would improve the effectiveness and sustainability of the assistance.

The third difficulty mentioned was finding a way to measure the rule of law. In the case of several other goals being considered, it was (relatively) easy to identify quantifiable goals and to indicate possible data sources: the rate of infant mortality, the number of persons living on less than \$1.25 a day, the rate of literacy, and so on. The concept of the 'rule of law', in comparison, remained vague. There was also the difficulties posed by the variety of legal systems, the absence of uniform terminology,¹⁶ and the paucity of comparable hard data on the operation of justice. Those critical of including a goal on the rule of law seized on these

¹² GA resolution A/RES/67/1.

¹³ Bergling and Tim, op.cit., pp. 439-449.

¹⁴ Bergling and Tim, op.cit., pp. 444-445.

¹⁵ Regarding the 'Washington Consensus', see in particular David Kennedy, *The 'Rule of Law,' Political Choices, and Development Common Sense*, in David M. Trubek and Alvaro Santos (eds., 2006), *The New Law and Economic Development. A Critical Appraisal*, Cambridge, pp. 95-173, at pp. 128-150.

¹⁶ For example, offences are defined differently in different countries, and even such basic concepts as 'crime', 'police officer', 'court' and 'conviction' are understood in widely different ways.

technical difficulties as further arguments to bolster their case.¹⁷

Despite the concerns by the Non-Aligned Movement countries, the SDGs ultimately did include a specific target on the rule of law, under Goal 16, which calls for the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all, and the building of effective, accountable and inclusive institutions at all levels. This target, 16.3, however, is rather vague: the member states are to '*promote the rule of law at the national and international levels and ensure equal access to justice for all.*'

III. EMERGENCE OF THE CONCEPT OF THE RULE OF LAW IN THE UNITED NATIONS CRIME PROGRAMME

It is presumably not coincidental that the phrase 'rule of law' began to appear in the context of the UN Crime Programme during the 1990s, at the same time as the phrase was gaining traction in the UN human rights programme, in the UN Development Programme, and in peacekeeping operations.

The first indication that a terminological shift was underway in the UN Crime Programme could be seen in the standards and norms on crime prevention and criminal justice. The drafting of these 'soft law' instruments began during the early years of the work of the United Nations, and they have been widely used for example in technical assistance.¹⁸ However, despite the central role of these standards and norms, it was only in 1990 that the phrase 'rule of law' made its first appearance in the one of them, the UN Standard Minimum Rules on Non-Custodial Treatment (the Tokyo Rules), in the context of legal safeguards for the offender.¹⁹ Several subsequent standards and norms make reference to the phrase.²⁰

The rule of law has also made frequent appearances in (draft) resolutions formulated by the UN Commission on Crime Prevention and Criminal Justice, for submission to ECOSOC and, in some cases, to the General Assembly. The phrase has even been the main topic of several resolutions, such as the (draft) resolutions on the rule of law and development (2004), the rule of law in Africa (2005 and 2006), the rule of law and criminal justice reform (2006), the rule of law and prosecution services (2008), the rule of law and criminal justice reform, particularly in the context of the UN system-wide approach to fighting transnational organized crime and drug trafficking (2012), and – feeding into the process of formulating the SDGs – the rule of law, crime prevention and criminal justice in the United Nations development agenda beyond 2015 (2013 and 2014).

The most important events in the UN Crime Programme are the UN Congress on Crime Prevention and Criminal Justice, which are organized every five years. The 1995 Crime Congress was the first one to be organized after the major political changes in Eastern Europe, and coincidentally also the first to be organized after the UN Crime Programme was restructured (in 1991). The 1995 Crime Congress had as one of its four main themes, 'International Cooperation and Practical Assistance for Strengthening the Rule of Law: Promoting the United Nations Crime Prevention and Criminal Justice Programme,' and one of the resolutions adopted at this Congress dealt with 'International Cooperation and Practical Assistance for Strengthening the Rule of Law: Development of United Nations Model Instruments'.²¹ The next Crime Congress, in 2000, also had the phrase inserted into the formulation of one of its four main themes, 'Promoting the rule of law and

¹⁷ Extensive consultations were held on this measurement issue. The author participated in one process, which resulted in the UNODC publication, *Accounting for Security and Justice in the Post-2015 Development Agenda*, Vienna, 2013. This publication suggested a large number of possible indicators.

¹⁸ An excellent presentation of the UN standards and norms can be found in Roger Clark (1994), *The United Nations Crime Prevention and Criminal Justice Program. Formulation of Standards and Efforts at Their Implementation*. University of Pennsylvania Press. The standards themselves are available at https://www.unodc.org/documents/justice-and-prison-reform/compendium/English_book.pdf

¹⁹ Rules 2.5 and 3.3.

²⁰ The phrase 'rule of law' appears not only in the Tokyo Rules, but also in the Guidelines for the Prevention of Crime (ECOSOC resolution 2002/13, annex, principle 12), the Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (GA resolution 65/228, annex, para. 16(j)), the Plan of action for the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (ECOSOC resolution 1998/21, annex, para. 4), the Bangalore Principles of Judicial Conduct (E/CN.4/2003/65, and ECOSOC resolution 2006/23, annex, preambular para 5 and principle 1), and the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (GA resolution 67/187, annex, para 1 and principle 1).

strengthening the criminal justice system'.²²

The working paper prepared by the Secretariat for the UN Crime Congress²³ held in 2000 identifies some of the 'elements or requirements of the rule of law', such as the need for the law to be comprehensive, clear, certain and accessible, the legitimacy of the law, equality before the law, and institutional independence and the separation of powers. Although several speakers during the High-Level Debate, which was arranged for the first time at such a Crime Congress, noted the importance of the rule of law, the description of the concept provided by the Secretariat did not generate any significant discussion at the Congress.²⁴ The phrase does not even appear in the final Congress declaration, although a vague echo of it can be found in the reference in preambular paragraph 4, which stresses that 'a fair, responsible, ethical and efficient criminal justice system is an important factor in the promotion of economic and social development and of human security'.

The declarations of the subsequent Congresses, however, refer to the phrase quite often. The Bangkok Congress Declaration (2005), for example, refers to it in paras 6, 8, 9, 11 and 24. In Bangkok, the member states voiced their support for a more integrated approach within the United Nations in respect of technical assistance and cooperation in criminal matters 'as a contribution to the establishment and strengthening of the rule of law' (para 6), and their conviction that upholding the rule of law and good governance and proper management of public affairs and public property at the local, national and international levels are prerequisites for creating and sustaining an environment for successfully preventing and combating crime' (para. 8). The member states further recognized 'the role of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations' in crime prevention and criminal justice, and encouraged the 'adoption of measures to strengthen this role within the rule of law' (para. 9).

Five years later, the member states at the Salvador Congress declared their recognition of 'the centrality of crime prevention and the criminal justice system to the rule of law' and that 'long term sustainable economic and social development and the establishment of a functioning, efficient, effective and humane criminal justice system have a positive influence on each other' (preambular para. 4), as well as their concern about 'the negative impact of organized crime on human rights, the rule of law, security and development' (preambular para. 6).²⁵

The most recent Crime Congress, held in Doha in 2015, even had the phrase enshrined in the (lengthy) title of its Declaration: the Doha Declaration on Integrating Crime Prevention and Criminal Justice into the Wider United Nations Agenda to Address Social and Economic Challenges and to Promote the Rule of Law at the National and International Levels, and Public Participation.

The star billing given to the rule of law at the Doha Congress can be attributed directly to the fact that the Congress was held a few months before the General Assembly was to finalize and adopt the Sustainable Development Goals, and the Doha Congress was seen as an excellent opportunity to contribute to the process, and in particular to seek to ensure that the rule of law would be featured as a self-standing goal in the SDGs.

In this light, it is understandable that the Doha Declaration refers to the rule of law time and time again. The single preambular paragraph sets the tone, by asserting that the member states had gathered in Doha to 'reaffirm our shared commitment to uphold the rule of law and to prevent and counter crime in all its forms and manifestations, at the domestic and international levels, to ensure that our criminal justice systems are effective, fair, humane and accountable, to provide access to justice for all, to build effective, accountable,

²¹ References in the Crime Congress documentation indicate that in this context, the rule of law was largely understood as something that could be attained by promoting the implementation of UN standards and norms on crime prevention and criminal justice. See, for example, section I(3) of the Congress Recommendations on the four substantive topics of the Congress, A/CONF.169/16/Rev.1. See also para 22 of the report of the Asia and Pacific regional preparatory meeting, A/CONF.169/RPM.1/Rev.1., and para II(1) of the Resolution of the African regional preparatory meeting, A/CONF.169/RPM.2.

²² The 2000 Crime Congress, however, did not make any reference to the rule of law in its Congress Declaration.

²³ A/CONF.187/3, paras 9–21.

²⁴ The present author served as Rapporteur at the 2000 Congress.

²⁵ The rule of law was also mentioned in paras 8, 43 and 44 of the Salvador Declaration.

impartial and inclusive institutions at all levels, and to uphold the principle of human dignity and the universal observance and respect of all human rights and fundamental freedoms'.

The Doha Declaration goes on to make several more points regarding the rule of law:

- a central component of the rule of law is the importance of effective, fair, humane and accountable crime prevention and criminal justice systems and the institutions comprising them (para. 3);
- sustainable development and the rule of law are strongly interrelated and mutually reinforcing, and in the context of the work on the SDGs the member states at the Congress 'reiterate the importance of promoting peaceful, corruption-free and inclusive societies for sustainable development, with a focus on a people-centred approach that provides access to justice for all and builds effective, accountable and inclusive institutions at all levels' (para 4);
- there is a need to 'ensure appropriate training of officials entrusted with upholding the rule of law and the protection of human rights and fundamental freedoms (para. 5(a));
- the importance of education of children and youth for the prevention of crime and corruption and for the promotion of a culture of lawfulness that supports the rule of law and human rights while respecting cultural identities (para. 7);
- the need for more analysis of information and practices relating to evolving forms of transnational organized crime in order to more effectively prevent and counter crime and strengthen the rule of law (para. 9(g));
- the need for awareness-raising programmes to convey key values based on the rule of law and supported by educational programmes (para. 10.(b)); and
- the need to promote a culture of lawfulness based on the protection of human rights and the rule of law 'while respecting cultural identity' (para.10(c)).
- the importance of technical assistance in enhancing international cooperation, upholding the rule of law and ensuring that crime prevention and criminal justice systems are effective, fair, humane and accountable.

IV. IS THE DEBATE IN THE UNITED NATIONS ON THE IMPORTANCE OF THE RULE OF LAW OVER? REFLECTIONS ON THE UNITED NATIONS DISCUSSION REGARDING A 'CULTURE OF LAWFULNESS'

Since the 1990s, the rule of law appears to have come into its own in the United Nations. To judge by its frequent appearance in resolutions and in the debate in the Security Council, the General Assembly and the Economic and Social Council, member states are comfortable with it, and accept its importance. To use UN jargon, the concept has become 'agreed language'.

Similarly, the extent to which the phrase is invoked in the UN work on human rights, development, peacekeeping, and crime and justice suggests that all is well.

Such an assumption, however, would be misleading. A hint to the continuation of the conflict in perspectives can be found in the formulation used in one of the most visible aspects of the work of the United Nations, the Sustainable Development Goals. Target 16.3 is formulated so that member states are to 'promote the rule of law at the national and international levels and ensure equal access to justice for all.' Given that no definition of 'rule of law' is offered, and the target is rather vague, both those advocating that the rule of law protects the individual against the state (the national level) and those advocating that it protects one state (or people) against another (the international level) can maintain their own position and priorities.

This is not merely a question of semantics. The SDGs and the UN resolutions guide the work of the UN bodies, and are used to formulate national policy. If there is no agreement on what a key phrase refers to, consensus will continue to rest on the basis of 'constructive ambiguity', with individual member states continuing to formulate national policy based on their own interpretation of the concept.

This can be illustrated by recent debates within the framework of the UN Crime Programme revolving around the concept of a 'culture of lawfulness'. This concept is not very well-known in English. Just as is the case with the 'rule of law' as a concept, it may well be misunderstood, or at least understood in different ways by different people.

Outside of the United Nations, the 'culture of lawfulness' concept is largely used in very specific connections, and in very specific ways:

- in peace-keeping and transitory justice projects (primarily US-funded technical assistance projects in Latin America and the Middle East), it tends to mean that society rejects violence and calls for a stable rule of law;
- in the law enforcement context, it is used as a synonym for integrity on the part of law enforcement personnel; and
- in the anti-corruption context, it is used as a synonym for integrity on the part of decision-makers both in government and in the private sector.

In distinction from these specific connections, the concept is usually associated with a general set of attitudes and conduct in society. Roy Godson has briefly defined a culture of lawfulness as a culture that is supportive of the rule of law.²⁶

Within the UN Crime Programme, in turn, the term apparently first appeared in the context of the formulation of the UN Guidelines for the Prevention of Crime.²⁷ Principle 12 of these guidelines states:

'12. The rule of law and those human rights which are recognized in international instruments to which Member States are parties must be respected in all aspects of crime prevention. A culture of lawfulness should be actively promoted in crime prevention.'

The concept appeared in a somewhat different formulation at the 2010 UN Crime Congress. In para. 43 of the Salvador Declaration, which again speaks largely about the prevention of crime, the member states note that they 'endeavour to take measures to promote wider education and awareness of the United Nations standards and norms in crime prevention and criminal justice to ensure a culture of respect for the rule of law. In this regard, we recognize the role of civil society and the media in cooperating with States in these efforts.'

Five years later, para. 7 of the Doha Declaration from the 2015 Crime Congress echoed this language, by emphasizing that 'education for all children and youth, including the eradication of illiteracy, is fundamental to the prevention of crime and corruption and to the promotion of a culture of lawfulness that supports the rule of law and human rights while respecting cultural identities.' Para 10(c) largely repeats this point by noting that the member states undertake to 'promote a culture of lawfulness based on the protection of human rights and the rule of law while respecting cultural identity, with particular emphasis on children and youth, seeking the support of civil society and intensifying our prevention efforts and measures targeting and using the full potential of families, schools, religious and cultural institutions, community organizations and the private sector in order to address the social and economic root causes of crime'.

Already during the negotiations of the Doha Declaration, some national delegations questioned the use of the term 'culture of lawfulness' and pointed out, quite correctly, that it was not 'agreed language' in the UN, and that there was no agreed definition of the term.

Although consensus was ultimately reached on the inclusion of the concept in these two paragraphs that were focused on crime prevention, heated discussion emerged subsequently at sessions of the Commission on Crime Prevention and Criminal Justice, when some delegations sought to return to the concept in connection

²⁶ Roy Godson has written extensively on the subject (e.g., *A Guide to Developing a Culture of Lawfulness* [2000]), citing practical examples from e.g. Colombia, Hong Kong and Sicily of how the fostering of a culture of lawfulness can be used to respond to wide-spread violence and organized crime

Godson's brief definition is substantially the same as that used by the US-government funded Culture of Lawfulness Project (<https://www.yumpu.com/en/document/view/11251856/building-a-culture-of-lawfulness-national-strategy-information->);

"A society in which the overwhelming majority of members are convinced that the rule of law offers the best long-term chance of securing their rights and attaining their goals. They believe that this is achievable and are committed to upholding it."

For a somewhat longer definition, see Roy Godson, *A Guide to Developing a Culture of Lawfulness* (2000), p. 5.

²⁷ ECOSOC resolution 2002/13, annex.

with the 2020 Crime Congress, to be held in Kyoto, Japan.²⁸

What appears to lie behind this convoluted debate is the concern of some representatives of states in the Non-Aligned Movement that the 'culture of lawfulness' as a concept is being used to disguise efforts to reassert the focus on rule of law at the national level. The concept can be understood from two diametrically opposed perspectives, that of the government (and practitioners), and that of the general public.

The government may understand a 'culture of lawfulness' to mean that the public respects the law – and those who represent the law, in other words the government. This would enhance the rule of law – more specifically, the law as defined by constitutionally approved bodies, whether these are a democratically representative body (such as a parliament) or a body consisting largely of a religious, political or economic elite.

The general public, in turn, may understand a culture of lawfulness to mean that the government (and practitioners) should follow the law, i.e., they should respect the rule of law. From this perspective, the 'law' could be understood more broadly to include not only national legislation, but also internationally recognized human rights standards. The 'rule of law' can also be understood to require that the government adheres to basic democratic principles.

From these two diametrically opposed perspectives, it is not a very long leap to the heated debate that has emerged in the United Nations on the role of civil society, and of non-governmental organizations. The debate has been particularly heated in the context of the United Nations Crime Programme.²⁹ According to one view, civil society activity, including that of non-governmental organizations, should be encouraged as widely as possible. According to the second view, such non-governmental activity should be supervised in order to ensure that the NGOs in question do not have malevolent intentions, or serve as a channel for importing foreign (and undesirable) social and cultural values.

The first view could be described as a bottom-up, community-based approach. Local communities have a wide range of concerns, among which may be the impact of crime on the local level. Through awareness-raising and advocacy, they may contribute to the detection of crime, and stimulate the authorities to respond.³⁰ This view has a direct analogy in community policing, which holds that the police and the public are jointly responsible for responding to crime and improving the quality of life on the community level. Community policing programmes generally seek to encourage public initiative, recognizing that while the goals of individual civil society groups need not necessarily be in full alignment with police goals, the work of these groups supplements the work of the police. In both a literal and a figurative sense, the mobilization of the public extends the reach of the criminal justice apparatus, in a way that not only enhances the effectiveness of criminal justice, but also fosters the trust of the public in the operation of the criminal justice system.

The second view could be described as a top-down approach, which seeks to ensure that civil society activity is in compliance with national law. The concerns expressed, as noted, at times refer to the potential that non-governmental organizations may have as channels for bringing unwanted foreign social and cultural values into a country. This is illustrated by the discussions held at the UN Crime Congress in 2015. As reflected in the report of the Congress, in respect of the discussions at the workshop on public participation in

²⁸ The flash point was the proposal that one of the four themes at the 2020 UN Crime Congress would essentially deal, quite simply, with the promotion of a culture of lawfulness. What originally was envisaged as a short and snappy theme (in the view of one delegation, it should be possible to encapsulate the theme in a single 140-character 'tweet') ultimately emerged as a mouthful: 'Multidimensional approaches by Governments to promoting the rule of law by, inter alia, providing access to justice for all; building effective, accountable, impartial and inclusive institutions; and considering social, educational and other relevant measures, including fostering a culture of lawfulness while respecting cultural identities, in line with the Doha Declaration'. (This would require two of the new and longer 280-character 'tweets'.) (Full disclosure: the comment regarding the 'tweet' was made by the present author, as the representative of Finland, during the informal negotiations in Vienna on the draft resolution on the 2020 Congress.)

²⁹ The background to, and evolution of, this debate is described in *Civil Society Engagement in the Implementation of the United Nations Convention against Corruption*. Conference Room paper submitted by the delegation of Finland, CAC/COSP/2015/CRP.3.

³⁰ The view is often associated with requests that governments operate in a more transparent manner, so that the public is provided with greater access to information for example on how decisions on public matters were made, and on what grounds.

crime prevention and criminal justice,

“A number of speakers noted that the engagement of civil society organizations should take place within the appropriate regulatory framework, in line with national legislation and in coordination with relevant oversight bodies, for example crime prevention councils, while also ensuring that organizations had the skills and knowledge for their functions. One speaker noted that any civil society activities should be framed and moderated by Governments, that non-local non-governmental organizations (NGOs) could propagate ideas or value systems that were foreign to some countries, and that those NGOs should respect the economic, cultural, social and religious values of societies. Some speakers referred to the need to build trust and transparency in that regard.”³¹

As expressed by one speaker at the Thirteenth United Nations Crime Congress workshop, the role of civil society is important if the groups are local and are based in the country, and if this role occurs in a certain context. Such groups understand the culture, they are subject to regulation and they are moderated by the government. The speaker observed that the groups should be transparent, and should respect the social and cultural values of the country in question; in the view of the speaker, this is of particular importance in developing countries.

It should be emphasized that this second view does not question the potential utility of the work of non-governmental organizations. The focus is on ensuring that NGOs function in accordance with the law – as the law is defined by the member state in question.

V. CONCLUDING REFLECTIONS

The concept of the rule of law has become part of ‘agreed language’ at the United Nations. The importance of the concept has increased incrementally since the beginning of the 1990s, and is much evident in the UN work on human rights, technical assistance, peacekeeping, and crime and justice.

The increased references to the rule of law, however, should not be understood to mean that the phrase is always understood in the same way, and should be promoted in the same way. A disagreement has arisen over whether the rule of law should be regarded from the national or the international perspective, as binding on governments in respect of their citizens, or as binding on states in their relations with one another and the international community at large.

Current practice is to paper over this disagreement by referring to ‘promotion of the rule of law at the national and the international levels’, thus allowing both sides to say that their view has been respected (usually a sign of a successful compromise). It should also be noted that this disagreement has not significantly affected the day-to-day work that United Nations staff are carrying out on the ground in the context of human rights, peacekeeping and technical assistance missions, since these are based on mandates of the Security Council, the General Assembly and ECOSOC, and are generally at the request of the countries in question.

Within the UN Crime Programme, however, the disagreement has carried over into a debate on the relation between the rule of law and a ‘culture of lawfulness’, and specifically on the extent to which civil society (and non-governmental organizations) should be encouraged to take part. Does the rule of law entail that views that are critical of the government in power should nonetheless be tolerated, as an expression of freedom of speech? Should local communities be allowed greater input into determining what their priorities are in the prevention and control (and perhaps even in the definition) of crime?

The debate in the United Nations on the rule of law shall apparently continue for years to come.

³¹ Report on Workshop 4 of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015. A/CONF.222/L.4/Add.1, para. 15.