The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility

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Introduction

The purpose of this paper is to articulate three "game changers" that can improve how the international community contributes to rule of law development in situations of fragility. Such change is long overdue. Many justice and security engagements fail to deliver their intended objectives because of the complexity of fragile environments, the political sensitivity of change in this area and current ways of working. In today's aid speak, transformative results are few and value for money is limited. Worse, the incentives and resources of many international actors are stacked against more realistic and political ways of providing support to rule of law development.

We define rule of law development simply as all efforts that contribute to a more accountable and more effective delivery of justice and security services to people.[1] This is a narrower view than e.g. articulated by the UN Secretary General in 2008, which holds the rule of law to be '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' (UN, 2008). It is precisely such a broad definition, in our view, that impedes clear operationalisation, gives too many actors a stake in the game and prevents effective management of UN efforts. It also does not explicitly recognise critical linkages between justice and security.

Three game changers

Based on lessons learned over the last five years, three game changers can be identified. What unifies these game changers is that they are practical propositions aimed to increase the quality of rule of law support. They are based on sound analysis that is already available. The challenge is to translate translating available knowledge into practice.

Game changer #1: Focus more on the political incentives and limitations of change

Issue: The organisations and means for providing justice and security represent tools of power that can be used for a wide range of political, economic and social purposes with an immediate effect on life, property and power relations. Change in access to, the organisation of, and authority over these tools is therefore a highly political issue that is bound to generate winners and losers. This creates extreme resistance and limitations to change. Historically, elite interests have dominated the organisation and use of justice and security mechanisms at most stages of development in most states. As a result, viewing or designing justice and security interventions – whether they take place at the local or the national level – as technical programmes is a recipe for failure.

Game changer. Justice and security interventions should be treated as political interventions with a technical component. They must be designed as political strategies and be backed up by adequate political capacity, analysis and engagement. Hence, the focus should be on having the ability to engage politically at all levels and on a daily basis to proactively build networks of political stakeholders in support of engagements and to react rapidly, with sufficient skill and muscle, to the inevitable setbacks and political challenges that will arise.

For example, Belgium, Germany and the Netherlands increasingly engage at high levels in a joint dialogue with the Burundian authorities on the politics of change on the back of the various justice and security programmes they support. This generates important signals, pressure and a better understanding of possibilities and limitations.

An obvious implication for the UN centres on the extent to which its Special Representatives and Resident Representatives can and should play a role as political change agents in support of UN rule of law efforts. It also points to the need for clear and political mission mandates, as well as to the need to be able to easily hire senior programme managers who combine political savvy with the required technical expertise where these are not available inside the UN.

Game changer #2: Build justice and security programmes in a more evolutionary manner

Issue. The most common way to design security and justice engagements today is to follow a programme/ project cycle approach of ca. 3-4 years. Most programmes are coherent sets of time-bound projects in pursuit of clear and detailed objectives with a defined financial and capacity envelope. Mounting evidence is suggesting that this programme cycle is not fit for purpose, in particular in conflict-affected and fragile situations. A concrete lesson is that the rigorous programme design, planning and implementation against detailed results suggest a level of predictability and plan-ability that belies the dynamics and characteristics of most fragile and conflict-affected situations.

Game changer. More realism and flexibility must be introduced in current programming methods.
The clarity on objectives and theories of change – in particular to achieve "Western" look-alike end-states – suggest a kind of malleability of social and political processes that is not realistic. Instead, more room should be created for programmes to develop in a more evolutionary fashion that allows for gradual convergence of the opportunities and limitations of the local environment, a sound understanding of context, stakeholder incentives and the organisation of resources into a feasible programme with meaningful results. This requires introducing or strengthening three elements in programmes:

- **The ability to establish detailed overall programme results progressively**. Current operating realities are often such that results for programmes of 3-4 years are designed on the basis of scoping missions of only 3-4 weeks that mainly features a set of one-off interviews with key formal (usually government) stakeholders. This is insufficient to obtain an intimate and detailed understanding of the interests of a sufficiently broad range of political stakeholders, societal priorities and limitations in often-contested societies. It is more appropriate to start programmes on the basis of relatively open-ended results and a set of principles for working together. Of course, such results need to be made more specific over time. Dialogue, joint experiences and analysis can serve this purpose. This will typically require more time and human resources than currently allocated. Yet it is critical to better ground programmes in the realities and needs of countries characterised by a weak rule of law.

- **The ability to work iteratively at every stage of the project cycle** with an increasingly central role for local stakeholders. It is well known that the operating environment in fragile states is fluid with unexpected setbacks and windows of opportunity. It is also well known that "ownership" is not a matter of a one-off conversation, but a continuous process of critical dialogue with a widening set of stakeholders to ensure engagements reflect the priorities and possibilities of at least some of these stakeholders. Hence, a slower and more iterative way of designing and implementing the series of projects that typically make up a programme is appropriate. This, of course, is only possible when resources can also be allocated and mobilised flexibly. It can also inform the progressive establishment of more detailed results for the programme overall.

- **The ability to learn**. Monitoring is the Achilles heel of much programming. Even where monitoring is up to standard, examples of its results positively influencing programme development are rare. It still often is the case that monitoring is not seen as a means to learn and adjust, but rather as an instrument to focus on results and accountability. The *Zimbabwe Peace and Security Program* is a good example that recently received high praise for the manner in which its monitoring system informs a forward-looking conversation between key stakeholders.

Simply put, effective programme design does not only require longer inception phases (of up to 12 months) or longer programme horizons (of a minimum of 6-8 years), but also a different way of working that is more flexible and iterative. This goes against the current wisdom of value for money and rapid results but is critical for achieving long-term outcomes.

An obvious implication of the above for the UN is the need for peace support operations to develop, from the start, justice and security interventions hand in glove with other parts of the UN system that have longer time horizons so that short-term leverage can be combined with long staying power. Another implication is the need to reduce focus on short-term results. This requires a high-level dialogue with key UN funders, informed by good, independent analysis of what makes programmes effective, to ensure that funding conditions for e.g. UNDP work less as a "results straightjacket" and stimulate learning and process-oriented approaches more instead.

Game changer #3: Engage more with local/non-state justice and security providers

Issue. In many conflict-affected and fragile states, local/non-state actors deliver a significant percentage (typically over 50%) of all justice and security services to the population. It is always possible to identify actors that merit support from both a normative and a practical point of view – such as neighbourhood watch groups, community development councils and trade associations. For example, in the urban areas of Bukavu (Eastern DRC), young men volunteered to patrol neighbourhoods in teams called "Forces Vives". As a neighbourhood watch group, these teams contribute significantly to safety in areas where the police rarely responds (Derks, 2012). However, supporting such actors is resource intensive, small-scale and risky, for instance because of local power dynamics that are difficult to grasp. Moreover, it might run counter to a government's centralisation agenda. Despite the latter's intentions to set up structures and services that may be able to deliver adequately in the long run, they are often inadequate to deal with immediate and medium term needs. International actors often take long-term statebuilding priorities as the starting point for their interventions. As a consequence, much international justice and security support centres on the executive with little effect beyond major urban centres.

Game changer. International support to justice and security development should aim to strike a better balance between working with local/non-state and central justice and security providers. Two relatively simple steps can accomplish this and so significantly extend its reach:

- Building sustainable long-term partnerships with (international) civil society organisations (CSOs) that can help design, implement and monitor support for local/non-state justice and security providers. Such CSOs should be selected on the basis of their local legitimacy, detailed local knowledge and ability to influence. Although this requires a substantial upfront investment in time and resources, it provides a way to go with the grain and avoid direct confrontation with central stakeholders. Examples such as the *African Security Sector Network* and the *Asia Foundation* spring to mind.
- Adopting a problem-solving or service delivery orientation for justice and security support. Focusing on a particular problem or service offers a good entry point to engage local communities, actors, as well as central state services. The resulting dialogue and identification of priorities and needs can help to build confidence between citizens, local and central organisations and stimulate a more effective division of labour to provide key services, which is recognizant of the multiple layers, actors and sources of law that are typical in many fragile situations.

An implication of the above for the UN is the need to refocus some of its institution and capacity building justice and security interventions towards problem-solving and service delivery oriented activities. Another is the need for missions and country offices to build larger and better networks with national/ local and international civil society. This, however, will likely require funds and skilled staff. The CapMatch concept that is being developed by the UN's Civilian Capacity Team may offer a good starting point for mobilising additional resources.

An agenda for change

Bold leadership and courageous decisions are required to operationalise and implement these three game changers. A first set of action could look as follows:

Here and now: easy, immediate actions

- Ensure that every justice and security intervention has a high-level, in-country political champion in the UN system with time to engage, build political relations and "troubleshoot" as necessary.
- Identify and use lessons learned from the recent refocus of the UK's Stabilisation Unit on smaller rosters that include more senior experts on permanent call down contracts who combine developmental with political experience and receive more training.

For later: difficult, catalytic actions

- Inventory which corrective measures in different sets of UN operating procedures (programming, risk management, procurement etc.) could bridge part of the tension between our knowledge and the current practice of supporting justice and security development.
- Ensure UN human resource policies on performance management, reward and leadership, provide incentives for staff to better cooperate and coordinate with colleagues across the UN system.
- Make it mandatory for peace support operations to conceive any justice and security programme type intervention with other relevant UN actors from the start to ensure adequate longevity of programmes. For instance, the UN's Integrated Mission Planning Process Guidelines of 2006 and 2008 could be used to operationalise the nuts and bolts of integrated programming. To ensure clarity of management and control, this must be done under clear mission leadership and with seconded staff authorised to commit their organisations. The UN's Interagency Security Sector Reform Task Force could be used as a resource and coordination centre for such joint justice and security programming.

Conclusions

Change in the area of the rule of law is more difficult, higher-risk and features longer timelines for transformation than many other areas of development. These characteristics place high demands on the quality of international support. Sadly, much international support today is not fit-for-purpose.
Such support neither delivers value for money, nor does it improve justice and security services for those who suffer their absence. We more or less know what must change. As the UN is a key global player in the area of rule of law development, the UN General Assembly's debate on the matter is a good place to start a discussion on how these lessons and implications can better inform the practice of UN engagement.

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Endnotes

[1] The term "accountable" covers aspects such as external and internal oversight over the manner in which justice and security services are provided (e.g. in line with human rights). See also: Bingham (2010) on the accountability dimension of the rule of law.

* This paper does not reflect the official views of either the Clingendael Institute or the OECD. We have geared our paper to a UN audience because of the aim of this report. Yet, neither of us works for the UN. We hope that our UN colleagues will engage with the spirit of our arguments and pardon us for any manifest lack of insight into UN operating realities.