

## THE NEW BLACK ON THE DEVELOPMENT CATWALK: INCORPORATING RULE OF LAW INTO THE SUSTAINABLE DEVELOPMENT GOALS

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*Abstract:* As the post-2015 Development Agenda is set to replace the Millennium Development Goals (“MDGs”), one of the most controversial new elements of the new agenda is the rule of law. While all of the official fora for discussing and producing recommendations have concluded that the rule of law (or some variation) should be included, there are still significant challenges to its incorporation in the final Sustainable Development Goals (“SDGs”). The interrelated points of contention have included whether rule of law applies at the national government level, whether it encompasses domestic governance, and how the concept should be defined and measured. Going forward, there are a few key factors influencing whether and how the rule of law will be incorporated into the next round of development goals: 1) the compelling force of traditional views on development in determining member states’ positions in the debate; 2) the continued importance of the United Nations General Assembly (“UNGA”) Rule of Law Declaration; 3) the centrality of the General Assembly’s Open Working Group on Sustainable Development Goals (“OWG”); and 4) the ease of measurement and implementation of proposed indicators. If incorporated into the new agenda, a rule of law goal will likely include indicators that are easily evaluated and generate little political friction, such as legal identity.

### I. THE NEW DEVELOPMENT AGENDA: IS RULE OF LAW IN VOGUE?

If there is a catwalk where states can be said to display their taste in development philosophy and objectives, then it would be in the formulation of the post-2015 Development Agenda (the so-called Sustainable Development Goals, or “SDGs”) set to replace the current Millennium Development Goals (“MDGs”). It is expected that these goals, just like the MDGs, will influence a range of developmental and other international and national policy initiatives by highlighting what is internationally agreed to be important and steering resources to those areas.<sup>1</sup>

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<sup>1</sup> In September 2000, the member states of the United Nations unanimously adopted the Millennium Declaration. The eight Millennium Development Goals are the most important part of the roadmap for implementing the Declaration. The Goals are: to eradicate extreme poverty and hunger, achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases, ensure environmental sustainability, and develop a global partnership for development. United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/55/L.2 (Sep. 18, 2000).

One of the most discussed and controversial elements of the new agenda is the rule of law. While the original MDGs did include commitments on security, human rights, good governance, and the rule of law,<sup>2</sup> they did not stipulate specific objectives for these topics. At that time, goals on governance and the rule of law were deemed too politically challenging to implement and too difficult to measure. However, they have surfaced again in the process of formulating the SDGs, resting on essentially the same intellectual conviction of their necessity and bolstered further by evidence that the MDGs were hampered by the absence of rule of law and governance-related goals.<sup>3</sup> The emerging number of groups and institutions supporting promotion, measurement, and evaluation of rule of law efforts may also have had a role in securing a place for the rule of law in the discussion.<sup>4</sup>

However, there are no guarantees that governance and rule of law will be included in the post-2015 Development Agenda. Many topics and goals compete for attention,<sup>5</sup> and some states actively oppose any goal with a bearing on governance, including the rule of law.<sup>6</sup> Clearly there are sensitive political issues to manage, particularly those related to sovereignty, distribution of resources, democracy, and human rights.<sup>7</sup> Proponents also face challenges with formulating an acceptable definition of the rule of law,<sup>8</sup> establishing causal evidence for its effectiveness,<sup>9</sup> and measuring its progress and failure.<sup>10</sup>

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<sup>2</sup> The Millennium Declaration states: “We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms.” *Id.* at ¶ 6.

<sup>3</sup> U.N. DEV. PROGRAMME, THE PATH TO ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS: A SYNTHESIS OF EVIDENCE FROM AROUND THE WORLD 59 (June 2010).

<sup>4</sup> INT’L DEV. LAW ORG., LEGAL AND JUDICIAL DEVELOPMENT ASSISTANCE GLOBAL REPORT 2010, 4-11 (2010).

<sup>5</sup> See U.N. Secretary-General, *Initial Input to the Open Working Group on Sustainable Development Goals*, ¶¶ 13-14, U.N. Doc. A/67/634 (Dec. 17, 2012).

<sup>6</sup> See *infra* Part III.C-E.

<sup>7</sup> COMM’N ON LEGAL EMPOWERMENT OF THE POOR, UNDP, MAKING THE LAW WORK FOR EVERYONE 80 (2008); David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT A CRITICAL APPRAISAL 95, 143, 162, 168 (David M. Trubek & Alvaro Santos eds., 2006); Rosie Wagner, *The Rule of Law and the Post-2015 Development Agenda* 11-12 (Mar. 26, 2013) (unpublished paper prepared for U.N. Development Programme Rule of Law Team), available at <https://www.innovations.harvard.edu/sites/default/files/2807279.pdf> [hereinafter Wagner].

<sup>8</sup> See, e.g., RACHEL KLEINFELD, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006).

<sup>9</sup> See generally MARCUS COX, SECURITY AND JUSTICE: MEASURING THE DEVELOPMENT RETURNS – A REVIEW OF KNOWLEDGE (2008).

<sup>10</sup> See generally Tom Ginsburg, *Pitfalls of Measuring the Rule of Law*, 3 HAGUE J. ON RULE L. 269 (2011).

This article will not elaborate on these substantive challenges. Instead, it will discuss the process of their negotiation and formulation, focusing on the various UN-sponsored fora where this process occurs, how states and other key actors have framed their preferences, states' arguments for or against various options, and identify the main states in supporting each option. This article also includes an element of prognosis or speculation on what will eventually be decided with regard to the main options at hand. It will refrain, however, from an in-depth scholarly inquiry. The observations in this article are drawn from the personal recollection and reflection of one of the authors, who was present as an observer and diplomatic representative of a UN member state (Sweden) when some of these discussions took place.

## II. INITIAL DESIGNS FOR THE SDGs: A COMMON THREAD

The different UN groups tasked with drafting recommendations for the post-2015 Development Agenda have all concluded that “rule of law” or other variations such as “access to justice” and “good governance” are instrumental to reaching development goals, if not intrinsically valuable of themselves. The groups charged with drafting these initial reports and proposals include the UN System Task Team on the post-2015 UN Development Agenda, the High Level Panel of Eminent Persons advising the UN Secretary General on the post-2015 Agenda, and the Open Working Group (OWG) on Sustainable Development Goals of the UN General Assembly. The following section highlights how each group has framed the rule of law in various reports and proposals.

The initial stages of drafting the SDGs began in earnest with the work of the UN System Task Team on the post-2015 UN Development Agenda. The Team consisted of over fifty experts from more than fifty UN entities and other international organizations along with linkages to academia, the media, private sector, and civil society.<sup>11</sup> In its 2012 report to the Secretary-General, the Team identified the rule of law as one of many factors that could be an “enabler” for reaching various development goals.<sup>12</sup>

The High Level Panel of Eminent Persons advising the UN Secretary General on the post-2015 Development Agenda reached a similar conclusion.<sup>13</sup> The Panel's May 2013 final report suggested that responsive

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<sup>11</sup> U.N. System Task Team on the Post-2015 UN Development Agenda, *Realizing the Future We Want for All: Rep. to the Secretary-General*, 44 (June 2012).

<sup>12</sup> *Id.* at 24.

<sup>13</sup> The High Level Panel is co-chaired by David Cameron of the United Kingdom, Susilo Bambang Yudoyono of Indonesia, and Ellen Johnson Sirleaf of Liberia, and comprises twenty-four additional experts from around the world who were appointed by the Secretary General in July 2013. The High Level

institutions promoting rule of law and access to justice are necessary for transformative shifts enabling development, to build effective, open and accountable institutions for all.<sup>14</sup> But it also went further than the Task Team by noting that institutions that are able to uphold the rule of law and deliver access to justice are necessary not only as drivers of development but have intrinsic value in themselves.<sup>15</sup>

The Panel thus proposed two specific goals: to “[e]nsure good governance and effective institutions” (Goal 10)<sup>16</sup> and to “[e]nsure stable and peaceful societies” (Goal 11).<sup>17</sup> Goal 10 includes targets aimed at reducing inequality. The targets related to rule of law include: a) providing free and universal legal identity, including birth registration, d) guaranteeing the public’s right to information and access to government data; and e) reducing bribery and corruption and ensure officials can be held accountable e).<sup>18</sup> Goal 11 includes safety-related targets, with those related to the rule of law including: a) reducing violent deaths per 100,000 by x and eliminating all forms of violence against children, b) ensuring justice institutions are accessible, independent, well-resourced and respect due-process rights, c) stemming the external stressors that lead to conflict, including those related to organised crime, and d) enhancing the capacity, professionalism and accountability of the security forces, police and judiciary.<sup>19</sup>

The High Level Panel also suggested that a number of justice- and security-related targets should be cross-applied to several other goals. For example, these targets overlap with implementation of Goal 1, which aims to end poverty by increasing the share of women and men, communities, and businesses with secure rights to land, property, and other assets.<sup>20</sup> The targets also intersect with Goal 2, directed at empowering girls and women and achieving gender equality by preventing and eliminating all forms of violence against girls and women as well as by ensuring the equal rights of women to own and inherit property, sign a contract, register a business and open a bank account.<sup>21</sup>

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Panel of Eminent Persons on the Post-2015 Development Agenda, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development*, 66 (May 30, 2013) [hereinafter The High-Level Panel Report].

<sup>14</sup> *Id.* at 4.

<sup>15</sup> *Id.* (“The rule of law, freedom of speech and the media, open political choice and active citizen participation, access to justice, non-discriminatory and accountable governments and public institutions help drive development and have their own intrinsic value.”).

<sup>16</sup> *Id.* at 50.

<sup>17</sup> *Id.* at 52.

<sup>18</sup> *See supra* text accompanying note 15.

<sup>19</sup> *Id.* at 52.

<sup>20</sup> *Id.* at 33.

<sup>21</sup> *Id.* at 34.

Parallel to the work of the High Level Panel, the General Assembly's thirty-member Open Working Group on Sustainable Development Goals ("OWG") launched a process to develop a set of sustainable development goals as part of the 2012 Rio+20 UN Conference on Sustainable Development.<sup>22</sup> The OWG noted that the Rio conference had concluded that "democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment are essential for sustainable development."<sup>23</sup> Pursuant to this conclusion, the OWG proposed a thematic sub-category for the SDGs on good governance, rule of law, peace, and security.<sup>24</sup>

The conclusions of some of these UN-sponsored processes were consolidated in the Secretary-General's December 2014 Synthesis Report to the General Assembly. The report was positively received by most member states and suggests that "justice" (understood as encompassing safe and peaceful societies as well as strong institutions) should be an "essential element" of the new agenda.<sup>25</sup> The General Assembly has also held that the document is to be understood as a conceptual guide for the remainder of the formulation process.<sup>26</sup>

The following parts will discuss how these different processes came to similar conclusions and proposals related to the rule of law and the potential course of their advancement in discussions and negotiations to come.

### III. THE TERMS AND SCOPE OF CONTEST: ALLIANCES, FRAMEWORKS, DEFINITIONS, AND MEASUREMENTS

Despite the agreement across proposals recommending rule of law as a target, consensus has yet to be reached on the substance and implementation of such a target. Much remains contested. The major debates include whether rule of law goals should attach at the level of national or international law, the nature of the relationship between governance and the rule of law, as well as disputes over the appropriate definition and measurement of rule of law.

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<sup>22</sup> G.A. Res. 66/288, U.N. Doc. A/RES/66/288 (July 27, 2012) (the General Assembly resolution establishing the Open Working Group).

<sup>23</sup> *Id.* at ¶ 10.

<sup>24</sup> Rep. of the Open Working Group of the General Assembly on Sustainable Development Goals, 68th Sess., U.N. Doc. A/68/970 (Aug. 12, 2014) [hereinafter Open Working Group Report].

<sup>25</sup> U.N. Secretary-General, *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet Synthesis Report of the Secretary-General on the Post-2015 Sustainable Development Agenda*, ¶¶ 77-79, U.N. Doc. A/69/700 (Dec. 4, 2014) [hereinafter *The Road to Dignity by 2030*].

<sup>26</sup> G.A. Res. 68/6, ¶ 25, U.N. Doc. A/RES/68/6 (Oct. 9, 2013).

A. *Formal and Informal Channels for Discussion and Negotiation*

Member states work through a variety of formal and informal channels promote shared perspectives on the new development agenda. The problems and considerations raised in discussions are of the kind commonly associated with reaching multilateral agreements in the UN. That is, the conditions and preferences of member states often differ along political, economic, and other lines. These differences are manifest in how states view the conclusions of the High Level Panel, the OWG, and other processes on democracy, human rights, and the rule of law.

There are of course a number of formally-established practices and modalities for guiding the exchange of views, reconciling differences, and coming to critical consensus. Among these include the custom of establishing internal consensus within each geographical group prior to actual General Assembly debates. Member states often try to prepare positions in the five geographical groups—the African States; Asia and Oceania; Eastern Europe (“EEG”); Latin America and the Caribbean (“GRULAC”); and Western Europe and Others (“WEOG”).<sup>27</sup> Other groups also hold preliminary negotiations, including the members of the G77 and China group and the Non-Aligned Movement (“NAM”).<sup>28</sup>

These preliminary negotiations allow for more states to be represented on the Open Working Group than there are seats available. The General Assembly allows the thirty seats of the OWG to be appointed by the five regional groups. Each seat is shared between two or three states, thus ensuring that many more states (around seventy) have a say in the negotiations.<sup>29</sup>

Member states also participate in informal practices and collaborations that also influence the discussion and consensus over the rule of law in relation to the new development agenda. Often, member states or their respective groups will meet face-to-face and show their cards for the first time at “informals,” which refers to the informal intergovernmental meetings on a specific theme in the UN building.<sup>30</sup> All interested member states will participate, and the chair of a particular geographic group will

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<sup>27</sup> MARTIN DANIEL NIEMITZ, REFORMING UN DECISION-MAKING PROCEDURES: PROMOTING A DELIBERATIVE SYSTEM FOR GLOBAL PEACE AND SECURITY 134 (2015).

<sup>28</sup> Adil Najam, *The Collective South in Multinational Environmental Politics*, in POLICYMAKING AND PROSPERITY: A MULTINATIONAL ANTHOLOGY 197, 208, 215 (Stuart S. Nagel ed., 2003).

<sup>29</sup> *Sustainable Development Knowledge Platform*, OPEN WORKING GROUP ON SUSTAINABLE DEVELOPMENT GOALS, <https://sustainabledevelopment.un.org/index.php?menu=1549> (last visited May 31, 2015).

<sup>30</sup> Courtney B. Smith, *Informal Governance at the United Nations*, in INTERNATIONAL HANDBOOK ON INFORMAL GOVERNANCE 236, 239 (Thomas Christiansen & Christine Neuhold eds., 2012).

speak on behalf of its group members.<sup>31</sup> Statements made in such informals indicate which proposals may gain the support of the majority in later actual General Assembly debates and become resolutions, declarations, and other committing instruments.<sup>32</sup>

Of particular relevance to this article is an informal group called the Group of Friends of the Rule of Law. The group is committed to the view that:

[I]nternational law and the rule of law are the foundations of the international system and that it is therefore imperative to strengthen the rule of law in all its dimensions, i.e., at the national, international, and institutional levels.<sup>33</sup>

Currently chaired by Austria, the group is comprised of member states of varying regions, political perspectives, and stages of development. Member states collaborate on promoting the rule of law among a range of UN processes with a particular emphasis on the development goals. The group provides a forum for the Permanent Representatives of these member states to meet in their personal capacity in developing guidance for the new development agenda.

#### IV. INTERNATIONAL OR NATIONAL RULE OF LAW?

The dispute over whether the rule of law is most relevant at the international or national level remains one of the major points of contention in the SDG discussions. This discussion is a continuation of the longstanding international versus national debate that profoundly influenced the negotiation and adoption of the 2012 Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels.<sup>34</sup> As its title indicates, the declaration concluded that the concept had equal relevance on both levels. This conclusion was the result of a rough compromise between member states whose positions remain grouped along a spectrum. Although it is far from a settled contest in all forums, the prevailing view within the OWG has largely turned out to be that of emphasizing applicability of the rule of law at the national level.

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Konrad G. Buhler, *The Australian Rule of Law Initiative 2004-2008—The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law*, 12 MAX PLANCK Y.B. OF U.N. LAW 409, 413 (2008).

<sup>34</sup> Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, G.A. Res. 67/1, U.N. Doc. A/RES/67/1 (Nov. 30, 2012) [hereinafter Declaration of the High-Level Meeting].

At one end of the spectrum, those generally identified as the “West” focus on the rule of law as a principle of governance and as such relevant everywhere, including at the national level. This means, for example, that rule of law encompasses national compliance with human rights norms and the ability to bring a range of civil and economic matters before national courts. At the other end of the spectrum is the Non-Aligned Movement (“NAM”). Chaired by Iran, the NAM emphasizes national sovereignty and sees the rule of law as a concept solely or at least primarily applicable at the international level. This interpretation is accordingly concerned with issues such as Security Council reform and the status of the Occupied Palestinian Territories in the Middle East.

The clash between these views was apparent at the recent Eighth OWG session.<sup>35</sup> Representing the views of the “West,” Austria spoke on behalf of the Group of Friends of the Rule of Law in reiterating the message of the Declaration and argued that rule of law and development are always strongly interrelated.<sup>36</sup> The WEOG members and organizations affiliated with the members of that group also advocated for a “national” level focus.<sup>37</sup> The Netherlands similarly stressed that the rule of law is at the heart of the social contract in every country.<sup>38</sup> The Netherlands specifically mentioned legal identity as the first step to accessing public services and to economic and political processes.<sup>39</sup> The European Union also argued for concrete and measurable commitments on the rule of law at the national level in the new framework.<sup>40</sup>

However, the supporters of the national view were not exclusively Northern, Western, or part of the WEOG. In the same session, a number of states from the “South” also expressed support for the rule of law at the national level. For example, Mexico and Peru argued that the rule of law is a *sine qua non* for sustainable development and applies equally to all

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<sup>35</sup> See Martin Sajdik, Remarks on Behalf of Members of the Group of Friends of the Rule of Law at the Eighth Session of the General Assembly Open Working Group on Sustainable Development Goals (Feb. 3-7, 2014), available at <https://sustainabledevelopment.un.org/content/documents/6565austria.pdf> [hereinafter Group of Friends OWG Statement].

<sup>36</sup> *Id.*

<sup>37</sup> See Australia, Netherlands, UK Troika Statement at the Eighth Session of the General Assembly Open Working Group on Sustainable Development Goals (Feb. 3-7, 2014), <https://sustainabledevelopment.un.org/index.php?page=view&type=255&nr=6370&menu=35> (last visited June 7, 2015).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See Ioannis Vrailas, Statement on Behalf of the European Union and its Member States at the Eighth Session of the General Assembly Open Working Group on Sustainable Development Goals (Feb. 3-7, 2014), <https://sustainabledevelopment.un.org/index.php?page=view&type=255&nr=6445&menu=35> (last visited June 7, 2015).



nations. States like Pakistan were more cautiously supportive, stating that rule of law is more relevant to the OWG than the typically international topics of conflict prevention and post-conflict building.<sup>41</sup> Egypt has also indicated support, albeit with even greater wariness. It has discussed the need to maintain a balance in developing the national and international dimensions of the rule of law while nonetheless stressing that it is the international level of rule of law which needs more attention.<sup>42</sup> Egypt understands application at the international level to mean compliance with public international law, particularly in the Middle East conflict.<sup>43</sup>

Meanwhile, the NAM represented the opposite view, stating after the 2012 General Assembly Declaration on the Rule of Law that no new conditions should be stipulated for member states at that time.<sup>44</sup> The group also highlighted the need to respect national sovereignty, undertake Security Council reforms, and to focus on current issues in the Middle East, particularly the Occupied Palestinian Territories.<sup>45</sup> The group further argued that rule of law should be pursued in a way that is respectful of the diversity of legal, political, and economic systems, and therefore opposed over-prescriptive targets, calling for respect for national circumstances.<sup>46</sup> NAM furthermore expressed particular concern about unilateral and extra-territorial measures, arguing that no state or group of states has the authority to deprive other states of their legal rights for political considerations.<sup>47</sup> Russia's position was equally negative, stating outright that rule of law as a goal would not be in line with the Rio+20 objectives and outcomes.

As far as the OWG is concerned, advocates of applying rule of law targets at both the international and national levels prevailed. This was in large part because of the normative support they were able to invoke from the 2012 UNGA Declaration.<sup>48</sup> In its August 2014 final report to the

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<sup>41</sup> See Masood Khan, Statement on Behalf of the Pakistan, India, and Sri Lanka at the Eighth Session of the General Assembly Open Working Group on Sustainable Development Goals (Feb. 3-7, 2014), available at <https://sustainabledevelopment.un.org/index.php?page=view&type=255&nr=6315&menu=35> (last visited June 7, 2015) [hereinafter Pakistan, India, and Sri Lanka OWG Statement].

<sup>42</sup> See Mohamed Khalil, Statement on Behalf of Egypt at the Eighth Session of the General Assembly Open Working Group on Sustainable Development Goals (Feb. 3-7, 2014) <https://sustainabledevelopment.un.org/index.php?page=view&type=255&nr=6425&menu=35> (last visited June 7, 2015).

<sup>43</sup> *Id.*

<sup>44</sup> See Gholamhossein Dehghani, Statement on Behalf of Non-Aligned Movement in the Eighth Session of the General Assembly Open Working Group on Sustainable Developments Goals (Feb. 3-7, 2014), <https://sustainabledevelopment.un.org/content/documents/6360iran1.pdf> (last visited June 7, 2015) [hereinafter NAM OWG Statement].

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Declaration of the High-Level Meeting, *supra* note 34.

General Assembly, the OWG accordingly included the following in Goal 16: to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”<sup>49</sup>

## V. GOVERNANCE AND THE RULE OF LAW

The relationship between the rule of law and governance has been another recurrent and controversial topic, with proponents and critics divided along roughly the same camps as those contesting whether rule of law should be relevant to national policy. Similarly, national sovereignty is a concern for many, particularly for recipients of foreign and international aid. However, given the clear endorsement of governance in the Secretary General’s synthesis report on the new development goals, it seems that there is some consensus on including governance within the new development agenda.

The “governance” or “good governance” doctrine has its roots in a group of theories often referred to as the “Washington Consensus.”<sup>50</sup> These theories suggest that economic development and poverty reduction are most likely to result from policies that reduce the role of the state, break up the dominance of corrupt political elites, and encourage private enterprise and foreign investment.<sup>51</sup> Policy makers have now also concluded that prescriptions for global governance should not stop at shrinking the state and liberalizing the economy, but should include initiatives to strengthen and open up the institutions that protect and enforce important rights and freedoms.<sup>52</sup> The current definition of governance accordingly calls for more than just a smaller and more effective state. It now includes support for establishing or consolidating key aspects of the rule of law, which encompasses at least the core human rights.<sup>53</sup>

Unsurprisingly, those states most sceptical about the governance doctrine are also those that have shared the greatest doubts about including the rule of law within the SDG agenda or sought to create a specific SDG-understanding of the concept. Pakistan, for example, has argued in the OWG that that the rule of law has to be conceived of in the broader context

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<sup>49</sup> Open Working Group Report, *supra* note 24, at 20.

<sup>50</sup> Joseph Stiglitz, *The Future of Global Governance*, in THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 309, 313 (Narcis Serra et al. eds., 2008).

<sup>51</sup> *Id.* at 315.

<sup>52</sup> *Id.*

<sup>53</sup> See generally ANNE METTE KJAER, GOVERNANCE 173 (2004); Kerry Rittich, *The Future of Law and Development: Second Generation of Reforms and the Incorporation of the Social*, 26 MICH. J. OF INT’L LAW 199 (2004).

of good governance and the right to development. In keeping with its position on the applicability of rule of law solely at the international level, Pakistan has also argued that the OWG must address institutional deficits in global governance and that rule of law must not be used to impose conditions upon member states.<sup>54</sup> Rather, Pakistan has stressed the importance of national ownership and a bottom-up approach.<sup>55</sup>

The members of the NAM group have taken a still more extreme position. NAM has criticized many aspects of governance and the rule of law as attempts to infringe on national sovereignty.<sup>56</sup> For similar reasons, developing countries are wary of attaching rule of law conditions to foreign aid. If rule of law reforms are included as “conditionalities” for eligibility for structural and large-scale support, developing countries argue that discretion over a wide range of formerly purely domestic issues would be beholden to a host of foreign or international actors.<sup>57</sup>

The positions of both donor and recipient states have merit. When the “West” argues for the inclusion of rule of law in the development agenda, it does so with some empirical evidence and normative support.<sup>58</sup> However, the recipients are right in pointing out that donors then also assert their right to weigh in on a much wider range of domestic political matters.

This dichotomy between aid donors and recipients is likely to continue influencing the SDG negotiation. At the same time, the Secretary General’s indicative synthesis report, “The Road to Dignity by 2030,” gives effective governance prominent placement at the start of its description of what “Justice” entails.<sup>59</sup> It would therefore seem that many developing countries already seem to have accepted that governance will be part of the new development agenda.

## VI. DEFINITIONAL DEBATES

The eternal question of what the rule of law actually is, and what political objectives it serves, casts its shadow over the SDG process in various ways. Some definitional latitude is only to be expected, as the rule of law is an inherently difficult concept. Some generality can also be positive, as the principles must always be adapted to national conditions.

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<sup>54</sup> See Pakistan, India, and Sri Lanka OWG Statement, *supra* note 41.

<sup>55</sup> *Id.*

<sup>56</sup> NAM OWG Statement, *supra* note 44.

<sup>57</sup> Notes from Sessions of General Assembly Open Working Group on Sustainable Development Goal sessions (taken by and on file with Professor Per Bergling) [hereinafter OWG Notes].

<sup>58</sup> Group of Friends OWG Statement, *supra* note 35.

<sup>59</sup> *The Road to Dignity by 2030*, *supra* note 25, at ¶ 77.

But there are also those who seek to exaggerate and exploit this conceptual uncertainty in order to exclude rule of law from the development agenda. Russia, for example, has on several occasions argued that the concept cannot be included because it lacks sufficient clarity with regard to its relationship to development and promotion, among other concerns.<sup>60</sup> Egypt and other countries have argued that more work needs to be done by the General Assembly to elaborate a common understanding of rule of law, including its parameters and elements, and that it is therefore premature to mainstream the notion of rule of law in the context of the SDGs.<sup>61</sup>

To be sure, there is limited normative guidance for the rule of law in international instruments such as the Universal Declaration of Human Rights (“UDHR”), the International Covenant on Civil and Political Rights (“ICCPR”), and similar documents.<sup>62</sup> Institutional definitions also vary, as different UN agencies choose different interpretations depending on their mandates, priorities, and the challenges at hand.

On the other hand, the UN Secretary General has clearly enunciated that the rule of law is a principle of governance in its strategic report, “*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*,” stating that:

[The rule of law] . . . refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to principles of supremacy of law, equality before the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>63</sup>

This report also appears to have been an important building block for the 2012 UNGA Rule of Law Declaration, which has been even more important in framing the rule of law within the SDG discussion. This unanimously adopted instrument confirms three very important points of

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<sup>60</sup> See OWG Notes, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> See John V. Orth, *Exporting the Rule of Law*, 24 N.C.J. INT’L L. & COMM. REG. 71, 76-79 (1998); Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in UNIVERSITY OF CALIFORNIA, LOS ANGELES SCHOOL OF LAW RESEARCH PAPER SERIES 1 (2004).

<sup>63</sup> U.N. Secretary-General, *Rep. of the United Nations Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 4, U.N. Doc. S/2004/616 (Aug. 23 2004).

departure. First, it states that concept of rule of law is relevant on the international and national level.<sup>64</sup> Second, it asserts a mutually-reinforcing relationship between the rule of law, human rights, and democracy.<sup>65</sup> Third, it holds that the rule of law should be regarded a principle of governance.<sup>66</sup> It also provides a concrete platform for discussing the rule of law in the SDG process by recommending consideration of the relationship between the rule of law and development in the post-2015 international development agenda.<sup>67</sup>

Also, although the Secretary General's 2014 synthesis report does not attempt a definition, it explains how the Secretary General perceives the rule of law as an "essential element" of justice. For example, the report mentions that laws and institutions must protect human rights and fundamental freedoms.<sup>68</sup> It also mentions that access to fair justice systems, accountable institutions of democratic governance are integral to sustainable development.<sup>69</sup>

Incidentally, there is also a slow process of political consensus-building going on independently of the SDG discussion. Several organizations and agencies have independently produced policy documents with similar statements and goals regarding the rule of law. For example, the World Bank says that it aims to supplant autocratic and state-centred systems with rule of law that operates objectively, is accessible, reasonably efficient, transparent, predictable, enforceable, and protects human rights and legitimate state interests, among other goals.<sup>70</sup> However, it seems that these discussions and ensuing understandings have made little impression on the OWG.

Ultimately, it is the documents put forth by the General Assembly and the Secretary General that seem to have disarmed most of the definitional sensitivities around the rule of law as a concept among key stakeholder countries for now. However, the definitions remain skeletal, making it likely that the issue will resurface when goals have actually been decided and the technical aspects of measurement elaborated, as will be discussed below.

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<sup>64</sup> Declaration of the High-Level Meeting, *supra* note 34, at ¶ 1.

<sup>65</sup> *Id.* at ¶ 5.

<sup>66</sup> *Id.* at ¶ 35.

<sup>67</sup> At the same time it should be remembered that important things needed to be sacrificed in order for the Declaration to be adopted. For example the idea of establishing a regular and inclusive (comprising also CSOs) process within the General Assembly (and above the Sixth Committee) with a view to continuously widen and deepen the UN concept of the rule of law.

<sup>68</sup> *The Road to Dignity by 2030*, *supra* note 25, at ¶ 77.

<sup>69</sup> *Id.* at ¶ 78.

<sup>70</sup> Mark K. Dietrich, *Legal and Judicial Reform in Central Europe and the Former Soviet Union – Voices From Five Countries* 4-5 (The World Bank, Report No. 25029, 2000).

## VII. MEASUREMENT: NOT JUST MATH

Although the inherent difficulties in quantifying the essentially qualitative concept of the rule of law are obvious, and Russia and some countries have been quick to invoke those difficulties for excluding the rule of law from the development agenda, there is more and more evidence from domestic state initiatives and international NGO efforts that the rule of law can actually be measured in some meaningful respects.<sup>71</sup> Many states already systematically and regularly measure aspects of the rule of law to justify policies and budget allocations, or to demonstrate to citizens that statutory responsibilities are taken seriously.<sup>72</sup> The implementation of the Millennium Development Goals has also brought about new and concentrated efforts to strengthen statistical data collection in many countries and sectors such as maternal mortality rates.<sup>73</sup> Those efforts are likely to intensify should the rule of law be included in the new development agenda.

A number of international actors, among them the EU and the UN, are also collecting, analyzing, and publishing statistics on a range of national rule of law matters, including, for example, homicide rates.<sup>74</sup> Furthermore, the Rio+20 outcome document,<sup>75</sup> the so-called Elements Paper of January 2014,<sup>76</sup> and other policy documents provide ideas and parameters to guide states and other actors in formulating goals, targets, and indicators. Such guidance includes, for example, suggestions that indicators should be limited in number, universal in application, measurable, easy to communicate, and adaptable to country conditions.

There are informal or non-state initiatives to the same end. Since 2010, the independent organisation World Justice Project has issued its *Rule of Law Index*.<sup>77</sup> In this perception-based index, citizens and experts give their own country score points in a range of rule of law-related areas.<sup>78</sup>

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<sup>71</sup> See Jim Parsons, *Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice*, 3 HAGUE J. ON THE RULE OF L. 170 (2011).

<sup>72</sup> See *id.*

<sup>73</sup> U.N. System Task Team, *Review of the Contributions of the MDG Agenda to foster development* (March 2012), available at [http://www.un.org/millenniumgoals/pdf/mdg\\_assessment\\_Aug.pdf](http://www.un.org/millenniumgoals/pdf/mdg_assessment_Aug.pdf).

<sup>74</sup> The EU is currently launching three distinct initiatives in measuring, mapping, and addressing the rule of law in member states: the Justice Scoreboard, the European Commission's Rule of Law Framework, and the recurrent rule of law dialogue in the European Council.

<sup>75</sup> See G.A. Res. 66/288, U.N. Doc. A/RES/66/288 (Sept. 11, 2012).

<sup>76</sup> Elements Paper for Declaration Discussion, 19-21 (Feb. 6, 2015), <https://sustainabledevelopment.un.org/content/documents/5977Intergovernmental%20Negotiations%20Post-2015%20Dev.Agenda%20-%206%20February%202015.pdf> (last visited June 7, 2015).

<sup>77</sup> World Justice Project, *WJP Rule of Law Index 2014* (May 16, 2015), <http://worldjusticeproject.org/rule-of-law-index> (last visited June 7, 2015).

<sup>78</sup> *Id.*

These areas include constraints on government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, civil justice, criminal justice, and informal justice.<sup>79</sup> When added together, the resulting scores provide a measure of each country's adherence to rule of law in each respective area.<sup>80</sup>

#### VIII. POSSIBLE GOALS AND INDICATORS FOR RULE OF LAW

The many unresolved issues regarding inclusion of rule of law in the new development agenda notwithstanding, various concrete options for rule of law goals and indicators have been discussed within and among states, international organizations, civil society, and interest groups for several years. The most frequently discussed among these options are legal identity, personal security, access to justice, and land rights.<sup>81</sup> Technically, it seems that the High Level Panel report, the OWG report and the Secretary General's synthesis report could accommodate any or all of them. The following section provides a brief synopsis of these options as well as the political, legal, technical, and other factors influencing the likelihood of implementation.

##### A. *Legal Identity*

Of the four main options, legal identity is the most likely to be implemented as a rule of law target or measurement. Although there is not a generally-accepted definition of the concept, the term is often understood as the status of a person before state authorities.<sup>82</sup> Member states generally support adoption of legal identity as a measurement because most states already seek to provide legal identity to citizens or even non-citizens. State motivations for providing legal identity range from governance and planning purposes to state acknowledgment that legal identity is essential for accessing various human rights and other rights entitlements such as voting, access services, and utilities.<sup>83</sup>

The practical aspect of ensuring and measuring legal identity is closely related to civil registration, which is defined in a UN handbook:

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> Wagner, *supra* note 7, at 10.

<sup>82</sup> ASIAN DEVELOPMENT BANK, LEGAL IDENTITY FOR INCLUSIVE DEVELOPMENT ix, 7 (2007) [hereinafter ADB LEGAL IDENTITY]; see also Tiernan Mennen, *Legal Identity and MDG Implementation, in ACCELERATING ACHIEVEMENT OF MDGS BY WAYS AND MEANS OF ECONOMIC AND SOCIAL RIGHTS* 184 (Asia-Pacific Regional Centre, 2012).

<sup>83</sup> Comm'n on Legal Empowerment of the Poor, *Making the Law Work for Everyone, Vol. I: Report of the Commission Legal Empowerment of the Poor* 32, 61 (U.N. Dev. Programme 2008).

The United Nations defines civil registration as the continuous, permanent, compulsory and universal recording of the occurrence and characteristics of vital events pertaining to the population as provided through decree or regulation in accordance with the legal requirements of each country. Civil registration is carried out primarily for the purpose of establishing the legal documents provided for by law.<sup>84</sup>

These registration documents themselves may not comprise the legal identity as such, but rather be considered as evidence of the actual status of the person. At the same time, claiming legal identity without documentation might be problematic or next to impossible. The institutional mechanism for providing legal identity is thus normally a civil registration system that both maintains records and provides registration documents to people.<sup>85</sup> Among these documents, birth registration is generally considered a good indicator of legal identity.<sup>86</sup> Birth registration is furthermore a fundamental human right. The Convention on the Rights of the Child, the International Covenant on Civil and Political Rights, and later UN resolutions call upon states to provide simple, accessible, and effective registration procedures to allow individuals to realize this right.<sup>87</sup> Regional instruments provide for similar rights.<sup>88</sup>

Arguments for the inclusion of legal identity in the SDG process are buttressed by the general perception that lack of legal identity is a critical problem. The World Bank estimates that 50 million births went unrecorded in 2009 and that seven in ten children in the world's least-developed countries do not have birth certificates or any other registration documents.<sup>89</sup> Birth registration also enjoys donor support from organizations including the World Bank and the Open Society Foundation.<sup>90</sup>

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<sup>84</sup> Statistics Div. U.N. Dep't of Econ. and Soc. Affairs, *Handbook on Training in Civil Registration and Vital Statistics Systems*, 5 ST/ESA/STAT/SER.F/84 (2002), [http://unstats.un.org/unsd/publication/SeriesF/SeriesF\\_84E.pdf](http://unstats.un.org/unsd/publication/SeriesF/SeriesF_84E.pdf) (last visited June 7, 2015).

<sup>85</sup> ADB LEGAL IDENTITY, *supra* note 82, at viii, 26.

<sup>86</sup> *Id.*, at 2.

<sup>87</sup> Convention on the Rights of the Child art. VII, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* International Covenant on Civil and Political Rights art. 24(2), Dec. 16, 1966, 999 U.N.T.S. 171. For a comprehensive list, see UNICEF, *A Passport to Protection A Guide to Birth Registration Programming* 16 (Dec. 2013) [hereinafter UNICEF Guide to Birth Registration].

<sup>88</sup> UNICEF Guide to Birth Registration, *supra* note 87, at 16 (list of regional instruments, including the American Convention on Human Rights (art. 20), African Charter on the Rights and Welfare of the Child (art. 6), European Convention on Nationality (arts. 4 and 6), and the Arab Charter on Human Rights (art. 29)).

<sup>89</sup> WORLD BANK, WORLD BANK DEVELOPMENT INDICATORS 32 (Apr. 14, 2015).

<sup>90</sup> The World Bank, *Global Civil Registration and Vital Statistics Scaling Up Investment Plan 2015-2024*, <http://www.worldbank.org/en/topic/health/publication/global-civil-registration-vital-statistics->



Legal identity is further acceptable because it is already a familiar concept within the development agenda context. At least six of the Millennium Development Goals rely on the registration of births and deaths.<sup>91</sup> Since the MDGs were established, the prominence of legal identity has only increased. The OWG proposal includes legal identity under Goal 16, which calls on states to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”<sup>92</sup> Under this goal, target nine specifically provides for legal identity, requiring states to: “by 2030, provide legal identity for all, including birth registration.”<sup>93</sup> The report of the High-Level Panel of Eminent Persons on the post-2015 Development Agenda also mentions legal identity under Goal 10a to “provide free and universal legal identity, such as birth registrations.”<sup>94</sup>

Measuring the breadth and nature of legal identity provision is also simplified because virtually all states already have institutions more or less capable of registering births and issuing birth certificates. General data on births in individual countries is also collected by the UN Statistics Division.<sup>95</sup> The number of such registrations is sensitive to policy changes, so any improvement would be notable.<sup>96</sup>

Legal identity still faces some challenges before it may be included as part of a rule of law development goal. These challenges range from providing evidence of its individual and state benefits to addressing potential negative impacts in certain contexts.

For example, there is a need for academic studies demonstrating a causal relationship between registration and individual empowerment or national planning.<sup>97</sup> The impact of development goals is also dependent on the context—for example, weak institutions and widespread corruption limit the concrete value of legal identity.<sup>98</sup>

There has been some discussion in the UN and among member states over whether including birth registrations as an indicator might give rise to

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scaling-up-investment (last visited May 16, 2015); Open Society Justice Initiative, *The Global Legal Empowerment Initiative*, (2012), <http://www.opensocietyfoundations.org/sites/default/files/glei-description-092712.pdf>.

<sup>91</sup> See MIA HARBITZ, *The Civil Registry: A Neglected Dimension of International Development* 5 (Inter-American Development Bank, No. IDB-TN-542, (May 2013).

<sup>92</sup> Open Working Group Report, *supra* note 24, at 22.

<sup>93</sup> *Id.*

<sup>94</sup> The High-Level Panel Report, *supra* note 13, at 50.

<sup>95</sup> U.N. Statistics Div., *Coverage of Birth and Death Registration* (May 16, 2015), [http://unstats.un.org/unsd/demographic/CRVS/CR\\_coverage.htm](http://unstats.un.org/unsd/demographic/CRVS/CR_coverage.htm).

<sup>96</sup> ADB LEGAL IDENTITY, *supra* note 82, at 10.

<sup>97</sup> *Id.* at ix.

<sup>98</sup> *Id.* at xiv.

negative consequences. For example, promoting birth registrations might in turn encourage states to make access to services contingent on possession of a certificate.<sup>99</sup> States may also use registration as a means of identifying and infringing on the rights or security of particular groups.<sup>100</sup> Some new development agenda discussions have noted these concerns, and the suggested policy implication is that birth registration should be free and available to everyone, but not mandatory. Another suggestion is that information on the birth certificates should comprise only the date, place of birth, and sex. The UN already stresses the need for confidentiality with regard to public records, both because it guarantees the privacy of individuals and because it encourages people to actually register.<sup>101</sup>

The legal identity option thus seems to be most likely to be accepted as an indicator due to its wide political acceptance and technical feasibility. Although it is difficult to account for its absence from the “Justice” section of the Secretary General’s synthesis report,<sup>102</sup> its place in the new development agenda seems otherwise solid. In other important documents, it is explicitly mentioned and discussed, for example as a target under Goal 10 in the report of the High Level Panel of Eminent Persons.<sup>103</sup>

## IX. PERSONAL SECURITY

Personal security also has the potential to be acceptable to many member states and other stakeholders: it is a fundamental state function, a human right,<sup>104</sup> and a basic precondition for almost all aspects of dignified human life.<sup>105</sup> It is also well known that interpersonal violence prevents or hampers many aspects of economic development.<sup>106</sup> It is widely acknowledged to deter investors, erode trust and social cohesion, consume

<sup>99</sup> O.H.C.H.R., *Birth Registration and the Right of Everyone to Recognition Everywhere as a Person Before the Law: Report of the Office of the United Nations High Commissioner for Human Rights*, ¶ 20, U.N. Doc. A/HRC/27/22 (June 17, 2014).

<sup>100</sup> *Id.*; see also David Lyon, *National IDs in a Global World: Surveillance, Security, and Citizenship*, 4 CASE W. RES. J. OF INT’L L. 607 (2010).

<sup>101</sup> UNICEF Guide to Birth Registration, *supra* note 87, at 6, 9.

<sup>102</sup> *The Road to Dignity by 2030*, *supra* note 25, at ¶ 77.

<sup>103</sup> The High-Level Panel Report, *supra* note 13, at 50.

<sup>104</sup> The Universal Declaration of Human Rights (“UNDHR”) states that everyone has the right to life, liberty and security of person. Universal Declaration of Human Rights art. 3, G.A. Res 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. The UDHR and the ICCPR also set out obligations for the treatment of persons accused and convicted of crimes, and the UN has issued several instruments setting our standards for criminal justice and crime prevention. UDHR arts. 9-11; International Covenant on Civil and Political Rights art. 14, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

<sup>105</sup> THE WORLD BANK, WORLD DEVELOPMENT REPORT 2011 CONFLICT, SECURITY, AND DEVELOPMENT 5 (2011) [hereinafter WORLD DEVELOPMENT REPORT 2011].

<sup>106</sup> *Id.*

state resources, and challenge proper governance structures.<sup>107</sup> However, disagreement over its definition and fear of negative human rights impacts make personal security an uncertain candidate for a rule of law indicator.

As with legal identity, there is no universal definition of personal security and reporting standards vary between countries. Some key aspects of personal security are nonetheless obvious and measurable through statistics such as homicide and assault rates and public perception of security.<sup>108</sup> Comparable data is usually either domestically or internationally available.<sup>109</sup> These indicators also tend to be sensitive to change over time, albeit slowly, given the time needed for law enforcement and judicial processes to undergo reform.<sup>110</sup>

The challenges to establishing personal security as an indicator for rule of law are largely attributable to state political attitudes. Many states regard all matters related to security as exclusively domestic and as such absolutely outside of the realm of international scrutiny. Discussion of actions to improve personal security will almost inevitably touch on the relationship between the state and the individual or the way the state is organized and operates.<sup>111</sup> Several states still do not respond to UN surveys on crime trends or the operation of criminal justice systems despite having the data readily available.<sup>112</sup> Besides withholding data due to opposing political perspectives, these countries may also be wary of putting off investors or tourists, or other image-related concerns.

There are also concerns about the deleterious effects of using personal security as an indicator. Enhancing security can mean increased repression and negative impacts on human rights or, indeed, essential elements of the rule of law.<sup>113</sup> Crime rate indicators may therefore need to be counter-balanced by indicators for police professionalism and respect for human

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<sup>107</sup> *Id.* at 1, 60-61 (noting that no low-income country experiencing fragility or conflict has yet achieved a single MDG).

<sup>108</sup> *Id.* at 80 (the homicide rate is considered the most reliable indicator to compare violence across countries).

<sup>109</sup> There are several international mechanisms for collecting official crime data and administrative data on criminal justice institutions, for example the UN Survey on Crime Trends and Operations of Criminal Justice Systems (UN-CTS), managed by the UN Office on Drugs and Crime. U.N. Office on Drugs and Crime, *United Nations Surveys on Crime Trends and the Operations of Criminal Justice Systems (CTS)*, <http://www.unodc.org/unodc/en/data-and-analysis/United-Nations-Surveys-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html> (last visited May 16, 2015).

<sup>110</sup> WORLD DEVELOPMENT REPORT 2011, *supra* note 105, at 10.

<sup>111</sup> Wagner, *supra* note 7, at 63.

<sup>112</sup> Kauko Aromaa, *Introduction to INTERNATIONAL STATISTICS ON CRIME AND JUSTICE 5* (Stefan Harrendorf et al. eds., 2010).

<sup>113</sup> WORLD DEVELOPMENT REPORT 2011, *supra* note 105, at 19.

rights in order to discourage coercive approaches to policing and other forms of excessive government authority.<sup>114</sup>

Whether states with disparate views on what personal security entails will be able to come to a consensus on a set of indicators remains uncertain. The likelihood of personal security serving as an indicator for rule of law is further hindered by scepticism from donor agencies, influential civil society actors, and other important facilitators of change. Many are already doubtful of initiatives related to security (aside from Security Sector Reform) for fear of empowering or lending legitimacy to branches of the state authority that are already problematic.

#### X. ACCESS TO JUSTICE

Access to justice was identified as a potential goal early on in the SDG process. It has been a popular topic in the UN and among influential international and aid organizations for some time. The concept is seen as not merely an inherent good, but also as instrumental to various aspects of development and the protection of human rights.<sup>115</sup> Many developing countries—often with the support of development agencies—have sought to develop various mechanisms that facilitate access to justice.<sup>116</sup>

However, definitional problems and a lack of readily available reporting mechanisms have abated support for inclusion of access to justice as a development goal. As with the other potential indicators, it is difficult to define “justice” and “access.”<sup>117</sup> In the absence of the domestic reporting mechanisms, the international alternatives for reporting are limited and inadequate.<sup>118</sup> Needs and challenges related to access to justice vary tremendously between countries and sectors, presenting a further challenge to the formulation of a goal with relevant and comparable indicators.<sup>119</sup>

Even the main proponents now seem to have tacitly acknowledged the difficulties involved. Although access to justice is still mentioned in the SDG context in, for example, the Secretary General’s synthesis report,<sup>120</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative 3* (Carnegie Endowment for Int’l Peace, Working Paper No. 41 2003).

<sup>116</sup> Stephen Golub, *The Past, Present and Possible Future of Legal Empowerment: One Practitioner’s Perspective*, in *INNOVATIONS IN RULE OF LAW: A COMPILATION OF CONCISE ESSAYS* 40, 82 (Juan Carlos Botero et al. eds., 2012), available at [http://worldjusticeproject.org/sites/default/files/wjp\\_hiil\\_compilation.pdf](http://worldjusticeproject.org/sites/default/files/wjp_hiil_compilation.pdf).

<sup>117</sup> Martin Gramatikov et al., *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, 3 *HAGUE J. ON THE RULE OF L.* 349, 349-50 (2011).

<sup>118</sup> Wagner, *supra* note 7, at 28.

<sup>119</sup> See *supra* note 66.

<sup>120</sup> *The Road to Dignity by 2030*, *supra* note 25, at ¶ 78.

fewer and fewer member states seriously argue for it as an attainable, stand-alone goal supported by measurable indicators.

## XI. LAND RIGHTS

The early interest in including land rights in the new development agenda was inspired by the body of empirical evidence that land rights are important for promoting stability and development.<sup>121</sup> Indeed, there are some references in new development agenda documents to ensuring that men and women have “control over land”<sup>122</sup> and that “[w]omen and girls must have . . . the right to own land.”<sup>123</sup> However, the initial enthusiasm has been largely overwhelmed by the difficulties presented by political opposition from influential countries such as China and the absence of certain key elements of support, notably international norms establishing clear rights to tenure or ownership of land. Furthermore, the case for including land rights also suffers from an absence of readily available mechanisms for measurement and reporting.<sup>124</sup>

## XII. CONCLUSION

Thus far, the new development agenda discussions and negotiations reveal a few key factors influencing whether and how the rule of law will be incorporated into the next round of development goals. Among these factors are 1) the compelling force of traditional political views and allegiances in determining member states’ positions in the debate, 2) the continued importance of the UNGA Rule of Law Declaration, 3) the centrality of the OWG, and 4) the ease of measurement and implementation of proposed indicators.

In posing arguments and forming alliances on the rule of law issue, member states have largely based their positions on political and historical predispositions rather than lessons learnt from implementing the current MDGs or empirical evidence. This means that states generally fall into fairly predictable regional and political camps—“western,” developed, aid-donating countries advocating rule of law definitions and indicators that

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<sup>121</sup> See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 11 (2000); Klaus Deininger & Gershon Feder, *Land Registration, Governance, and Development: Evidence and Implications for Policy*, 24 *THE WORLD BANK RESEARCH OBSERVER* 7, 55 (2009); Holly D. Lange, Comment, *Climate Refugees Require Relocation Assistance: Guaranteeing Adequate Land Assets Through Treaties Based on the National Adaptation Programmes of Action*, 19 *PAC. RIM L. & POL’Y J.* 613 (2010).

<sup>122</sup> Open Working Group Report, *supra* note 24, at 5.

<sup>123</sup> *The Road to Dignity by 2030*, *supra* note 25, at ¶ 69.

<sup>124</sup> Wagner, *supra* note 7, at 52-55.

reach national law and domestic governance, while “southern,” developing, aid-recipient countries emphasize rule of law principles at the international level that give great deference to national sovereignty. Such reflexive debate has made it extremely difficult to reach consensus or final conclusions, and the disparity of views on politics and development philosophy will continue to shape further discussions. Documents such as the 2012 United Nations General Assembly Rule of Law Declaration and conclusions such as those issued by the OWG and the United Nations Secretary General are therefore critical for establishing frameworks to move discussion forward.

The unanimously adopted 2012 UNGA Rule of Law Declaration has provided a particularly important normative platform for discussion and continues to frame the ongoing debate. It is true that there were rule of law dimensions in the MDGs and that a rule of law goal has enjoyed widespread support from several influential state and non-state actors, but it would hardly have been possible to pursue inclusion of specific rule of law ambitions within the new development agenda if it were not for the foundation established by the Declaration. The Declaration does not just stipulate that the rule of law should be included in the new agenda, it also provides a framework for how the rule of law should be understood. Furthermore, it specifies critical positions on otherwise contested issues, stating, for example, that the rule of law is applicable at the level of both international and national law and that it is interlinked with human rights and democracy.

Meanwhile, the OWG has become the main forum for producing conclusions on options for how a rule of law goal should materialize. As its thirty members represent the views of roughly seventy different member states, reaching consensus in the OWG is an extremely cumbersome process. The demanding nature of the process is nonetheless vital to lending persuasive weight to its development agenda proposals. The efforts invested and the consensus reached have also generated a notion that the OWG conclusions now need to be preserved and safeguarded. At the same time, the Secretary General’s report has provided a provisional baseline for discussions, with the section on “Justice” largely covering most issues related to rule of law. Also, the High-Level Panel has given additional political endorsement as well as contributed experience and evidence to proposals.

The technical feasibility of goals and indicators is also important to their chances of inclusion within the new development agenda. The rule of law indicators most likely to be adopted are those which, like legal identity,

are already widely implemented and easily measured and understood. Other successful indicators will also likely rely on measures that member states can carry out with existing infrastructure and are easy to evaluate and compare. These are important reasons for why legal identity enjoys broad support across member states.