

JRR Options Paper
William G. O'Neill
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1. Introduction

The Justice Rapid Response Initiative (JRR) aims to fill a well-known gap in efforts to address serious crimes committed during armed conflicts. Since most modern wars are internal and often the state institutions responsible for investigating and prosecuting violations of human rights and the laws of war are either destroyed or unable to fulfill their duties. Rebuilding the national police, prosecutorial offices and the judiciary will take years if not decades. In many cases, these state institutions were incompetent, corrupt or dysfunctional in the first place so even talk of “rebuilding” is inaccurate; “building” a rights-respecting police, an independent judiciary and a professional prosecutor’s office for the first time in the state’s history is more accurate. Educating the public about their role in establishing the rule of law in countries where civil society had no participation is also crucial but takes years

Yet time marches on and crucial evidence of massacres, disappearances, torture, ethnic cleansing, rape, children forced to fight and kill fades and can even disappear. Unlike the Nazis, those responsible for genocide, war crimes and crimes against humanity in places like Rwanda, Sierra Leone, Liberia, Democratic Republic of the Congo and Timor-Leste, rarely leave huge caches of documentary evidence to identify those responsible for ordering and committing these crimes. The overwhelming mass of evidence in modern conflicts depends on forensics and eyewitnesses: including surviving victims. Yet physical evidence of crime, unless preserved, degrades and even vanishes. Witnesses, especially traumatized victims living among the perpetrators, are often too frightened to testify knowing the state can offer no protection to them or their loved ones.

This confluence of weak or absent state institutions and the fragile, transient nature of the evidence has created a torrent of impunity. Literally, many perpetrators of the worst crimes under international law have gotten away with murder, torture and rape. And since those most responsible for these crimes remain unpunished, so do the many thousands more who actually executed their orders, aided, abetted or were culpable at various levels.

While the international criminal tribunals for Rwanda and the Former Yugoslavia and the International Criminal Court have helped in the fight to end impunity, they will only reach a tiny fraction of perpetrators. Hybrid tribunals in Kosovo, Cambodia and Sierra Leone are also limited by time and geographic restrictions. Purely national efforts in states with barely functioning institutions like Haiti, Burundi, Timor-Leste, Liberia and the Congo have yielded paltry results. The police, prosecution and courts in Cote d’Ivoire, for example, will be unable and probably unwilling to investigate and hold accountable those responsible for serious crimes committed during its conflict. What will happen to the evidence of mass graves in the western part of the country, or the disappearance of student and labor leaders in Abidjan? Who will interview the

eyewitnesses while details remain fresh? And who will protect them after they have shared such sensitive, even life-threatening information?

JRR proposes to step into this breach. The initiative correctly focuses on the two major weaknesses in post-conflict justice: the local capacity void and the cumbersome response by international institutions.

“JRR aims to respond quickly to a request for expertise and/or resources in support of genuine efforts to identify, collect and preserve information about genocide, war crimes and crimes against humanity for any accountability mechanism deemed appropriate. If JRR succeeds, a wide range of international, hybrid, and national courts, as well as truth commissions, could benefit from higher quality evidence gathered more efficiently and at lower cost, and in forms that permit its use under both domestic as well as international rules of evidence.”¹

JRR’s emphasizes speed and a priority on the most serious crimes under international law: genocide, war crimes and crimes against humanity. The nature and extent of the evidence gathered may indicate what would be the best choices for the state: prosecutions, truth telling, traditional or customary justice, reparations programs for victims/survivors and memorials. Building the capacity of local institutions, while laudable, is not an objective but could be a welcome by-product of JRR actions.

2. JRR: Integration or Coordination with the United Nations?

What is the best way to organize the JRR, its roster of experts, resources and skill sets, so that it can rapidly respond to requests from whatever source- the state, the ICC, Truth Commissions or hybrid tribunals? The authors of the JRR Feasibility Study considered several options and noted:

“While the need for speedy action and lean administration likely rules out integrating JRR into the functions of an international organization such as the UN, potentially viable alternatives exist.”²

I agree that integrating the JRR into the UN would be a mistake. Unfortunately, the UN system- its agencies, departments and funds - are not geared to quick action, especially on such sensitive issues like international and national criminal responsibility that most often will include powerful political figures in governments of sovereign UN member-states. The only exception is the Office for the Coordination of Humanitarian Affairs’s (OCHA) increased capacity to respond relatively quickly to provide emergency assistance. Yet the much less politically sensitive task of providing food, shelter and medical care to those in desperate need sparked numerous road-blocks by the governments of Indonesia, Sri Lanka and India during the tsunami relief efforts that impeded the UN’s response in 2004-5. Even greater hurdles would appear when the

¹ Justice Rapid Response Feasibility Study (Oct. 2005), p. 1

² *Id.*, p. 2

focus shifts to investigating and prosecuting senior officials implicated in the most serious crimes.

Putting the JRR inside the UN, or “situating” it within the Office of the High Commissioner for Human Rights (OHCHR), the UN Development Program’s Bureau for Crisis Response and Recovery (UNDP/BCPR) or the new and still amorphous Peacebuilding Commission (PBC) would effectively neuter the initiative. The more realistic approach consistent with the needs in the field and the goals of the JRR would be the “coordination” approach mentioned in the feasibility study.

“Coordination” has many meanings and like beauty, is often defined in the eyes of the beholder. I suggest a more concrete understanding of coordination between the UN and the JRR, including some markers. To meet the JRR’s objectives, the initiative’s partner inside the UN system would be the entity that best responds to the following questions:

1. Who in the UN system has the mandate, means, personnel and institutional culture best suited to achieving JRR’s goals?
2. Who will be the most reliable and supportive counterpart in the UN system to identify needs or funnel requests to JRR?
3. Which UN entity, given the political constraints inherent in the organization, will act quickly and with as much independence as the system allows, providing JRR with institutional support and safeguards (sometimes including political “cover”) to achieve its mission?
4. Which UN partner is literally most likely to initiate and return phone calls or e-mails, advocate for JRR participation and be the best interlocutor and ambassador with the rest of the UN system?

The answers to these questions, from the interviews conducted and the materials reviewed, is the OHCHR. Though not a perfect fit by any measure, the Office of the High Commissioner for Human Rights should provide the kind of counterpart JRR needs to become operational.

One of former Secretary-General Kofi Annan’s last policy decisions reinforces this conclusion.

3. Recent Rule of Law Developments in the UN

Former UN Secretary-General Kofi Annan defined 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.”³

The UN has struggled to rationalize its work in the rule of law sector. Dispersed over at least 11 departments and agencies, often with overlapping mandates, the UN’s work on judicial reform, police and corrections was often incoherent, inefficient and ineffective.

In the summer of 2002, the Executive Committee on Peace and Security (ECPS) formed a Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations whose task was to take stock of UN activity to date in the rule of law sector. The Task Force compiled for the first time all training modules, strategy papers, manuals, guidelines and after-action analyses dispersed across the UN system, identified gaps in the sector and actors outside the UN system, principally European or North American entities, who had contributed to rule of law efforts in post-conflicts who might also help support the UN to fill these gaps.

The Task Force produced a report in September 2002 which the ECPS endorsed in November.⁴ The Task Force recommended creating a small working group of “focal points” within the key agencies/departments working on rule of law issues whose goal would be to enhance the coherence and effectiveness of UN work in this field.⁵

The Working Group met periodically over the next few years which produced improved pre-Mission planning; screening of candidates for rule of law posts accelerated and better personnel were found and recruited. The division of labor at headquarters and in the field yielded better results.

Yet turf battles and confusion continued. The Working Group could address some of the working level problems, but higher policy decisions were outside their remit. No consistent policies emerged on certain core issues like who should be primarily responsible for monitoring the courts or even the police, train police and cover transitional justice. These misunderstandings and rivalries played out at both the headquarters level and in the field.

Under increasing pressure to rectify the cacophony in the rule of law field, the UN senior leadership realized that a high-level policy decision was the only way to resolve the situation. After months of meetings, the Secretary-General issued his Decision No. 2006-47 at a November 24, 2006 meeting of the Policy Committee. The Secretary-General noted that the principal objectives of this policy directive are to:

³ Report of the Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (23 Aug. 2004), para. 6

⁴ Final Report, ECPS Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations (15 August 2002)

⁵ DPKO, OHCHR, UNDP, OLA, DPA

- a. significantly enhance coherence and coordination across the UN system and with non-UN actors both at the global and country level; and
- b. increase and deepen required capacity in priority areas in each of the main “baskets” of rule of law activity (at the international level, in the context of conflict and post-conflict situations, and in the context of long-term development).⁶

The Decision establishes a division of labor among UN entities to achieve these objectives removing ambiguity over who is in charge. The lead entity assumes “clearly defined coordination and other responsibilities for specific areas of rule of law activity.” “Lead” does not mean monopoly power or “exclusive control,” rather, the lead entity is supposed to “take into account and draw on the capacities and expertise of other entities.”

The Decision establishes a Rule of Law Coordination and Resource Group which is charged with insuring overall coordination across the various “baskets of issues” within the rule of law sector. The Deputy Secretary-General chairs the Group and the current Secretary-General is supposed to decide where the Group should be located in the UN. The Group consists of those entities given lead responsibility in at least one “basket” of rule of law issues: DPKO, OLA, OHCHR, UNDP, UNHCR, UNODC, DPA and UNIFEM. DPKO, OLA, OHCHR and UNDP were charged with immediately designating one person to be seconded to the Group and to begin meeting “as soon as possible.”

The Group is “the HQ focal point for coordinating system-wide attention for the rule of law to ensure quality, policy coherence and coordination.”⁷ It should work closely with the designated lead agency for each basket/sector of rule of law activity. The Group “facilitates contact” between the UN’s actors involved in rule of law activities and Member-States, regional bodies, donors and non-governmental organizations. The Group is also supposed to mediate any disputes within the UN that cannot be solved within the sector or at the country level; if necessary, the Group can refer disagreements to the Secretary-General for resolution.⁸

Of particular interest to the JRR, the Group has the specific responsibility to insure that the UN system “responds to requests from States for assistance effectively and coherently, in close collaboration with lead entities.” JRR could be expected to communicate with the Group or alternatively, a Member-State could request assistance and the Group could inform JRR.

For JRR purposes, this Decision should identify who in the UN system will serve as the most appropriate interlocutor. Annex 2 to the Decision identifies the various “Baskets/Sectors” of the Rule of Law. Under Item 2, “Rule of Law in the Context of Conflict and Post-Conflict Situations,” “Transitional Justice” and “Strengthening of

⁶ Decision of the Secretary-General, 7 November 2006, Policy Committee Meeting, Decision No. 2006/47

⁷ Decision No. 2006/47, Annex 3

⁸ In theory, if the Group had existed at the time it could have clarified the status of the Mission’s request for JRR involvement in the Congo.

National Justice Systems and Institutions” are separate categories with different leads. Among the issues in the Transitional Justice is “Ad Hoc Investigations, Fact-Finding and Commissions of Inquiry.” The lead entity in this area is OHCHR, with UNDP and DPA noted as “other key entities, roles and contributors.”⁹

This basket of issues is the closest in letter and spirit to the substance and goals of the JRR which, as noted above, is concerned above all else on a speedy deployment to identify, gather, secure and preserve key evidence of serious international crimes and human rights violations. In related matters in this same basket: “National Transitional Justice Consultation Processes, Truth and Reconciliation Mechanisms, Reparations Processes and National Human Rights Institutions,” OHCHR is also given the lead role, with possible support from UNDP, UNODC, UNIFEM, DPA and OLA depending on the exact issue.

In a separate basket of issues called “Strengthening of National Justice Systems and Institutions,” the lead role depends on the context. For countries with a peace operation, DPKO has the lead role; where there are no peace operations, UNDP has the lead role. These scenarios cover strengthening legal and judicial institutions like the prosecution, defense, ministry of justice and criminal justice. This division of labor makes sense because these areas are longer-term and concerned with building the capacity of local institutions. JRR is decidedly not a capacity-building enterprise, although as mentioned, any positive impact on local practices is a welcome by-product but not an explicit objective.

4. OHCHR’s Emergency Response Unit

The Office of the High Commissioner for Human Rights in Geneva has an Emergency Response Unit for responding to directives from the Security Council and the new Human Rights Council to deploy fact-finding missions, ad hoc investigations and Commissions of Inquiry to areas that have recently experienced grave human rights violations, war crimes and crimes against humanity. Just in the last 12 months the Unit has responded to requests to send special investigators to the Lebanon (twice), Darfur (twice), Guinea, Liberia, Chad, Nepal, Occupied Palestinian Territories and Timor-Leste.¹⁰ The Unit also works closely with OHCHR’s Rule of Law Unit and those responsible for developing methodology and training standards related to international criminal justice issues. OHCHR is not limited to countries emerging from conflict or with a peacekeeping mission.

The Unit does not have internal forensic capacity and doubts that it ever will. This gap is not new; in the early 1990s the first calls for special investigators to go to the Balkans, Ethiopia, Guatemala and northern Iraq (principally the Kurdish areas) were made. Groups organized to find the “missing” from the conflicts of the early and mid-1990s urged the UN to develop its own capacity or to find others who could find and identify those killed and help establish who was responsible for their murders. NGOs

⁹ Decision No. 2006/47, Annex 2

¹⁰ Interview with OHCHR Officers, Feb. 12, 2007

like Physicians for Human Rights and volunteer teams of forensic scientists responded by deploying experts whose work was later used by the ICTY, national trials and truth commissions. For example, the UN/OAS Mission in Haiti brought in a team of Argentine forensic experts in 1997 to investigate a mass grave and prepare evidence for a trial in the national judiciary where several senior Haitian army officers were accused of murder. Neither the Mission's human rights officers nor the Haitian institutions had the necessary equipment or expertise.

The OHCHR Unit has also called upon a roster from the International Institute for Criminal Investigations based in Siracusa, Italy to provide experts in various fields of forensic investigations. The IICI offers courses in international criminal investigations and maintains a roster of people who have successfully completed these courses. The Unit reports that it has excellent relations with the IICI and its roster of experts has provided key personnel for recent deployments.

It appears that the preferred option would have the JRR adopt a similar relationship with the Unit in particular and the OHCHR/UN in general. Serious hurdles militate against incorporating or "locating" the JRR inside the Unit. First, the UN's rules against "gratis" employees would make it impossible for the UN to accept JRR as staff members funded by their home governments. They would have to be paid from the UN budget and this is highly unlikely. Second, JRR's membership will probably be slanted to the "West" (meaning Europe and North America).¹¹ This too presents many problems. Many UN Member-States would object to a formal incorporation of JRR into the UN for this reason alone.¹²

The Emergency Response Unit would be the most natural counterpart/interlocutor for the JRR. As noted above, OHCHR has the lead role now for all special inquiries, investigations and fact-finding activities in conflict and post-conflict situations. Also, based on the mandates of most Security Council-authorized peace operations, the Human Rights component in the operation will have the primary responsibility to investigate, monitor and report on exactly the kinds of incidents most likely to require the precise expertise offered by the JRR. Requests for help will emanate from the Human Rights Officers in a peacekeeping operation and will be directed to OHCHR in Geneva who in turn will refer the request to the Emergency Response Unit. The Unit could then coordinate with the JRR.¹³

¹¹ This issue came up during the work of the ECPS Task Force when over 90% of the "external entities" working in the rule of law sector by Task Force members were European, North American or from Australia/New Zealand. One umbrella organization funded by Norway and Canada and based in Bulawayo, Zimbabwe- the Southern Africa Democracy Initiative or SAFDEM, was identified. SAFDEM has created a roster of experts, including rule of law, based in the Southern Africa region.

¹² The drafters of the JRR anticipated this problem and note that it is crucial that JRR not be "monochromatic." JRR Feasibility Study, p. 17. This is true but the challenge remains.

¹³ Maintaining a reliable channel to the UN Office on Drugs and Crime (UNODC) would also be advisable. This office has lead responsibility for Victim and Witness Protections which is a crucial issue in scenarios where the JRR is likely to be active. UNODC has the lead role for organized and transnational crime which could be related to incidents requiring JRR action. UNODC also has a roster of experts in various areas of criminal justice.

This largely describes the current relationship the Unit has with the Institute for International Criminal Investigations.¹⁴ JRR and IICI should start discussions immediately if they already have not done so to identify how they could best collaborate to achieve shared objectives.

Another option would be to have JRR “on call” to the UN similar to the arrangement the UN has with the Norwegian Refugee Council, for example. In this case the NRC has an agreement with the UN to identify potential “Senior Protection Officers” for deployment in UN missions. The UN has the final say in deciding whether or not the person identified by NRC will be recruited for the post. UN officials interviewed for this paper insisted that they would have to have a similar veto power for candidates proposed by the JRR. If people were hired from the JRR roster for UN posts, there would also need to be an understanding that they report solely to the UN and not to their home governments. “Dual reporting lines have caused us many problems in the past” said one UN official.

OHCHR has real drawbacks also. It has limited experience in criminal investigations, which are very different from human rights monitoring. Being based in Geneva is a handicap not overcome always by video-conferencing or e-mail. And while OHCHR has improved its capacity to mount field operations, its response remains too slow and burdened by bureaucracy.

5. Peacebuilding Commission (PBC) and the Peacebuilding Support Office (PBSO) and the JRR

The concept of a Peacebuilding Commission was introduced in December 2004 in a UN High-Level Panel Report and the idea gained momentum in March 2005 when former Secretary-General Kofi Annan released his report, **In Larger Freedom**.

Annan noted a “gaping hole” in the UN’s efforts to assist countries recovering from conflict to make the transition from war to lasting peace. Currently, half the countries emerging from violent conflict slip back to instability or violence within five years. Since no part of the UN system is directly responsible for helping countries rebuild after a conflict ends, the Secretary General proposed creating a permanent Peacebuilding Commission.

Several months of debate ensued as UN member-states wrangled over the size, composition and exact mandate of the PBC. A familiar split between the global “North” and “South” over whether the PBC would have a more robust, interventionist mandate, or one that focused on development and assistance delayed action. States disagreed over the PBC’s relationship to the Security Council.

Finally, in late 2005 differences were resolved and simultaneous resolutions approved in both the General Assembly and the Security Council creating the PBC. All

¹⁴ For more information on the IICI, see their web-site at <www.iici.info>

five permanent members of the Security Council plus two others are on the PBC. Membership also includes rotating members from the Economic and Social Council, five of the top 10 financial providers to UN peacekeeping, five of the top ten providers of military personnel and police and seven additional members elected by the General Assembly.

The PBC is supposed to marshal resources and propose integrated strategies for post-conflict peacebuilding and recovery. It is also mandated to focus attention on reconstruction and institution-building efforts and highlight ways to improve coordination of all relevant actors, develop best practices and help insure reliable and extended funding for peacebuilding.

Given its membership, structure and mandate, PBC is neither the right location for nor partner to the JRR for several reasons:

*The PBC and PBSO are new and are still trying to establish procedures, rules and priorities. This is taking a long time and even the UN Security Council is getting frustrated with the delays. “They have been told they better show some results quick and demonstrate how they are making a difference” according to one UN official who works in the PBSO.¹⁵ Yet the PBC has yet to decide which thematic issues it will cover. Another PBSO officer stated “I can’t see how the PBSO could get involved with something this specific, we don’t have the capacity, we are not staffed for this kind of work. We are concentrating on the Member-States right now and on rules, procedures and very general matters.” At a recent Security Council meeting to review the PBC, the ambassador from Japan tellingly noted that: “while the Commission had done some good work identifying specific needs in Sierra Leone and Burundi -- the two countries on its inaugural agenda -- the key task of formulating an integrated peacebuilding strategy had not yet been tackled.”¹⁶ “If JRR waits for the PBC to get organized, JRR will die” noted another UN official.

* The Peacebuilding Commission has no authority to manage the peacebuilding process. The PBC has neither direct operational capacity nor command or control over the hydra-headed UN operations or national authorities. It has even less influence over the bilateral donors, local NGOs and the thousands of other actors who frequently swarm to post-conflict states. Refugees International points out: “These myriad institutions may choose to cooperate with the commission or they may not, but

¹⁵ Interview with a staff member of the PBSO, Feb. 8, 2007

¹⁶ The Security Council held an open meeting on 31 January 2007 to review its relationship with the PBC and sent strong signals that it wanted action and results and not more reports and speeches. See UN Dept. of Public Information, SC/8935, 31 Jan. 2007. The General Assembly met on 5 February 2007 to review progress and several member-states worried that the PBC might duplicate efforts of other UN agencies and urged the PBC to be flexible and action-oriented.

the commission will be able to do little to ensure cooperation, and in the end that may prove to be a major flaw in the design of this essential reform.”¹⁷

*The PBC is comprised of member-states and, based on meetings so far, they take a very cautious, pro-government approach. “Sovereignty” is invoked often, in the old-fashioned sense of “stay out of the internal affairs of member-states” and not in the “Responsibility to Protect” spirit meaning if states cannot protect than others have the obligation to step in. Initial meetings on the situations in Burundi and Sierra Leone have not been auspicious, especially regarding raising human rights concerns and fighting impunity. These meetings have discussed at length how to obtain money for government reconstruction projects.¹⁸

*The nature of the PBC’s work is essentially long-term development and reconstruction of war-ruined states. The PBC’s mandate does not include focusing on the immediate needs and urgent measures featured in the JRR mandate. Sustainable development through institution-building, not gathering sensitive and evanescent evidence of serious crimes, is the PBC’s main goal. While this is laudable it is not directly germane to JRR’s objectives.

For these reasons locating the JRR in the PBC or PBSO would be a mistake and having either one as the main counterpart to or coordinator of the JRR would not be a good fit since their mandates, composition, operating style and priorities (JRR featuring speed, independence and lean administration while PBC is state-dominated, bureaucratic, requiring consensus from a widely disparate group of states before it can authorize action and taking the long view on issues) are so different. The PBC does poorly when one considers the questions posed on page 3 of this study.

This does not mean there would be no possible coordination or cooperation between the JRR and the PBC/PBSO. Once the JRR team has completed its work, the PBC/PBSO could assume responsibility for integrating the JRR’s recommendations into a coherent post-conflict recovery strategy and for finding financial support to implement them.

6. UNDP/Bureau of Crisis Prevention and Recovery

UNDP is the branch of the UN charged with development issues. By definition, it focuses on sustainable efforts that will build national institutions capable of providing good governance and protecting the full panoply of human rights- economic, social, cultural, political and civil.

UNDP’s Bureau of Crisis Prevention and Recovery seeks to “become a global centre of excellence on crisis prevention and recovery, through attracting the best

¹⁷ InterAction website, Refugees International, Peter Ganz, “The UN Peacebuilding Commission: Further Clarification Needed” (Sept. 12, 2005) available at <http://www.globalpolicy.org/reform/topics/pbc/2005/0912clarify.htm>

¹⁸ “The fear is that they will see us as an ATM” said one UN official who follows the PBC.

professionals, providing knowledge and quality services, responding quickly and appropriately to country demands, and building effective partnerships.”¹⁹

On recovery from conflict, BCPR has identified disarmament, demobilization and reintegration, small arms control, natural disasters, mine action, security sector reform and transitional justice as priorities. This last area has potential relevance to the JRR. On transitional justice, BCPR seeks to “facilitate dialogue, provide tools to assess needs and to develop capacities.”²⁰ BCPR states that:

Based on a concept of transitional justice that comprises four essential pillars (criminal justice, truth seeking, reparation, and institutional reform), work in this sector is as much about dealing with the past to prevent violence from recurring as it is about building accountable institutions, a mainstay of UNDP’s expertise, that can implement and sustain transitional justice processes.²¹

BCPR and UNDP are increasingly involved in some transitional justice processes and BCPR has helped in rapid response efforts in post-crisis situations. UNDP’s extensive global presence in 140 countries offers a good platform for channelling requests from host states.

Yet in a thoughtful self-assessment of BCPR’s suitability as a host for the JRR, several difficulties were recognized.²² JRR gathers information that could be used in national or international trials which could undermine UNDP’s “neutrality.” Conversely, UNDP traditionally maintains close relations with the host state which could present serious difficulties to the independence and thus the effectiveness of the JRR.

One outside expert identified additional problems:

“Generally they [UNDP] are not great at responding quickly. This is not about reforming structures but about responding to ad hoc requests. They are highly decentralized and this may be too political for your average resident rep, and they might have problems responding to requests for assistance which did not stem from a host government, for example the ICC or the UN itself.”²³

Even if most requests come from the government, problems often arise when teams start to investigate and need access to certain persons, places and documents. Securing the invitation is only the beginning. In these later and more sensitive phases, the JRR would need solid and consistent support from its UN host or counterpart. In places where UNDP felt a conflict between supporting the host state or the JRR, it is not at all certain that standing by the JRR would prevail. This is especially likely where investigations start to identify leading government figures as suspects in the crimes at

¹⁹ BCPR’s web-site available at www.undp.org/bcpr/.

²⁰ BCPR, Transitional Justice web-page, available at http://www.undp.org/bcpr/we_do/trans_justice.shtml

²¹ “UNDP and Transitional Justice: An Overview” (January 2006), p. 1

²² “Assessing UNDP’s potential role in ‘Justice Rapid Response,’ Brief to BCPR’s Director (31 May 2006)

²³ Interview with government official, Feb. 22, 2007

issue. This could also complicate if not halt UNDP's ability to do its bread and butter prevention/recovery/development work.

JRR work could conflict with UNDP's "development mandate."²⁴ UNDP is a development agency and is not in the business of building cases to prosecute war crimes and crimes against humanity. JRR could create a severe "mandate compromise" and undermine UNDP/BCPR's regular programming. The organization has few people conversant with the substance of JRR's mandate. BCPR emphasizes building national capacity both as a way to prevent and to help countries recover from conflict. UNDP conducts needs assessments, trains local counterparts, and establishes systems governing personnel policies, administrative rules and management guidelines.²⁵ BCPR does not have the mandate, means, personnel or institutional culture best suited to achieving JRR's goals.

The Secretary-General's November 2006 Decision recognizes this reality. In the division of labor created in this decision, UNDP has the lead role only in countries where there are no peace operations and then only for the issues coming under the heading "Strengthening of National Justice Systems and Institutions." Even here, OHCHR "plays [a] major or lead role in some countries without missions in addition to its normative and monitoring roles..."²⁶ And in the scenario most likely to require JRR action, the need for a special investigation, commission of inquiry or specialized fact-finding when a state cannot or will not assume its sovereign responsibility, OHCHR has the lead role.

UNDP/BCPR has not exactly sprinted with open arms to embrace JRR. For over a year now and hours of staff discussions and numerous memoranda, senior management has not yet decided on a formal position. Several people in the organization have expressed serious doubts about the advisability of taking on the JRR. In addition to the reasons cited above, staff have raised questions about logistical and technical issues concerning contracts, liability, insurance, privileges and immunities and evacuation policy. As with OHCHR, UNDP insists on vetting and a veto on candidates and even said the host state should have a say in recruitment.

Finally, it appears that UNDP would need an authorization from the General Assembly to change its mandate to incorporate JRR.²⁷ This would be highly unlikely given the current climate at GA, especially if the JRR were to be seen as a form or outside intervention from the Global North.

7. Case Study: Timor Leste

The current situation in Timor-Leste illustrates the gaps and challenges regarding the JRR, and some of the pitfalls created by inadequate UN support and confusion of roles within the UN family.

²⁴ *Id.* p. 3

²⁵ Interview with BCPR official, Feb. 15, 2007

²⁶ Decision of the Secretary-General, No. 2006/47, Annex 2

²⁷ JRR Conference Report, Venice-Lido, 15-17 June 2006, p. 9

In April and May, 2006, Timor-Leste exploded in violence. Long-standing rivalries among Timorese leaders dating from the mid-1970s' struggle against Indonesian occupation exploded in the streets of the capital, Dili. The police (PNTL) and the army (F-FDTL) split and gun battles between the two left hundreds dead, while armed civilians rampaged through the streets, burning houses, markets and shops. An ugly ethnic divide between "Easterners" and "Westerners" resulted in "ethnic cleansing" in parts of Dili. In one horrific episode, eight Timorese police were killed by military as they left a government building under UN escort after securing what they thought was a safe passage brokered by the UN Office in Timor-Leste.

The Australian Defense Forces, at the invitation of the President of Timor-Leste, Xanana Gusmao, entered the country in early June 2006 to re-establish peace and security. Australian and New Zealand police officers accompanied the military. The Timorese National Police or PNTL, had disintegrated in Dili, its leadership abandoned their posts and most of the officers went into hiding. Outside Dili, the PNTL largely continued operations, with some officers from eastern districts fleeing home from western postings.

The Minister of Foreign Affairs of Timor-Leste wrote to the Secretary-General asking for help in investigating the events of April and May 2006. The Secretary-General turned to the Office of the High Commissioner for Human Rights which in turn established, equipped and deployed the Independent Special Commission of Inquiry for Timor Leste (CoI) whose mandate was:

"to establish the facts and circumstances relevant to incidents that took place on 28 and 29 April and 23, 24 and 25 May and related events or issues that contributed to the crisis, clarify responsibility for those events and recommend measures of accountability for crimes and serious violations of human rights allegedly committed during the mandated period."²⁸

The CoI noted that it was not a court or tribunal and could not establish beyond a reasonable doubt who was criminally liable for these events, but the CoI identified individuals "reasonably suspected of participation in serious criminal activity and recommends that these people be prosecuted under the domestic law."²⁹

The problem, as the members of the CoI knew, is that Timor-Leste's criminal justice system was incapable of investigating or prosecuting these cases on its own. This was doubly true because, as the CoI report noted, "[p]ersons holding public office and senior appointments within the security sector" were among those identified as likely perpetrators of the crimes. The world's youngest state has neither the resources nor expertise nor the operational independence necessary to take on such delicate, complex cases. This weak and intimidated criminal justice system must prosecute more than 50 individuals, many senior military and police officers who still wield wide influence.

²⁸ "Report of the United Nations Special Commission of Inquiry for Timor-Leste" (2 October 2006), p. 2

²⁹ *Id.*

Securing UN support for the Timorese was difficult. OHCHR declined, saying that UNDP had in place a justice system support project with a large presence in Timor-Leste and thus should take the lead. OHCHR had only a few human rights officers in country who were being transferred from the former UN mission (UNOTIL) to the newly mandated UN Mission in Timor-Leste (UNMIT).³⁰ Their mandate is primarily to assist in further strengthening “the national institutional and societal capacity and mechanisms for the monitoring, promoting and protecting of human rights and for promoting justice and reconciliation.” The Resolution does not mention providing expertise or special capacity for criminal investigations. The PBC has been silent so far on Timor-Leste, so UNDP has been left the task of implementing the CoI recommendations.

UNDP in Timor-Leste is overwhelmed with the enormity and complexity of the task. The office does not have in-house expertise to deal with the CoI cases. Its justice support program, geared to a long-term, institutional capacity-building exercise in peacetime, will have to be revamped to address serious high-profile crimes in a still tense post-conflict setting where the army remains furious about the arrest of some of its colleagues while one of the leaders of the 2006 mutiny roams free in western Timor, allegedly with the agreement of senior government officials.

Neither the PNTL nor the UN Police has any forensic capacity in Dili. No crime lab, no body bags, no evidence bags, no microscope, ballistics testing, finger-print equipment, not even a vehicle to transport corpses.³¹ Thus evidence from the Commission cases will depend almost entirely on victim and witness statements. Yet there is no Witness Protection program in place; people are terrified of testifying.³²

UNDP has removed two international prosecutors from their “normal” caseloads to begin the criminal investigations of some of the Commission of Inquiry cases. They have already received anonymous death threats and UNDP cannot provide them with security. The prosecutors are upset and afraid and have said that this is not the job they had agreed to do originally.³³ Many “regular” cases stopped and UNDP’s entire justice support program is in jeopardy unless reinforcements arrive soon.³⁴ Crucially, there is currently no budget for defense lawyers; in cases of such great notoriety and political sensitivity, competent, independent defense counsel will be crucial to the credibility of these trials.

The new UNMIT mandate does not cover the Spring 2006 incidents. The Security Council created UNMIT in August 2006, two months before the Commission’s findings became public. UNMIT is charged with providing investigative assistance to the Prosecutor General’s office to complete investigations begun by the former Serious

³⁰ UN Security Council Resolution 1704 (25 August 2006)

³¹ Interview with UN Police Forensic Specialist, Dili, Jan. 26, 2007

³² Interview with UNPOL Officer, Dili, Jan. 25, 2007

³³ Interview with international prosecutors, Dili, Jan. 23, 2007

³⁴ Interview with UNDP official, Dili, Jan. 29, 2007

Crimes Unit into cases of serious human rights violations committed in 1999.³⁵ The real priority, however, should be the 2006 cases.

The result is the two most logical UN entities to help investigate and prosecute the Timor-Leste 2006 cases, OHCHR and DPKO through UNMIT, are not in the picture. UNDP is left holding the bag.

8. Other Possible Options

The Rule of Law Coordination and Resource Group could be the most logical counterpart or coordinator of the JRR. Comprising all the UN entities that have the lead role in the rule of law sector, the Group could decide which UN partner should collaborate with JRR in a given context. In the Timor-Leste case, if the Group had existed in August 2006, it might have realized that the CoI cases would require special expertise and that the best UN partner to coordinate logistics and handle substantive issues, based on the Secretary-General's decision, would have been DPKO through UNMIT, and not UNDP. So rather than name one permanent host or coordinator within the UN for JRR, why not consider the Rule of Law Coordination and Resource Group whose purpose is to rationalize the UN's response to rule of law gaps in a variety of situations, peacekeeping and others?

DPKO's UN Police Division adopted a policy directive establishing a "Police Standing Capacity" (May 2006). The SPC will identify what types of policing expertise are needed in the earliest days of a peace operation and begin base-line implementation of police activities. This could include precisely the forensic investigative skills identified by the JRR so JRR should consider how it complement or coordinate with the SPC.

Another option could be for the JRR to have a formal link to the International Criminal Court or be incorporated by it. JRR would be able to overcome many of the legal, practical and financial hurdles it would face as a stand-alone body. This would mean that JRR could not use current state employees. While not ideal, it would be an improvement over the status quo. Moreover, JRR could reinforce the ICC's support to national institutions by sharing its expertise with local partners.³⁶

The European Union, under the Civilian Crisis Management Initiative could add a professional criminal investigation capacity to its existing rule of law/human rights rapid deployment capabilities (including by means of call-down arrangements with States and organizations). While this would make JRR a European initiative, the all the states currently supporting the idea (except for Canada and Switzerland) are EU members. This too is not ideal, but reflects reality and could spur others to support the initiative.

³⁵ Security Council Resolution 1704, para. 4(i)

³⁶ See Marieke Wierda, Andrea Goodman, William G. O'Neill, "The 'Legacy' of the Special Court for Sierra Leone" UNDP and International Center for Transitional Justice (Sept. 2003) which recommended ways the Special Court could strengthen local institutions while it conducted its work.

