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The Rule of Law in the 2030 Agenda

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The Rule of Law in the 2030 Agenda*

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Abstract:

The rule of law is the cornerstone of the international legal system. This paper shows, through analysis of intergovernmental instruments, statements made by representatives of States, and negotiation records, that the rule of law at the United Nations has become increasingly contested in the past years. More precisely, the argument builds on the process of integrating the notion of the rule of law into the Sustainable Development Goals, adopted in September 2015 in the document Transforming our world: the 2030 Agenda for Sustainable Development. The main sections set out the background of the rule of law debate at the UN, the elements of the rule of law at the goal- and target levels in the 2030 Agenda – especially in the SDG 16 –, and evaluate whether the rule of law in this context may be viewed as a normative and universal foundation of international law. The paper concludes, with reflections drawn from the process leading up to the 2030 Agenda and the final outcome document that the rule of law – or at least strong and precise formulations of the concept – may be in decline in institutional and normative settings. This can be perceived as symptomatic of a broader crisis of the international legal order.

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1. Introduction

“We have a shared responsibility to embark on a path to inclusive and shared prosperity in a peaceful and resilient world where human rights and the rule of law are upheld.”²

The rule of law is key in achieving sustainable development. Many elements of the rule of law anchor development to peace and security, respect for human rights, and good governance. This paper describes how the Sustainable Development Goals (SDGs), adopted in September 2015 in the document “Transforming our world: the 2030 Agenda for Sustainable Development” (the 2030 Agenda)³, set out the rule of law at the goal- and target levels and evaluates whether the new development agenda as whole can strengthen the international rule of law as a cross-cutting theme in the international system. It looks at the negotiations leading up to the adoption of the SDGs, and assesses whether the formulation of the rule of law in the final document underpins the assertion that its normative authority – at least in the context of the United Nations (UN) – is in crisis.

The 2030 Agenda and the SDG 16 integrate procedural and substantive aspects of the rule of law: procedurally, how States should promote universal, non-discriminatory and equitable mechanisms, and substantively, addressing specific elements relevant in strengthening the rule of law. At the same time, many issues were left out of the final outcome document. In order to understand the complexity of bringing the rule of law into the 2030 Agenda, the concept of the rule of law at the UN and within the development discourse is explored in the first section (I) of this paper, which provides an overview of the relevant policy instruments, the discussions in the Sixth Committee, and the Millennium Development Goals (MDGs).

The second section (II) looks at the negotiations leading up to the adoption of the SDGs, and the debate surrounding the rule of law at goal- and target-levels. The third section (III) reviews the substantive features of the 2030 Agenda that embody aspects of the rule of law. In particular, SDG 16 titled “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”, is central to assessing the rule of law in the new development agenda.

The fourth section (IV) discusses the role of the rule of law and the 2030 Agenda in the international legal system. To reflect on this, and while noting that the 2030 Agenda is not a legally binding document, the SDG 16 and its targets are shown to align with number of existing obligations of States under international law. As a general conclusion, some normative observations are drawn, placing the perceived decline of the rule of law in the more general framework of the crisis of international law.

While looking at the rule of law through the prism of the post-2015 discussions, the underlying objective of this paper is to illustrate that simultaneously with the broadening of the concept, its normative specificity and credibility may be diluted, which in turn invites contestations as additional values become attached to it. In this context, the analysis is framed institutionally and

² Synthesis report of the Secretary-General on the post-2015 sustainable development agenda, “The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet”, 4 December 2014, A/69/700, para. 3.

³ Transforming our world: the 2030 Agenda for Sustainable Development, adopted 25 September 2015, A/RES/70/1.

limited to the UN. These contestations stem from a long-running polarisation among the Member States on issues pertaining to the rule of law and governance, coupled intrinsically with the rise of re-iterations of state sovereignty and national ownership, explicitly illustrated in the post-2015 process, and in the “evasive and voluntary spirit of the final outcome document”⁴.

2. Rule of Law at the UN

a) General Considerations

While the normative foundation of the rule of law in the UN framework originates from the Preamble of the UN Charter, the precise meaning of “the rule of law” remains contested among the membership.⁵ In 2004, the Secretary-General 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 and standards.”⁶ This was a definitional cornerstone and provided substance for later articulations of the concept, most notably, the 2012 High-level declaration on the rule of law at the national and international levels.⁷ Not all States, however, concur with the Secretary-General’s definition, and to date, there is no universally agreed understanding on the definition and elements of the rule of law.

The discussion on the rule of law at the UN has been mainly centred on the Sixth Committee (the Legal Committee) of the General Assembly, which has included the rule of law topic in its agenda annually since its sixty-first session in 2006, in the follow-up to the 2005 World Summit Outcome. The Sixth Committee usually includes also an annual subtopic into its agenda. In October 2015, the rule of law debate at the Sixth Committee focused on multilateral treaty processes. This was the first time that the debate on the subtopic related to the rule of law at the international level, and it was welcomed by many States, which had argued against the over-emphasis on the rule of law at the national level. In 2016, two subtopics were discussed, namely “Sharing national practices of States in the implementation of multilateral treaties” and “Practical measures to facilitate access to justice for all, including for the poorest and most vulnerable”.⁸ The 2017 subtopic is titled “Ways and means to further disseminate international law to strengthen the rule of law”.⁹

The rule of law debate at the UN is polarised. Many developed countries have emphasised the promotion of the rule of law at the national level, through strong institutions, inclusive decision-

⁴ Kate Donald and Sally-Anne Way, “Accountability for the Sustainable Development Goals: A Lost Opportunity?”, 30 (2) *Ethics and International Affairs* (2016) 201, at 208.

⁵ Expressing the determination of the founding Members of the Organization “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. Charter of the United Nations, 24 October 1945, 1 UNTS XVI. This etymology of the rule of law from the Charter is questioned by some of the membership. Most recently in 2015, at the 6th Committee, Russia reiterated its objection to viewing the rule of law as an inalienable part of the Charter, stating that the Charter does not mention “rule of law” at all, but addresses international law. Russia also has objected to the Secretary-General’s 2004 definition of the term.

⁶ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies”, 23 August 2004, S/2004/616, para. 6.

⁷ Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted 24 September 2012, A/RES/67/1.

⁸ For a summary record, see http://www.un.org/en/ga/sixth/71/rule_of_law.shtml.

⁹ Resolution adopted by the General Assembly on the rule of law at the national and international levels, 13 December 2016, A/RES/71/148, para. 26.

making, promotion of human rights and non-discrimination, and good governance. The BRICS¹⁰ and many developing countries call for more emphasis on the rule of law at the international level, including the promotion of sovereign equality, ending foreign occupation, more equal representation at international financial institutions, and strengthening the rule of law within the institutional structures and functions of the UN itself, such as the reform of the Security Council. At the 2015 debate in the Sixth Committee, some delegations, in particular the Non-Aligned Movement (NAM), African Group and Russia, reiterated the need to establish a balance between the national and international dimensions of the rule of law both conceptually and in the activities and processes of the UN.¹¹ In a similar vein, Russia raised concern over drawing interlinkages between the rule of law, human rights and democratic governance.¹²

In spite of the contested substance of the rule of law, Member States make repeated references to it in different contexts, and have highlighted its importance as a guiding principle of the UN's work in a number of high-level meetings and instruments – discussed below with emphasis on the rule of law and development. While the mandate for the inclusion of the rule of law in the SDGs – as set out in “The Future We Want” – may seem self-evident at first, the years leading up to the 2030 Agenda saw much debate among the UN membership on the scope and limits of the rule of law in this context. This section sets a frame of the evolution of the rule of law discourse leading up to the post-2015 negotiations, and illustrates that, as with international treaties, resolutions and declarations in general, the inclusion of concepts and language into an intergovernmental agreement result from years of preparation, advocacy, and consultations with multiple stakeholders.

b) From Rio to Millennium Development Goals

The aspiration to integrate justice, good governance, and strong institutions into the UN development policy began at the Earth Summit 1992, where Member States adopted Agenda 21, a work-plan for a global partnership, and the Rio Declaration setting out 27 aspirational principles on environment and development.¹³ Principle 10 of the Rio Declaration calls for the participation of citizens; access to and provision of information; participatory decision-making processes; and finally, effective access to judicial and administrative proceedings.¹⁴ It is understood to set out “a foundational principle of democracy: the peoples’ right to participate in decisions that affect them”¹⁵. While the emphasis in the Rio Declaration was on environmental issues, subsequently the

¹⁰ Association of five major emerging national economies: Brazil, Russia, India, China and South Africa.

¹¹ Summary record of the 6th meeting of the Sixth Committee, 15 October, agenda item 85: The rule of law at the national and international levels, A/C.6/70/SR.6, para. 54.

¹² *Ibid.*, para. 56.

¹³ See for instance, David A. Wirth, “The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa”, 29 *Georgia Law Review* (1995) 599.

¹⁴ “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” Principle 10 of the Rio Declaration on Environment and Development, 14 June 1992, A/CONF.151/26.

¹⁵ Marcos Orellana, “Governance and the Sustainable Development Goals: The Increasing Relevance of Access Rights in Principle 10 of the Rio Declaration”, 25 (1) *Review of European Community and International Environmental Law* (2016) 50, at 51.

Millennium Development Goals and the UN Millennium Declaration, adopted in September 2000, shifted the focus toward social and economic objectives, with the reduction of poverty as the core aim.

The Millennium Declaration and the MDGs created a new global partnership to reduce poverty, improve health, and promote peace, human rights, gender equality, and environmental sustainability by 2015.¹⁶ The UN Millennium Declaration¹⁷ makes some references to the importance of the rule of law, linking it to compliance and dispute settlement, and placing it in the same bracket with promotion of democracy: “we resolve [...] to strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties,”¹⁸ and “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, including the right to development.”¹⁹ The Millennium Declaration utilises the rule of law as a general principle, rather than a concrete concept entailing multiple, substantive and measurable elements.

The MDGs consist of eight goals²⁰ and 18 targets²¹. The first seven goals do not address elements of the rule of law directly but some touch upon issues of inclusive and representative societies and equality. For instance, the target on eliminating gender disparity in education is supported by an indicator measuring the proportion of seats held by women in national parliaments. MDG 8, on developing a global partnership for development, on the other hand, includes target 12 on “developing further an open, rule-based, predictable, non-discriminatory trading and financial system (includes a commitment to good governance, development, and poverty reduction, both nationally and internationally)”, which encapsulates some principles of international economic law, and illustrates features of the rule of law at the international level, albeit in a limited context.²² The indicators for this target, however, do not measure whether systems are rule-based or non-discriminatory, or any aspects of governance in this context.

The widely-acknowledged report on achieving the MDGs highlights the importance of institutional mechanisms in protecting basic rights and the fair treatment, as a first step in establishing the rule of law.²³ This report considers the rule of law in a narrow sense, as a catalyst, or an enabler for good governance (“a prerequisite to sound governance”), on the same level with other sources of good governance such as accountability and transparency, public administration, human rights, sound economic policies, and the role of civil society, rather than a cross-cutting feature of the whole development agenda. The failure of the MDGs to coherently address the rule of law and

¹⁶ See for instance, Jeffrey Sachs, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals*, Report to the UN Secretary General (United Nations Development Programme, 2005).

¹⁷ Millennium Declaration, 8 September 2000, A/RES/55/2.

¹⁸ *Ibid.*, para. 9.

¹⁹ *Ibid.*, para. 24.

²⁰ 1. Eradicate extreme poverty and hunger; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV/AIDS, malaria and other diseases; 7. Ensure environmental sustainability; 8. Develop a global partnership for development.

²¹ <http://www.unmillenniumproject.org/goals/gti.htm>.

²² Note the similar language in SDG 17.10, which reads: “Promote a universal, rules based, open, non-discriminatory and equitable multilateral trading system [...]”.

²³ Jeffrey Sachs, *Investing in Development*, at 115.

governance as enablers and/or outcomes of development agenda was often raised also in the post-2015 discussions. For instance, the Permanent Representative of Pakistan noted that “one of the main lessons drawn from the implementation of the UN Millennium Development Goals has been the absence of synergy between the governance, rule of law and development”.²⁴

c) 2005 World Summit Outcome

The rule of law discussions began to gain momentum among the UN membership in the aftermath of the 2005 World Summit. The normative relevance of the rule of law was becoming recognized as “an increasingly relevant reference point against which the behaviour of states is assessed under international law”.²⁵ The World Summit Outcome highlighted the need for “universal adherence to and implementation of the rule of law at both the national and international levels”²⁶ and reaffirmed Member States’ commitment to “an international order based on the rule of law and international law.”²⁷ The outcome document also noted that both good governance and the rule of law are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.²⁸ These notions were treated in an intertwined manner in the World Summit Outcome, and this paved the way for the rule of law expanding from a distinct principle to an overarching concept, relevant to all three pillars of the UN: peace and security, human rights and development.²⁹ In a sense, conceptually the rule of law gained ground that was already being covered by good governance. With its broadened scope and increased references to its centrality in the work of the UN, the rule of law started to become “common parlance at the United Nations”.³⁰

d) 2012 Rio +20 “The Future We Want”

Member States revisited the link between development and the rule of law in the Rio 2012 Summit, adopting the Rio +20 outcome document, “The Future We Want”.³¹ This document sets out the mandate to negotiate among the membership of the UN a new, broader set of sustainable development goals, and provides some guidelines on the post-2015 process.

“The Future We Want” spells out more coherently and comprehensively the concept of the rule of law, linking it to democracy, and good governance, and recognising both national and international dimensions of the rule of law.³² Moreover, it notes the relevance of institutions: “to achieve [SDGs],

²⁴ Statement by Pakistan on behalf of Pakistan, India and Sri Lanka, on Conflict Prevention, Post-Conflict Peacebuilding and Promotion of Durable Peace, Rule of Law and Governance, OWG8, 3-7 February 2014, <https://sustainabledevelopment.un.org/content/documents/6315pakistan1.pdf>.

²⁵ Helmut Aust and Georg Nolte, “International Law and the Rule of Law at National Level”, 48, in Michael Zürn, André Nollkaemper and Randall Peerenboom (eds.), *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge University Press, 2012).

²⁶ 2005 World Summit Outcome, 24 October 2005, A/RES/60/1, para.134.

²⁷ *Ibid.*, para. 134 (a).

²⁸ *Ibid.*, para. 11.

²⁹ For an overview of the “rise” of the rule of law at the UN between 1993-2008, see Thomas Fitschen, “Inventing the Rule of Law for the United Nations”, 12 *Max Planck Yearbook of United Nations Law* (2008) 347.

³⁰ Edric Selous, “The Rule of Law and its Application to the United Nations” in Clemens Feinäugle (ed.) *The Rule of Law and Its Application to the United Nations*, (Hart, 2016), 13.

³¹ The Future We Want, adopted 27 July 2012, A/RES/66/288, para. 246. For discussion of the notion “sustainable development”, see John C. Dernback and Federico Cheever, “Sustainable Development and Its Discontents”, 4(2) *Transnational Environmental Law* (2015) 247.

³² The Future We Want, para. 10.

we need institutions at all levels that are effective, transparent, accountable, and democratic”³³, and addresses a number of substantive elements of the rule of law at the national³⁴ and international³⁵ levels.

e) 2012 High-Level Declaration on the Rule of Law

Following the 2005 World Summit, which expanded the rule of law to a cross-cutting concept, the 2012 High-level meeting on the rule of law at the national and international levels aimed to map the conceptual and practical relevance of the rule of law nationally, internationally, and within the UN. The High-level meeting built on years of consideration of the rule of law in different settings and contexts. In the resulting Declaration³⁶ the Member States reaffirmed their “solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world”³⁷. Although some early drafts of the Declaration repeated the definition of the rule of law as set out in the 2004 Report of the Secretary-General,³⁸ the Member States finally failed to agree on a single definition of the rule of law due to conflicting political interests and protective attitude over aspects that – many considered – may impair state sovereignty and national ownership. States also avoided using language implying that the rule of law may be a binding principle of international law, and rededicated themselves “to support all efforts to uphold the sovereign equality of all States, to respect their territorial integrity and political independence [...]”³⁹ and recognising “the importance of national ownership in rule of law activities”⁴⁰. Similar formulations were repeated during the post-2015 negotiations.

Paragraph 2 of the Declaration contains the basic elements that Member States could agree on, namely, the authority of the law, equality before the law, accountability and non-discrimination. It notes that these apply to all States and to international organizations, including the United

³³ *Ibid.*

³⁴ For example, para. 43: “we underscore that broad participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development”; para. 88(h): “[Member States will] ensure the active participation of all relevant stakeholders drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and effective engagement of civil society”; and para. 238: “the repeal of discriminatory laws and the removal of formal barriers, ensuring equal access to justice and legal support, the reform of institutions to ensure competence and capacity for gender mainstreaming and the development and adoption of innovative and special approaches to address informal, harmful practices that act as barriers to gender equality.”

³⁵ For example, para. 77: “we acknowledge the vital importance of an inclusive, transparent, reformed, strengthened and effective multilateral system in order to better address the urgent global challenges of sustainable development [...]”; and para. 78: “we underscore the need to strengthen United Nations system-wide coherence and coordination, while ensuring appropriate accountability to Member States [...]”.

³⁶ Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted 24 September 2012, A/RES/67/1.

³⁷ *Ibid.*, para. 1. For analysis of the Declaration and the negotiations, see Clemens A. Feinäugle, “The UN Declaration on the Rule of Law and the Application of the Rule of Law to the UN: A Reconstruction from an International Public Authority Perspective”, 7 *Goettingen Journal of International Law* (2016) 157.

³⁸ Edric Selous, “The Rule of Law and its Application to the United Nations” in *The Rule of Law and Its Application to the United Nations*, ed. Clemens Feinäugle (Hart, 2016), 13, at 25.

³⁹ Declaration on the Rule of Law, para. 3.

⁴⁰ Declaration on the Rule of Law, para 11.

Nations. It is noteworthy that this defining paragraph omits any references to human rights, separation of powers, participation in decision-making, and procedural and legal transparency.⁴¹

Most of the elements included in the Declaration were not novel *per se* but rather a compilation of previously agreed UN language and reiterations of practices relevant to the rule of law. Substantive areas addressed in the Declaration include human rights protection and humanitarian law, the interrelationship of development and the rule of law, informal justice systems and transitional justice, support for international courts and tribunals, and domestic criminal justice processes, transnational organized crime and terrorism, corruption and international trade. The Declaration also emphasised the strengthening of the linkages between the rule of law and the three pillars of the United Nations.⁴² Paragraph 7 notes the interlinkage and mutually reinforcing nature of rule of law and development and calls for this to be considered in the post-2015 development agenda.⁴³

The elements of the rule of law expressed in the Declaration reflect the most extensive level of consensus possible for Member States in 2012.⁴⁴ Considering political developments since the adoption of the Declaration, the traction of the rule of law at the UN has decreased, and while the generalities listed in paragraph 2 enjoy overall support, the membership has grown increasingly polarised *vis-à-vis* specific rule of law elements. Nonetheless, the Declaration was a milestone in defining the parameters of the rule of law both conceptually and in the activities of the UN. It has become a reference point for discussions on the rule of law and was utilised as such in subsequent negotiations, especially in the post-2015 process leading up to 2030 Agenda.

f) 2014 Linkages report

The linkages between the rule of law and human rights, peace and security, and development were further explored in the Secretary-General's Linkages Report⁴⁵, mandated by the General Assembly in the High-level Declaration⁴⁶. This Report noted that "the rule of law and human rights are two sides of the same principle, the freedom to live in dignity"⁴⁷, and "the rule of law is the implementation mechanism for human rights"⁴⁸. The Report also recognized that countries marked by weak rule of law pose threats to peace and security, and similarly, weak economic development and inequality can trigger crime and violence. On a more specific note, the Linkages Report highlighted specific issues of rule of law at both national and international levels, and links between these two levels. For example, it referred to number of international instruments against

⁴¹ See Selous (2016), 25.

⁴² Declaration on the Rule of Law, para. 41.

⁴³ Also some other parts of the Declaration relate to law and development: para. 8 (legal frameworks in generating development); para. 9 (trade restrictions in hindering development); 24 (world drug problem and transnational crime undermining security and development); and 25 (negative impact of corruption on development).

⁴⁴ For analysis on the neutrality and universality of the rule of law, reflecting on the High-Level Declaration five years on, see Noora Arajärvi and Julian Kulaga, "The Rule of Law at the UN: Neither Universal nor Neutral?", KFG Working Paper Series, forthcoming in autumn 2017 (draft paper on file with the author).

⁴⁵ Addendum to the Report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, 11 July 2014, A/68/213/Add.1.

⁴⁶ Declaration on the Rule of Law, para. 41: "[...] we request the Secretary-General to propose ways and means of developing, with wide stakeholder participation, further [linkages between the rule of law and the three main pillars of the United Nations], and to include this in his report to the Assembly at its sixty-eighth session."

⁴⁷ *Ibid.*, para. 17.

⁴⁸ *Ibid.*, para. 14.

terrorism, and against transnational crimes, and noted that these activities have a negative impact on social and economic development. These rationales illustrating the importance of the rule of law as a cross-cutting feature and as an enabler for development were often repeated in the negotiations leading up to the SDGs.

3. Post-2015 Process and the Sustainable Development Goals

a) General Considerations

“[T]he legitimacy of this process will rest, in significant measure, on the degree to which the core messages that we have received are reflected in the final outcome.”⁴⁹

In the Rio +20 outcome document “The Future We Want”, States spelled out the mandate for negotiating a new, sustainable, development agenda: “We resolve to establish an inclusive and transparent intergovernmental process on sustainable development goals that is open to all stakeholders, with a view to developing global sustainable development goals to be agreed by the General Assembly. An open working group shall be constituted no later than at the opening of the sixty-seventh session of the Assembly and shall comprise thirty representatives, nominated by Member States from the five United Nations regional groups, with the aim of achieving fair, equitable and balanced geographical representation.”⁵⁰

The general background and analysis of the mandate for the post-2015 process has been extensively covered elsewhere.⁵¹ Here, the focus lies on the specific issue of the inclusion of the rule of law – broadly conceived to include justice, institutions, and governance – in the 2030 Agenda. As noted in the previous section, the MDGs did not address good governance and the rule of law issues. This has been widely viewed as one of the major pitfalls of the MDGs and States expressed desire to mend this in the new development agenda.⁵² This caveat brought on increased calls to address development more holistically in the new framework, and to bring focus to the structural issues that may hinder development. Importantly, this led to a broadly shared understanding – at least on a conceptual level – that weak institutions and the absence of the rule of law limit development potential.

The 2030 Agenda was set up to have sustainable development at its core and poverty eradication as its highest priority, with the catch phrase “leave no one behind”. “The Future We Want” provided the parameters of the format as follows: “SDGs should be action-oriented, concise and easy to communicate, limited in number, aspirational, global in nature and universally applicable to all countries while taking into account different national realities, capacities and levels of

⁴⁹Synthesis report of the Secretary-General on the post-2015 sustainable development agenda” (2014), para. 20.

⁵⁰ The Future We Want, para. 248.

⁵¹ Pamela S. Chasek, Lynn M. Wagner, Faye Leone, Ana-Maria Lebadu and Nathalie Risse, “Getting to 2030: Negotiating Sustainable Development Agenda”, 25(1) *Review of European Community and International Environmental Law* (2016) 5.

⁵² For example, Ikuho Miyazawa and Eric Zusman, “A Quantitative Analysis of the Effect of Governance on the Millennium Development Goals (MDGs): Implications for the Post-2015 Development Agenda”, Institute for Global Environmental Strategies Discussion Paper No. 2014-02, January 2015.

development and respecting national policies and priorities.”⁵³ This was echoed in the Secretary-General’s Synthesis Report, which spelled out the “six essential elements for delivering on the sustainable development goals”.⁵⁴

As set out in the “Future We Want”, the government-led process and negotiations were headed by the Open Working Group on Sustainable Development Goals (OWG), constituting of 77 Member States in 30 groups.⁵⁵ The OWG convened its first meeting in March 2013, and was chaired by the Permanent Representatives of Kenya and Hungary. In August 2014, after having held 13 formal sessions, and countless informal consultations and “informal-informal” meetings, the OWG delivered a final set of 17 proposed SDGs, including 169 targets. In December 2014, the Secretary-General submitted the Synthesis report “The road to dignity by 2030: ending poverty, transforming all lives and protecting the planet”, presenting a summary of the inputs to the post-2015 process. This was followed by intergovernmental negotiations, co-facilitated by the Permanent Representatives of Kenya and Ireland.⁵⁶ The negotiations ran from January to July 2015 culminating at the United Nations Sustainable Development Summit in September 2015, which adopted the 2030 Agenda with the SDGs, as proposed by the OWG. Below, the OWG’s work relevant to the rule of law at goal- and target levels is reviewed.

b) Open Working Group Sessions 1-8

The Open Working Group held its first session in March 2013, reflecting on the initial input of the Secretary-General to the Open Working Group⁵⁷ and discussing general aspects of the SDGs.⁵⁸ In its second to eighth sessions, the Open Working Group, through keynote addresses, introductions of Issues Briefs by the United Nations Technical Support Team (TST)⁵⁹, panel discussions and an interactive debate, considered different subject-matters, including poverty eradication (second session); food security, agriculture, water and sanitation (third session); employment, health and population dynamics (fourth session); economic, trade and energy (fifth session); means of implementation, global partnership, human rights and global governance (sixth session); cities, consumption and production, and climate change (seventh session); and biodiversity, equality, conflict prevention, peacebuilding, rule of law and governance (eighth session).⁶⁰

⁵³ The Future We Want, para. 247. See also, Secretary-General’s remarks to the General Assembly on the Synthesis Report on the Post-2015 Agenda, New York, 4 December 2014, available at <http://www.un.org/sg/statements/index.asp?nid=8250>.

⁵⁴ Synthesis report, paras. 66-81.

⁵⁵ The Open Working Group was established on 22nd of January 2013 by decision 67/555 (see A/67/L.48/rev.1) of the General Assembly. See also A/67/L.48/Rev.1, Annex.

⁵⁶ For an interesting stock-taking on the negotiations by the Permanent Representative of Ireland, see David Donoghue, “My perspective on the SDG negotiations”, 17 May 2016, available at <http://deliver2030.org/wp-content/uploads/2016/05/DAVID-DONOGHUE-sdgs-history.pdf>.

⁵⁷ Initial input of the Secretary-General to the Open Working Group on Sustainable Development Goals, 17 December 2012, A/67/634.

⁵⁸ For summaries of all the sessions, see <https://sustainabledevelopment.un.org/owg.html>.

⁵⁹ TST was established pursuant to paragraph 249 of the Rio+20 outcome document, the Future We Want. Prior to the sessions of the OWG, the TST circulated an issues brief outlining the reasons and rationale for the inclusion of peace and security on one hand, and the rule of law and governance on the other: Issues Brief 29: Conflict prevention, post-conflict peacebuilding and the promotion of durable peace, rule of law and governance, United Nations General Assembly, Open Working Group on Sustainable Development Goals, Compendium of TST Issues Briefs (October 2014), at 225-240.

⁶⁰ Progress report of the Open Working Group of the General Assembly on Sustainable Development Goals, available at <https://sustainabledevelopment.un.org/content/documents/3238summaryallowg.pdf>.

During the early meetings of the OWG there was a push, especially by some European States⁶¹, to include two separate goals, one on peaceful and non-violent societies, and one on governance, capable institutions and the rule of law, as was proposed also by the High Level Panel of Eminent Persons on the Post-2015 Development Agenda⁶². Given the importance of rule of law in the discussions among Member States before and during the OWG negotiations, the question for the proponents was how to integrate the rule of law into the Agenda so that it is a goal on its own right but also an enabler in achieving the other goals and targets.⁶³ Most of the States delivering statements in the eighth session of the OWG highlighted the importance of governance and rule of law, while also noting that the main focus should be on the social, economic, and environmental dimensions of sustainable development.⁶⁴

A repeated slogan for some States opposing the integration of the rule of law into the Agenda was “no one-size-fits all model for the rule of law”. They placed heightened emphasis on national ownership, and argued that any universal basis for assessing “levels of implementation” of the rule of law was lacking.⁶⁵ Another frequently referenced issue, as initiated by Iran, on behalf of the Non-Aligned Movement, called for balance in developing the national and international dimensions of the rule of law.⁶⁶

Some pointed out that the Rio+20 Outcome document provides no pillar or goal on peace and security and that SDGs should be guided by “The Future We Want”.⁶⁷ Moreover, Bolivia and Ecuador, supported by Russia, univocally stated that “we believe that the issues of Security and Rule of Law should not be part of the Sustainable Development Goals [...]”.⁶⁸ Similarly, India, Pakistan and Sri Lanka, were of the view that conflict prevention and post-conflict peace-building should not be included under the SDGs, as they ought to remain the prerogatives of the Security Council and the

⁶¹ See the Statements of Netherlands on behalf of the UK, Australia and Netherlands (<https://sustainabledevelopment.un.org/content/documents/6370uk3.pdf>) and Sweden (<https://sustainabledevelopment.un.org/content/documents/6535sweden2.pdf>), on Conflict Prevention, Post-Conflict Peacebuilding and Promotion of Durable Peace, Rule of Law and Governance, eighth session of the OWG, 3-7 February 2014.

⁶² The Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, “A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development”, 30 May 2013.

⁶³ For an overview on the debate on the rule of law, see Per Bergling and Sophie Jin, “The New Black on the Development Catwalk: Incorporating Rule of Law into the Sustainable Development Goals”, 24 *Washington International Law Journal* (2015) 435.

⁶⁴ Iran on behalf of NAM, the EU, Guyana on behalf of CARICOM, Austria on behalf of the Group of Friends of the Rule of Law, Mexico, Peru, Zambia, Zimbabwe and Southern African Countries, the United States, Canada, Israel, Romania, Poland, Netherlands, UK, Australia, Montenegro, Slovenia, Singapore, Cyprus, United Arab Emirates, Turkey, Spain, Italy, Croatia, Bulgaria, Denmark, Ireland, Norway, Switzerland, Germany, France, Benin for LDC's, Nepal, Tanzania, Japan, Guinea on behalf of the African Group, Timor-Leste, Moldova, Palau, Sweden, Finland, Korea, Lichtenstein, Uganda, Senegal, Rwanda, Nigeria, Lebanon, South Africa, Jordan and Palestine. This list is based on personal notes of the meeting.

⁶⁵ See Co-Chairs' Summary bullet points for OWG-8, <https://sustainabledevelopment.un.org/content/documents/3190summarybullets.pdf>.

⁶⁶ Statement by Iran on behalf of the Non-Aligned Movement, on Conflict Prevention, Post-Conflict Peacebuilding and Promotion of Durable Peace, Rule of Law and Governance, the eighth session of the OWG, 3-7 February 2014. <https://sustainabledevelopment.un.org/content/documents/6360iran1.pdf>.

⁶⁷ For instance, the statement by Brazil on behalf of Brazil and Nicaragua, <https://sustainabledevelopment.un.org/content/documents/6520brazil.pdf>.

⁶⁸ Statement by Bolivia on behalf of Bolivia and Ecuador, <https://sustainabledevelopment.un.org/content/documents/6663bolivia2.pdf>.

Peace Building Commission.⁶⁹ They, however, did note that “the rule of law and governance, [are] more relevant to our work”⁷⁰ and proposed a set of principles relevant in the context of the rule of law and governance.

The Russian Federation has been one of the most consistently vocal opponents of including the rule of law, governance, and peaceful societies into the new development agenda. In the eighth session of the OWG, Russia noted that there is no clear definition of the rule of law, and no proof of linkage between the rule of law and economic growth. Moreover, Russia suggested that using rule of law indicators poses an interference with national affairs, and that measuring the rule of law is simply not possible.⁷¹ This arises partly from the disdain of many towards rule of law indices produced by NGOs, which rank countries according to their performance in different rule of law areas and according to the quality of their democratic governance.⁷²

While the eighth session of the OWG set a more general direction of the debate on the inclusion of the rule of law, also substantive aspects were brought into the negotiations at this stage, including participatory decision-making; inclusive economic governance and equitable management of natural resources; curbing organized crime, illicit financial flows and the illicit arms trade; open and effective institutions; access to justice; public access to information; and legal identity.⁷³ After the eight stock-taking sessions, the OWG moved to the consideration of the specific elements for goals and targets, followed by sessions focusing on refining and consolidating the final text.

c) Open Working Group Sessions 9-13

The ninth session of the OWG consisted of interactive discussion of the focus areas, and brought clarity on their desired format. The discussion was informed by the Focus Area Document based on the previous OWG sessions, with Focus Area 19 titled “Peaceful and non-violent societies, capable institutions”.⁷⁴ The Document was generally well-received by the Member States, which considered it a fair and balanced representation of the views expressed during the earlier OWG meetings and as providing a good basis for the negotiations to move forward.

In the ninth session, many European and some Latin American countries proposed two focus areas, separating peace and security from institutions, governance and the rule of law. The same countries called for a human rights-based approach to be introduced and for mainstreaming of the rule of law and governance across the development agenda.⁷⁵

⁶⁹ Statement by Pakistan on behalf of Pakistan, India and Sri Lanka, <https://sustainabledevelopment.un.org/content/documents/6315pakistan1.pdf>.

⁷⁰ *Ibid.*

⁷¹ See UN Webcast Library, 10th meeting, OWG8, 7 February 2014, at 41:30-45:45, <https://sustainabledevelopment.un.org/index.php?page=view&nr=872&type=12&menu=1807&template=1042&play=477> Transcript not available on the OWG website.

⁷² For example, the World Justice Project: <http://worldjusticeproject.org/rule-of-law-index>, and the Freedom House: <https://freedomhouse.org/issues/rule-law>. See also Wolfgang Merkel, “Measuring the Quality of Rule of Law: Virtues, Perils, Results”, 21, in Michael Zürn, André Nollkaemper and Randall Peerenboom, *Rule of Law Dynamics in an Era of International and Transnational Governance* (Cambridge University Press, 2012).

⁷³ Co-Chairs’ Summary bullet points for OWG-8, *supra*.

⁷⁴ Focus Area Document (24 February 2014), available at <https://sustainabledevelopment.un.org/content/documents/3276focusareas.pdf>.

⁷⁵ See <https://sustainabledevelopment.un.org/owg9.html>.

Brazil, Nicaragua and Saudi Arabia were explicitly against the inclusion of the rule of law; whereas China, Russia, Indonesia, Kazakhstan and Uganda wanted the rule of law to be included only in the narrative of the outcome document.⁷⁶

Prior to the tenth session of the OWG, the co-chairs proposed that the focus areas be considered in the clusters, with Cluster 8 titled “Peaceful and non-violent societies, rule of law and capable institutions”. During the debate, there were strong objections by Brazil, Nicaragua, Russia, China, Indonesia and Kazakhstan, and Cuba for the inclusion of these areas into the next version of the document, arguing that Focus Area 19 as a whole goes beyond the three pillars of sustainable development defined in the Rio +20 outcome document.⁷⁷ Strong scepticism was also expressed by Argentina, Bolivia and Ecuador, and Iran, which considered the rule of law elements as overstepping on mandates of other bodies such as the Security Council, as already noted in the previous sessions. Brazil and Nicaragua and the troika of Argentina, Bolivia and Ecuador, however, did express openness to consider governance and rule of law as key enablers through concepts such as institutions, transparency and accountability across other goal areas.⁷⁸

During the tenth session of the OWG, Western Europe, Australia, as well as Guatemala and Colombia proposed that Focus Area 19 would be presented as two separate goals: 1) Peaceful and non-violent societies; and 2) governance and capable institutions/democratic governance and the rule of law.⁷⁹ In a clear discrepancy to their previous positions, UK, Australia and the Netherlands, as well as Germany, France and Switzerland worded the second goal without explicit reference to the rule of law, but rather with governance and institutions as the overarching title.⁸⁰

In the 11th OWG session, focus areas were renumbered and Focus Area 19 was re-titled as Focus Area 16 “Peaceful and inclusive societies, rule of law and capable institutions”. The co-chair of the OWG noted that the elements of this focus area have been refined to have more direct linkage to issues of sustainable development.⁸¹ Working Document for the Eleventh Session of the Open Working Group on SDGs, containing all the focus areas and proposals for targets, divided Focus Area 16 into two sub-areas, namely “Creating peaceful and inclusive societies” and “Rule of law, capable institutions”.⁸²

There was still, however, a strong division of opinion on whether Focus Area 16 should ultimately be formulated as a stand-alone goal, divided into two goals, streamlined and implemented under other focus areas, or set aside altogether. Concluding the 11th session, the co-chair stated that

⁷⁶ *Ibid.*

⁷⁷ Brazil, Nicaragua, Russia, China, Indonesia and Kazakhstan, and Cuba. See <https://sustainabledevelopment.un.org/owg10.html> and <https://sustainabledevelopment.un.org/index.php?page=view&nr=872&type=12&menu=1807&template=1042&play=642>.

⁷⁸ *Ibid* and <https://sustainabledevelopment.un.org/content/documents/8132nicaragua.pdf>.

⁷⁹ <https://sustainabledevelopment.un.org/owg10.html>.

⁸⁰ See the statements by UK, Australia and the Netherlands (<https://sustainabledevelopment.un.org/content/documents/8017uk3.pdf>) and by Germany, France and Switzerland (<https://sustainabledevelopment.un.org/content/documents/8102france17.pdf>).

⁸¹ See the UN Webcast Library, 1st meeting, OWG11, 5 May 2014, <https://sustainabledevelopment.un.org/index.php?page=view&nr=872&type=12&menu=1807&template=1042&play=710>.

⁸² Working Document for the Eleventh Session of the Open Working Group on SDGs, 5-9 May 2014, p. 10, https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc_0205_additional supporters.pdf

Focus Area 16 will remain as a stand-alone goal, at least for the purposes of the next working document and the next session of the OWG.

The 12th session of the OWG was held in June 2014, prior to which the co-chairs circulated the draft chapeau and the zero-draft of goals and targets, bringing the total number of focus areas to 17.⁸³ The subheadings under Focus Area 16 – namely, peace and security, and rule of law and institutions – were included into the SDG 16, titled “Achieve peaceful and inclusive societies, rule of law, effective and capable institutions”. At this point, SDG 16 contained 17 targets, and was substantively the most extensive draft, covering multiple aspects of the rule of law.⁸⁴

In the 12th OWG session, Russia voiced strong opposition to the formulation of SDG 16, with the main argument that “Goal 16 constitutes a clear attempt to bring in the so-called “fourth dimension” into sustainable development which is alien to the agreed three-dimensional concept.”⁸⁵ Moreover, Russia highlighted a number of objections to the inclusion of the rule of law, some of which had been raised in debates in other contexts, and many which reiterated statements made previously in the working group. In short, elements of Goal were highlighted as interfering in the internal matter of the State constituting a violation of Article 2 (7) of the UN Charter⁸⁶, politicizing the development discourse, opening the possibility of the Secretariat or NGOs to “grade” States according to their performance, and the lack of measurability.⁸⁷ Russia also indicated that neither SDG 16 nor the definition of the rule of law are universal.⁸⁸ Finally, Russia did propose a compromise solution, which would bring some of the national developmental capacity elements of SDG 16 under the proposed SDG 10 (Reduce inequality within and among countries).⁸⁹

After the close of the 12th session of the OWG, the co-chairs distributed a revised zero-draft, which aimed “to more closely reflect areas of agreement and expressed priorities [and] to simplify and harmonize the phrasing of some of the goals”.⁹⁰ As the negotiations progressed to the final session of the OWG, the two-goal aspiration was set aside, and focus of the proponents, such as the Group of Friends of the Rule of Law headed by Austria, was on retaining the rule of law in the Agenda as a stand-alone goal, which was, at the start of the 13th OWG session, titled “Achieve peaceful and inclusive societies, access to justice for all, and effective and capable institutions”, with target 16.5

⁸³ Introduction and Proposed Goals and Targets on Sustainable Development for the Post2015 Development Agenda, 2 June 2014, <https://sustainabledevelopment.un.org/content/documents/4528zerodraft12OWG.pdf>.

⁸⁴ For instance, incorporating inclusive, participatory and representative decision-making; capacity building for peaceful and inclusive societies; “unity in diversity” through democratic practices and mechanisms; formal and non-formal dispute resolution; internally displaced persons and refugees; capacity, professionalism and accountability of the security forces, police and judiciary; effective, accountable and transparent public institutions; access to justice and legal aid; legal identity; public access to information and government data; promulgation of all laws; accountability for corruption and bribery; and freedom of media, association and speech. *Ibid.*, at 15-16.

⁸⁵ Points by the Russian delegation on proposed SDG 16 “Achieve peaceful and inclusive societies, rule of law, effective and capable institutions”, OWG12, 19 June 2014, <https://sustainabledevelopment.un.org/content/documents/10494russia.pdf>.

⁸⁶ Article 2 (7) UN Charter reads “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter”.

⁸⁷ Points by the Russian delegation on proposed SDG 16, *supra* note.

⁸⁸ *Ibid.*

⁸⁹ Targets 16.13 (provide legal identity for all), 16.14 (improve public access to information and government data) and 16.15 (ensure that all laws are publicized). *Ibid.*

⁹⁰ See the letter of co-chairs, 30 June 2014, <https://sustainabledevelopment.un.org/content/documents/4324lettercochairs30june14.pdf>.

reading “by 2030 provide equal access for all to independent, effective, and responsive justice systems and promote the rule of law”.⁹¹

Evidently, this draft no longer contained the notion of the rule of law at the goal level. Replacing “the rule of law” by “access to justice” was viewed by some delegations as providing alternative, neutral and more acceptable language for SDG 16. As noted by the Director of International Development of the Canadian Bar Association, advancing a stand-alone and broader rule of law goal may notionally have been better in reflecting the understanding of the importance of rule of law to development but it was not likely to survive the negotiations and political bargaining.⁹² Framing the goal using a seemingly narrower concept of access to justice ensured the survival of at least some rule of law elements into the Agenda. This implicit hierarchy, however, is conceptually troubling: SDG 16 – the more general heading – spells out access to justice and institutions, whereas target 16.3. addresses the rule of law, adjoined with the access to justice. In reality – and most scholars agree with this conceptualisation – the rule of law is the broader umbrella that covers the other issues included as targets under SDG 16, such as effective, accountable and inclusive institutions and equal access to justice. This was, of course, a matter of political compromise that consequently affects the coherence and logic of SDG 16, its targets, and indicators.

While some statements were congratulatory for finalising the work of the OWG and cautioning against reopening of the text, in the 13th session (and in its immediate aftermath), some remaining issues were still raised, including general concern with the text and formulations⁹³. For instance, the Arab Group voiced their regret for exclusion of the issue of foreign occupation and colonial domination as a target under SDG 16⁹⁴, which the USA, unsurprisingly, had openly opposed⁹⁵. In addition, Sudan also noted the regret for “not seeing any reference to the proposal made by Russia on adding ‘illegal unilateral economic sanctions’” to the text.⁹⁶

Some States were uneasy with the reference to the United Nations Convention on the Law of the Sea under SDG 14 and the Means of Implementation.⁹⁷ The Netherlands, Australia and the United

⁹¹ Revised zero-draft, 30 June 2014,

<https://sustainabledevelopment.un.org/content/documents/4523zerodraft.pdf>.

⁹² Robin Sully, “Rule of Law and the Post-2015 Sustainable Development Agenda – It’s About Justice!”, (2014), 6, http://www.icjcanada.org/images/documents/tarnopolsky-winners/Robin_Sully_2014_Rule_of_Law_Paper.pdf.

⁹³ For instance, the statement by the delegation of Liechtenstein in OWG13, 19 July 2014, https://sustainabledevelopment.un.org/content/documents/112382014-7-19%20LIE%20Statement%20OWG%2013_final.pdf.

⁹⁴ See the letter by the Permanent Mission of the Arab Republic of Egypt to the UN, addressed to the co-chairs of the OWG, 25 July 2014, [https://sustainabledevelopment.un.org/content/documents/11062Egypt%20\(Algeria,%20Morocco,%20Saudi%20Arabia,%20Tunisia%20and%20UAE\).pdf](https://sustainabledevelopment.un.org/content/documents/11062Egypt%20(Algeria,%20Morocco,%20Saudi%20Arabia,%20Tunisia%20and%20UAE).pdf), and a letter by the Permanent Mission of Sudan to the co-chair, 1 August 2014, <https://sustainabledevelopment.un.org/content/documents/11097Sudan.pdf>.

⁹⁵ “Last, in connection with the reference to foreign occupation in the chapeau, we reaffirm our view that this text is not the place to address issues of this nature.” Closing statement and explanation of position by the Representative of the USA, OWG13, 19 July 2014, <https://sustainabledevelopment.un.org/content/documents/11117United%20States.pdf>.

⁹⁶ Letter by Sudan, *supra*.

⁹⁷ For instance, statement by the Pacific Small Island Developing States, OWG13, 19 July 2014, <https://sustainabledevelopment.un.org/content/documents/11092PSIDS.pdf>, and letter by the Permanent Mission of Mexico to the co-chairs, 9 September 2014, <https://sustainabledevelopment.un.org/content/documents/11243201409161326.pdf>.

Kingdom noted “the absence of the rule of law in goal 16, and are puzzled about the absence of the language on illicit arms”⁹⁸, and Romania and Poland “would have favoured stronger language in goal 16”⁹⁹.

d) Concluding Observations on the Open Working Group

Many central issues were set aside during the OWG negotiations, for example, the rights of refugees and internally displaced persons (IDPs)¹⁰⁰; international dispute settlement; and the right to self-determination – the latter included in the Declaration of the 2030 Agenda (limiting it to “colonial and foreign occupation”) but not in the SDGs.¹⁰¹ The proposed target on refugees and IDPs was excluded partly due to the problems of definition, measurability, (debatably) its lack of universal application, and importantly, the perverse incentive arising from the formulation – States committing to *reducing* the number of refugees and IDPs. Migration and refugees are, however, also mentioned in the Declaration.¹⁰²

On the target level, the inclusion of issues such as legal identity, reduction of violence, and fighting corruption enjoyed fairly general support. Targets on access to information, protection of fundamental freedoms, and the rule of law and access to justice, were more contested. Regarding the former, this is illustrated in the final outcome, which includes a qualifier in the language of target 16.10 – some arguing going against the objective of universality of the SDGs: “Ensure public access to information and protect fundamental freedoms, *in accordance with national legislation* and international agreements” (emphasis added).

Most opponents to the inclusion of the rule of law, governance and peaceful societies argued that including these in the SDGs was infringing on the notion of state sovereignty, by engaging States in far reaching governance reforms and opening areas of domestic policy-making to international scrutiny and involvement. They – many members of NAM and the BRICS – saw this as an attempt of the international community and international law to regulate strictly domestic affairs: police, security and corrections, as well the way the institutions are run and structured. Some States repeatedly pointed to the absence of targets addressing international dimensions of the rule of law and the need for structural reform of international institutions.¹⁰³

Parallel to the rule of law debate at the OWG, along the way of negotiations direct references to good governance were dropped out of the title of the goal and from the wording of the targets – with the exception of target 16.8. in the final document, which refers to “institutions of *global*

⁹⁸ Closing statement on behalf of the Netherlands, Australia and the United Kingdom, OWG13, [https://sustainabledevelopment.un.org/content/documents/11107United%20Kingdom%20\(Australia,%20Netherlands\).pdf](https://sustainabledevelopment.un.org/content/documents/11107United%20Kingdom%20(Australia,%20Netherlands).pdf).

⁹⁹ Statement on behalf of Romania and Poland, OWG13, 19 July 2014, [https://sustainabledevelopment.un.org/content/documents/11207Poland%20\(Romania\).pdf](https://sustainabledevelopment.un.org/content/documents/11207Poland%20(Romania).pdf).

¹⁰⁰ Rights of migrants are addressed under SDG 8 and SDG 10. But see Bob van Dillen, “The MDGs ignored migrants and refugees. How will the SDGs fare?”, blog entry on 12 August 2015 at Deliver2030.org, available at <http://deliver2030.org/?p=6204>.

¹⁰¹ 2030 Agenda, para. 35: “We call for further effective measures and actions to be taken, in conformity with international law, to remove the obstacles to the full realization of the right of self-determination of peoples living under colonial and foreign occupation [...]”.

¹⁰² 2030 Agenda, para. 23 and para. 29.

¹⁰³ For instance, see statements made in the OWG by the African Group; Brazil and Nicaragua; Iran; Benin; Tunisia; India; and Sierra Leone.

governance". There is no common understanding of the concept of "governance" among the membership, and no agreed language explaining its meaning and function in the development context. Some States expressed their concern over the close connection between "governance" and "democratic governance", and some noted the history of including "governance" at international political formulations and the use of these formulations to the disadvantage of developing countries. However, the Declaration in the 2030 Agenda does make a reference to democracy and good governance¹⁰⁴, as well as to global economic governance.¹⁰⁵

It is noteworthy that there was no real consensus on the final document among the membership of the OWG, as exclaimed by the representative of Tanzania in the final meeting of the OWG: "Truly, we cannot claim to have achieved a meaningful consensus under these circumstances!"¹⁰⁶. Member States generally were not comfortable with the outcome of the negotiations but at the same time there was evident negotiation fatigue and no strong political will to re-open the document for discussion.

e) 2014 Synthesis Report "The Road to Dignity"

The Secretary-General's Synthesis Report compiled the "full range of inputs" related to the post-2015 process, outlining the multiple work streams and consultations that fed into the 2030 Agenda. The main purpose of the report was to support the intergovernmental negotiations, which followed the conclusion of the work of the OWG. In this regard, the report recognised and commended the OWG's proposal containing 17 goals and 169 targets.

The Synthesis Report delivered a cautiously optimistic and encouraging outlook with transcendental references to "universal call to action"¹⁰⁷, "shared ambitions"¹⁰⁸, and "together in a universal compact"¹⁰⁹. It drew from two decades of development experience¹¹⁰, the discussion of the post-2015 sustainable development agenda¹¹¹, and then proposed "six essential elements for delivering on the sustainable development goals": dignity, people, prosperity, planet, partnership, and justice¹¹². It also addressed the broader aspects of implementing and delivering the 2030 Agenda.¹¹³ The element of "justice" encompasses most of the rule of law-related issues and largely corresponds to OWG's proposed SDG 16.

Taking this report and the SDGs proposed by the OWG into consideration, the intergovernmental negotiations concluded in July 2015, and the 2030 Agenda was adopted in September 2015.

¹⁰⁴ 2030 Agenda, paras. 9 and 35

¹⁰⁵ *Ibid.*, para. 44. See also para. 63 under the "Means of Implementation and Global Partnership".

¹⁰⁶ Statement by the representative of Tanzania, OWG13, 19 July 2014, <https://sustainabledevelopment.un.org/content/documents/11112United%20Republic%20of%20Tanzania.pdf>. Exclamation in the original.

¹⁰⁷ Synthesis report, title of part I.

¹⁰⁸ *Ibid.*, title of part II, section C.

¹⁰⁹ *Ibid.*, title of part VI.

¹¹⁰ *Ibid.*, paras. 26-35.

¹¹¹ *Ibid.*, paras. 36-47

¹¹² *Ibid.*, paras. 66-81.

¹¹³ *Ibid.*, parts IV and V.

4. Rule of Law in the 2030 Agenda

a) General Considerations

At the 70th session of the General Assembly, on 25 September 2015, the Member States adopted the new development agenda titled “Transforming our world: the 2030 Agenda for Sustainable Development”. It includes Preamble, Declaration, the Goals and Targets, Means of Implementation and the Global Partnership, Follow-up and Review.

While the Preamble of the 2030 Agenda follows on the footsteps of the MDGs by emphasising eradication of poverty, it introduces a more holistic approach under three dimensions – the economic, social and environmental. It also presents the five “Ps”, that is, “areas of critical importance to humanity and the planet”: people, planet, prosperity, peace, and partnership. The Declaration states that the Agenda is guided by “the purposes and principles” of the UN Charter, “including full respect for international law”.¹¹⁴ It further lists some instruments on which the Agenda is grounded on.¹¹⁵

The Declaration takes stock of the rule of law and its elements in several paragraphs. It presents the rule of law at an equal standing with human rights, justice, equality and non-discrimination¹¹⁶, noting that democracy, good governance and the rule of law are essential for sustainable development¹¹⁷, and linking the rule of law to peaceful societies and sustainable development¹¹⁸.

The 2030 Agenda sets out 17 SDGs. There is no explicit hierarchy among the Goals but placing poverty reduction as SDG 1 was an obvious and uncontested decision. Most of the rule of law targets are situated under SDG 16: “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”. It encompasses 12 targets, which address peaceful and inclusive societies; access to justice for all; and effective, accountable and inclusive institutions at all levels. These are discussed in detail in below.

Simultaneously with the final phase of the post-2015 process, the UN Statistical Commission set up an Inter-Agency Expert Group on SDG Indicators (IAEG-SDG) composed of 28 representatives of national statistical offices and, as observers, representatives of regional commissions and regional and international agencies. It was tasked to develop an indicator framework for the SDGs, and to support its implementation. The targets under the SDGs are supported by indicators, which measure the performance in achieving the targets, and will provide further focus for the targets. IAEG-SDG delivered a proposal of 230 indicators to the Statistical Commission in March 2016.¹¹⁹ While this was intended as a technical exercise, it was not void of political pressure, which is reflected in the selection of the indicators and negligible attention given to the consideration of

¹¹⁴ 2030 Agenda, para. 10.

¹¹⁵ Universal Declaration of Human Rights, international human rights treaties, the Millennium Declaration, the 2005 World Summit Outcome, Declaration on the Right to Development. *Ibid.*

¹¹⁶ 2030 Agenda, para. 8.

¹¹⁷ *Ibid.*, para. 9.

¹¹⁸ *Ibid.*, para. 35.

¹¹⁹ Report of the Inter-Agency and Expert Group on Sustainable Development Goal Indicators, 19 February 2016, E/CN.3/2016/2/Rev.1. See also <http://unstats.un.org/sdgs/indicators/Official%20List%20of%20Proposed%20SDG%20Indicators.pdf>.

some of the indicators supporting the rule of law targets. The process of the formulation of indicators was a contested issue – there was a strong feeling at the UN that the politicization of the process reflected negatively on the outcomes, refuting more technical aspects, and meant that not always the most accurate and methodologically sound indicators were chosen.¹²⁰ Likewise, within the United Nations there were internal battles between different agencies pushing their own agenda and own indicators. Below, the indicators supporting the rule of law targets are listed on footnote for each target.¹²¹

b) SDG 16

SDG 16 includes 12 targets: three addressing reduction of violence, organised crime, and illicit financial and arms flows; seven that relate to institutions, rule of law and some aspects of governance; and two on the implementation of the SDG 16.

The three targets addressing peace and security through the reduction of violence and crime are 16.1 (significantly reduce all forms of violence and related death rates everywhere¹²²); 16.2 (end abuse, exploitation, trafficking and all forms of violence against and torture of children¹²³); and 16.4 (by 2030, significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime¹²⁴). 16.1 has been criticised for lacking in specificity in terms of quantity of reduction of violence and death rates, and timeframe.¹²⁵ Similar critique has been voiced at 16.2, which also has been labelled as over-ambitious.¹²⁶ 16.4, on the

¹²⁰ See Tomáš Háek, Svatava Janoušková, Bedřich Moldan, “Sustainable Development Goals: A need for relevant indicators”, 60 *Ecological Indicators* (January 2016) 565; and Marianne Beisheim; Hedda Løkken; Nils aus dem Moore; László Pintér; and Wilfried Rickels, *Measuring Sustainable Development: How Can Science Contribute to Realizing the SDGs?* Background Paper (2 April 2015) with Results from the Conference (20 May 2015), (Deutsche Forschungsgemeinschaft and the United Nations University, 2015), available at http://www.dfg.de/download/pdf/dfg_im_profil/geschaeftsstelle/dfg_praesenz_ausland/nordamerika/2015/150421_dfg_unu_konferenz/backgroundpaper.pdf.

¹²¹ For measuring the rule of law and governance generally, see Kevin E. Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry, *Governance by Indicators: Global Power Through Quantification and Rankings* (Oxford University Press, 2012) and Sally Engle Merry, Kevin E. Davis, Benedict Kingsbury, *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (Cambridge University Press, 2015).

¹²² Indicators: 16.1.1 Number of victims of intentional homicide per 100,000 population, by sex and age, 16.1.2 Conflict-related deaths per 100,000 population, by sex, age and cause; 16.1.3 Proportion of population subjected to physical, psychological or sexual violence in the previous 12 months; 16.1.4 Proportion of population that feel safe walking alone around the area they live.

¹²³ Indicators: 16.2.1 Proportion of children aged 1-17 years who experienced any physical punishment and/or psychological aggression by caregivers in the past month; 16.2.2 Number of victims of human trafficking per 100,000 population, by sex, age and form of exploitation; 16.2.3 Proportion of young women and men aged 18-29 years who experienced sexual violence by age 18.

¹²⁴ Indicators: 16.4.1 Total value of inward and outward illicit financial flows (in current United States dollars); 16.4.2 Proportion of seized small arms and light weapons that are recorded and traced, in accordance with international standards and legal instruments.

¹²⁵ Charlotte Fiedler et al., “Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”, 81, at 82, in Markus Loewe and Nicole Rippin (eds.), *The Sustainable Development Goals of the Post-2015 Agenda: Comments on the OWG and SDSN Proposals*, (German Development Institute / Deutsches Institut für Entwicklungspolitik, 2015).

¹²⁶ *Ibid.*, at 82-83.

other hand calls for “a strong national legislative and executive implementation framework”, which may not be universally available.¹²⁷

Target 16.3 is “the rule of law” target (promote the rule of law at the national and international levels and ensure equal access to justice for all¹²⁸). This target is tautological: ensuring equal access to justice is just a rewording of the goal title. Generally, it is vague and “practically impossible not to reach”¹²⁹. Neither of the indicators measures the promotion of the rule of law, nor access to justice *per se*. Some more suitable indicators could have included measuring the impartiality and independence of the judiciary, and the percentage of defendants who are represented by a legal counsel or who are recipients of legal assistance.

Governance-related targets include 16.5 (substantially reduce corruption and bribery in all their forms¹³⁰); 16.6 (develop effective, accountable and transparent institutions at all levels¹³¹); 16.7 (ensure responsive, inclusive, participatory and representative decision-making at all levels¹³²); and 16.9 (by 2030, provide legal identity for all, including birth registration¹³³). 16.8 (broaden and strengthen the participation of developing countries in the institutions of global governance¹³⁴) addresses global governance and the supporting indicator focuses on the voting rights of developing countries.

The only distinct human rights target is 16.10 (ensure public access to information and protect fundamental freedoms, in accordance with national legislation and international agreements¹³⁵). As noted above, the inclusion of the qualifier “in accordance with national legislation” weakens any normative impetus that this target might otherwise carry. In addition, the indicators are problematic. First, when States are self-reporting these incidences unreliable figures may be

¹²⁷ Marc A. Levy and Michelle Scobie, “Goal 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels”, 75, at 76, in ICSU, ISSC, *Review of the Sustainable Development Goals: The Science Perspective*, (International Council for Science, 2015),

¹²⁸ Indicators: 16.3.1 Proportion of victims of violence in the previous 12 months who reported their victimization to competent authorities or other officially recognized conflict resolution mechanisms; 16.3.2 Unsensitized detainees as a proportion of overall prison population.

¹²⁹ Charlotte Fiedler et al., at 83.

¹³⁰ Indicators: 16.5.1 Proportion of persons who had at least one contact with a public official and who paid a bribe to a public official, or were asked for a bribe by those public officials, during the previous 12 months; 16.5.2 Proportion of businesses that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months.

¹³¹ Indicators: 16.6.1 Primary government expenditures as a proportion of original approved budget, by sector (or by budget codes or similar); 16.6.2 Proportion of the population satisfied with their last experience of public services.

¹³² Indicators: 16.7.1 Proportions of positions (by sex, age, persons with disabilities and population groups) in public institutions (national and local legislatures, public service, and judiciary) compared to national distributions; 16.7.2 Proportion of population who believe decision-making is inclusive and responsive, by sex, age, disability and population group. On drafting history of 16.7.2, see Graham Long, “The Idea of Universality in the Sustainable Development Goals”, 29 (2) *Ethics and International Affairs* (2015) 203.

¹³³ Indicator: 16.9.1 Proportion of children under 5 years of age whose births have been registered with a civil authority, by age.

¹³⁴ Indicator: 16.8.1 Proportion of members and voting rights of developing countries in international organizations.

¹³⁵ Indicators: 16.10.1 Number of verified cases of killing, kidnapping, enforced disappearance, arbitrary detention and torture of journalists, associated media personnel, trade unionists and human rights advocates in the previous 12 months; 16.10.2 Number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information.

presented (16.10.1). Secondly, 16.10.2 is a structural indicator that does not place any level of ambition on any individual State, as it merely measures the number of countries that provide access to information, and lacks any qualifying feature.

Targets 16.a (strengthen relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime¹³⁶) and 16.b (promote and enforce non-discriminatory laws and policies for sustainable development¹³⁷) are aimed at supporting the implementation of the SDGs. They are reiterations of the other targets, and as such 16.a seems over-inclusive, whereas 16.b spells out the important issue of non-discrimination.

SDG 16 has been described as “neither concise nor easy to communicate”.¹³⁸ This is true to the extent that it lacks internal logic, arising from the merger of peace and security, governance, access to justice, rule of law, and human rights elements into one goal. The logic also suffers, as explained above, from the lack of conceptual hierarchy within the goal- and target-levels. On the other hand, SDG 16 has been declared to be “genuinely novel and important”¹³⁹, for its input on governance and institutions, even when the direct reference to the former has been omitted.¹⁴⁰ Curiously, in later statements some States have re-elevated the rule of law as key element in the Agenda: Liechtenstein noted in 2016 that “The Agenda contains numerous goals and targets that incorporate important elements of the rule of law – such as access to justice, equality and non-discrimination, anti-corruption and good governance. It fully recognizes the rule of law as an indispensable enabler, as well as an outcome, of sustainable development.”¹⁴¹ Nonetheless, in comparison to the MDGs, SDG 16 is progressive contribution to the development framework, even if it may read as a somewhat haphazard and insipid version of what it could have been.

In addition to SDG 16, some other goals and supporting targets touch upon different aspects of the rule of law, ranging from the environmental rule of law (SDGs 14¹⁴² and 15¹⁴³) to addressing inequality within and between countries (SDG 10)¹⁴⁴. These are, however, closely connected to other thematic issues and do not purport as such to promote the rule of law in the 2030 Agenda.

¹³⁶ Indicator: 16.a.1 Existence of independent national human rights institutions in compliance with the Paris Principles.

¹³⁷ Indicator: 16.b.1 Proportion of population reporting having personally felt discriminated against or harassed in the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law.

¹³⁸ Charlotte Fiedler et al., at 81.

¹³⁹ Niheer Dasandi, David Hudson and Tom Pegram, “Post-2015 Development Agenda Setting in Focus: Governance and Institutions”, 63, in Jeff Waage and Chris Yap, *Thinking Beyond Sectors for Sustainable Development* (Ubiquity Press, 2015).

¹⁴⁰ See discussion in the previous section on the elimination of reference to “governance” in the OWG.

¹⁴¹ Statement by the representative of Liechtenstein, Sixth Committee, agenda item 84: The rule of law at the national and international levels, 6 October 2016, <http://statements.unmeetings.org/media2/7661288/liechtenstein.pdf>.

¹⁴² SDG 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development.

¹⁴³ SDG 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss.

¹⁴⁴ See in particular 10.3, “Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard”. For analysis of SDG 10, see Edward Anderson, “Equality as a Global Goal”, 30 (2) *Ethics and International Affairs* (2016) 189.

5. SDGs in International Normative Framework

“Sustainable development is a normative conceptual framework; it is not a legal framework. Yet, just as other normative ideas such as freedom, equality, and justice have been written into law, so sustainable development is being written into law.”¹⁴⁵

The SDGs are a collective effort of the international community setting out universal commitments and providing normative guidance for the creation of a better, more just world. This section sets out some reflections on whether the 2030 Agenda and the SDGs integrate some normative elements that may reinforce international law or whether this aspect was diluted through the arduous negotiation process.

The SDGs are based on the principle of universality,¹⁴⁶ conversely to the MDGs, which addressed issues largely pertaining to developing countries. The definition of universality remains undetermined, and the 2030 Agenda recognises in the Declaration “common but differentiated responsibilities” of States, another concept of much contention during the negotiations.¹⁴⁷ Despite the universal nature of the 2030 Agenda, many targets – especially regarding the implementation of the SDGs – recognise and call for international cooperation and capacity-building support to developing countries.¹⁴⁸

The quest for substantive universality proved to be problematic during the OWG and intergovernmental negotiations: all targets and indicators needed to be formulated in a manner applicable to all States. In the final outcome, many of the targets still require more effort from developing States. At the same time, some of the targets do not entail further action by all States. For instance, 16.9 on the provision of legal identity, including birth registration, is already fulfilled by number of States.¹⁴⁹ All in all, the measurement of some targets is global,¹⁵⁰ whereas many are strictly domestic¹⁵¹, and others are intentionally left open-ended¹⁵² or explicitly integrate all

¹⁴⁵ John C. Dernbach and Federico Cheever, “Sustainable Development and Its Discontents”, 4 (2) *Transnational Environmental Law* (2015) 247, at 251.

¹⁴⁶ 2030 Agenda, Preamble, and Declaration, para. 5.

¹⁴⁷ 2030 Agenda, para. 12. See also para. 55: “The Sustainable Development Goals and targets are integrated and indivisible, global in nature and universally applicable, taking into account different national realities, capacities and levels of development and respecting national policies and priorities.” And para. 71: “We reiterate that this Agenda and the Sustainable Development Goals and targets, including the means of implementation, are universal, indivisible and interlinked.”

¹⁴⁸ See the implementation-related targets at the end of each goal, and specifically, SDG 17 on implementation.

¹⁴⁹ Same could be said about 3.1. and 3.2. on reducing maternal and infant mortality below certain thresholds, and 4.1 on ensuring free, equitable and quality primary and secondary education.

¹⁵⁰ For example, 3.1 By 2030, reduce the global maternal mortality ratio; 3.6 By 2020, halve the number of global deaths and injuries from road traffic accidents; 7.3 By 2030, double the global rate of improvement in energy efficiency; 11.4 Strengthen efforts to protect and safeguard the world’s cultural and natural heritage; 15.c Enhance global support for efforts to combat poaching and trafficking of protected species.

¹⁵¹ 1.3 Implement nationally appropriate social protection systems and measures for all, and by 2030 achieve substantial coverage of the poor and the vulnerable; 2.3 By 2030, double the agricultural productivity and incomes of small-scale food producers; 8.1 Sustain per capita economic growth in accordance with national circumstances.

¹⁵² 1.1 By 2030, eradicate extreme poverty for all people everywhere; 5.1 End all forms of discrimination against all women and girls everywhere.

levels¹⁵³. This is reflected throughout the Agenda, including the SDG 16, with elements of the rule of law at the national, transnational and international levels.

A recent scholarly contribution has acknowledged that “the academic normative analysis of the SDGs is in its infancy”.¹⁵⁴ It proposes that this analysis should be conducted through cosmopolitan theory and by assessing the impact of the SDGs on global justice.¹⁵⁵ Another author has compared MDGs and SDGs, concluding that the SDGs, in fact, represent a form of institutional cosmopolitanism.¹⁵⁶ For the focus of this paper, reflecting on the broader notion of global egalitarianism, it suffices to note that SDG 16, with its targets and indicators, lacks such a unified objective and logic that could be truly contributing to the cosmopolitan notion of global justice. The intent to reflect the cross-cutting nature of the rule of law and universal delivery of justice was initially present, building on the 2012 High-level declaration on the rule of law, but this rigour was diluted along the way.¹⁵⁷ Interestingly, the same observation of watering down the normative impetus of initial proposals has been made in relation to the accountability of States for implementing the SDGs¹⁵⁸, and on human rights and environmental protection.¹⁵⁹

There clearly exists a relationship between the SDGs and international law.¹⁶⁰ Such a relationship between development and (environmental) law was acknowledged already prior to the MDGs.¹⁶¹ This relationship of development and international law has expanded – with the broadening notion of sustainable development – to areas of law relevant to economic and social development. National systems often integrate the norms set out in the development framework through their legislative processes, and then in turn – due to the interactive nature of the international and national law – transfer these codified norms back to the international level. Even though the 2030 Agenda is not a legally binding instrument, it can be expected to eventuate the legalisation of some of the norms it sets out,¹⁶² and strengthen those that are already codified elsewhere. As Malcom Langford so eloquently notes: “The normative gains within the SDGs provide [...] a political

¹⁵³ 1.b Create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions.

¹⁵⁴ Graham Long, “The Idea of Universality in the Sustainable Development Goals”, at 206.

¹⁵⁵ *Ibid.*

¹⁵⁶ Malcolm Langford, “Lost in Transformation? The Politics of the Sustainable Development Goals”, 30 (2) *Ethics and International Affairs* (2016) 167, at 173.

¹⁵⁷ Unlike with, for instance, gender equality, which was successfully mainstreamed across the SDGs. For discussion, see Sandra Fredman, Jaakko Kuosmanen, and Meghan Campbell, “Transformative Equality: Making the Sustainable Development Goals Work for Women”, 30 (2) *Ethics and International Affairs* (2016) 177.

¹⁵⁸ Kate Donald and Sally-Anne Way, “Accountability for the Sustainable Development Goals”, at 208.

¹⁵⁹ “Many of the goals are praiseworthy. But most of the goals and, even more, the targets, remain too general and vague to provide much practical guidance to those working to promote human rights and environmental protection.” John H. Knox, “Human Rights, Environmental Protection, and the Sustainable Development Goals”, 24 (3) *Washington International Law Journal* (2015) 517, at 536.

¹⁶⁰ Rakhyun E. Kim, “The Nexus between International Law and the Sustainable Development Goals”, 25 (1) *Review of European, Comparative and International Environmental Law* (2016) 15, at 15.

¹⁶¹ Alan Boyle and David Freestone, *International Law and Sustainable Development* (1999, Oxford University Press), at 6.

¹⁶² Similarly, Dernbach and Cheever suggest that “[t]he policy space created by the concept of sustainable development is being filled by a variety of laws, policies, and activities that further social and economic goals while protecting the environment.” Dernbach and Cheever, “Sustainable Development and Its Discontents”, at 286.

resource for selectively defending and promoting targets that require greater attention or legitimization.”¹⁶³

Nonetheless, one should not overestimate any legal impetus of the 2030 Agenda. There was no ambiguity in the OWG on the nature of the instrument. This was highlighted in the statement by the United States at the final OWG session, noting that “nothing in this text purports to affect rights and obligations under international law, including with respect to the rights to take trade measures, and it should not purport to affect the potential constraints under international law or agreements that apply to “policy space.”¹⁶⁴ This cautious attitude also impacted the content of the rule of law elements in the 2030 Agenda: when norm entrepreneurs wish to ensure that nothing implies legal bindingness of the instrument, the rule of law language may easily seem precarious and opening the text to uninvited legal interpretations.

While the 2030 Agenda is a political declaration, it brings into one document an extensive set of references to existing institutional arrangements as well as some language from legally binding instruments. Although it does not embrace legal language *per se*, many targets are reformulations of existing obligations drawn from treaties and other formal and informal instruments. Prior to the adoption of the 2030 Agenda, the UN Secretariat was requested to draft a document setting out the ‘existing accountability frameworks’, that is, listing any binding and non-binding mechanisms for each target which was anticipated to be included in the final Agenda. These include UN review mechanisms (treaty-based and other), mechanisms by regional organizations, such as the European Union and the African Union, and even some NGO initiatives. The purpose of this exercise was to establish, on one hand, a certain credence and pre-existing authority of the proposed targets, and on the other, to illustrate that data needed to measure these targets was already being collected by different entities.¹⁶⁵ This also shows that some of the targets directly trace back to existing treaty-obligations.

For instance, targets 16.2 and 16.9 draw from the Convention on the Rights of the Child; 16.2 and 16.4 adopt some language from the Protocols to the Convention against Transnational Organised Crime (Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, and Protocol against the Illicit Manufacturing of and Trafficking in Firearms, respectively); 16.5 shares the objectives with the Convention against Corruption; and 16.10 is connected to many human rights conventions, as well as to the objectives of the World Summit on the information Society Geneva Plan of Action. 16.3 takes on the general theme of the 2012 High-level declaration on the rule of law at the national and international levels. In addition, many targets draw language from a multitude of international and regional policy instruments, including but not limited to General Assembly and Security Council resolutions, Ministerial declarations of the Economic and Social Council, UN principles and guidelines, and plans and programmes of actions of different organizations and agencies. The references to existing accountability frameworks provided some level of authority to the issues included under the SDG 16, and helped to bring them into the Agenda. States were more open to include issues on which there was a pre-existing consensus – and in some cases, also data and review mechanisms – in place.

¹⁶³ Malcolm Langford, “Lost in Transformation? The Politics of the Sustainable Development Goals”, at 176.

¹⁶⁴ Statement by the representative of the United States in OWG13, 19 July 2014, <https://sustainabledevelopment.un.org/content/documents/11117United%20States.pdf>.

¹⁶⁵ The issue of data collection is predominantly a matter of the Statistical Commission, and is based on the proposed indicator(s) for each target.

Formal and informal rules and mechanisms have an inherent function in promoting and enabling development policies and can provide transformative force for the realisation of the SDGs.¹⁶⁶ This presumes effective national implementation of the targets, accurate measurement mechanisms based on the indicators, and active review to follow-up on the commitments. The new agenda sets policy on many aspects that international law aims to govern. This is not to say that the two spheres are overlapping but rather run parallel towards the same aim of peaceful and prosperous world.

6. Concluding Remarks

The UN has been on the lookout for a coordinated approach on the rule of law, both in functional and normative contexts. Following the 2005 World Summit the rule of law gained a lot of traction at the UN, culminating at the 2012 High-level declaration. The polarisation of the understandings of the rule of law among the membership, however, had already begun behind the scenes leading up to the 2012 Declaration, and continues to be omnipresent in the annual Sixth Committee debates. As the rule of law has grown into a catch-all category, it has lost its normative specificity and become blurred, while at the same time any serious attempt to attach substantive features to it is being met with resistance.

The rule of law did not become a cross-cutting and enabling feature of the 2030 Agenda, and could not re-claim the momentum leading up to the 2012 Declaration. The push-back to the cross-cutting nature of rule of law in the Agenda, and the failure of the international community to include the rule of law as a central element, even within SDG 16, and to secure stronger legal language in the formulation of the targets, may be a symptom of a larger crisis in international law. This is not for the lack of aspiration or vision for a better, just world but a consequence of the long-running division among the Member States on how they view international law and the rule of law: Some States clearly perceive both international law and the rule of law as pervasive and antagonistic tools of the powerful, whereas others praise these for paving the road to a more equal world. This dichotomy bears close resemblance to that related to human rights paradigm versus sovereignty in the earlier years of the UN.¹⁶⁷ The polarisation was explicitly illustrated in the post-2015 process, with the re-iterations of state sovereignty and national ownership, and the opposition to include substantive language on the rule of law, good governance and human rights.

Perhaps the OWG (and even Rio +20) set out to do too much and went too far, becoming over-inclusive and broadening the object and purpose of the new development framework: even if strong institutions and strengthening of the rule of law have a direct link to sustainable development, the main purpose of the 2030 Agenda is to eradicate poverty. Nonetheless, SDG 16 may provide some contribution to the rule of law at the national and international levels, at the very least in contributing to and broadening the development discourse, serving as a rhetoric device and a reference point. The SDGs are an improvement to the MDGs in their more holistic approach and recognition of the impact of the rule of law on development, even if this is not fully fledged within the 2030 Agenda. It is clear, however, that an overarching vision, normative unity, and a definition of the rule of law remain absent, both in the SDGs and at the UN in general.

¹⁶⁶ O Soyeju, "Making a case for a development-driven approach to law as a linchpin for the post-2015 development agenda", 18(2) *Potchefstroom Electronic Law Journal* (2015) 363, at 372.

¹⁶⁷ See for instance, Michael W. Reisman, "Sovereignty and Human Rights in Contemporary International Law", 84 (4) *American Journal of International Law* (1990) 866.

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The Kolleg-Forschergruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. Can we, under the current significantly changing conditions, still observe an increasing juridification of international relations based on a universal understanding of values, or are we, to the contrary, rather facing a tendency towards an informalization or a reformalization of international law, or even an erosion of international legal norms? Would it be appropriate to revisit classical elements of international law in order to react to structural changes, which may give rise to a more polycentric or non-polar world order? Or are we simply observing a slump in the development towards an international rule of law based on a universal understanding of values?

The Research Group brings together international lawyers and political scientists from five institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Hertie School of Governance, Humboldt-Universität zu Berlin, Universität Potsdam and Social Science Research Center Berlin (Wissenschaftszentrum Berlin). An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.
