An Examination of the Rule of Law Provisions within the African Standby Force

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"If we do not get rule of law and security right, nothing else will work:"

"Peacemaking and peace-keeping operations, to be truly successful, must come to include comprehensive efforts to identify and support structures which will tend to consolidate peace and advance a sense of confidence and well-being among people." [2]
                                                    - Former United Nations Secretary General,
                                                    Boutros Boutros-Ghali

Introduction

When the African Union [AU] was established in 2000, it was charged with the task of ensuring "peace, security and stability on [the] continent."[3] Such rhetoric was, however, hardly new within Africa. The AU's predecessor, the Organization of African Unity [OAU], had expressed similar lofty goals and yet, had failed to prevent conflict.[4] The member states of the AU, therefore, decided to provide the new body with what had previously been missing: an enforcement mechanism. In 2003, they agreed to create a standby peacekeeping force, capable of rapid deployment at the first sign of violence.[5] The proposed body, known as the African Standby Force [ASF], is to be composed of civilian and police components and military brigades from North, Southern, Central, East and West Africa.[6] It will, in theory, be fully operational by June 2010 and will be capable of deploying in a variety of scenarios, ranging from military observer missions to full-blown interventions in the case of genocide.[7]

As the ASF enters its final stages of development, it is an opportune moment to reflect on the progress that has been made thus far. On the military front, preparations are in full swing. Although there is some disparity between the current capacities of the regional organizations, extensive time, money and effort has been spent on developing key preliminary documents, such as Standard Operating Procedures [SOP], and beginning initial training exercises.[8] The civilian component has, in contrast, been widely neglected. The equivalent foundational documents, for example, were only prepared recently and lack the authoritative tone and clarity of their military counterparts. In most cases, they do little more than outline the potential positions and personnel that could, depending on the nature of the emergency, prove valuable.

One area of particular concern is rule of law [RoL]. While the United Nations [UN] has, in recent years, come to stress the vital importance of RoL to peacekeeping

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[2] Quoted in Michael J. Kelly, "Responsibility for Public Security in Peace Operations," in *The Changing Face of Conflict and the Efficacy of International Humanitarian* Law, eds. Helen Durham and Timothy L.H. McCormack (The Hague: Kluwer Law, 1999), 141.

[3] Member States of the Organization of African Unity, *Constitutive Act of the African Union,* 2000, Art. 3.f.

[4] *See,* Member States of the Organization of African Unity, *OAU Charter*, 1963, Preamble

[5] *See generally* African Union, *Roadmap for the Operationalization of the African Standby Force* (Addis Ababa, 2005).

[6] *See generally* African Union, *Roadmap.*

[7] Ibid.

[8] *See, e.g.,* Jakkie Cilliers, "The African Standby Force: An Update On Progress," (Occasional Paper 160, The Institute of Security Studies, 2008).

operations, the ASF has, by and large, neglected the issue.[9] In contrast to the foundational documents for the military contingent, which establish clear cut guidelines, the RoL drafts are entirely hypothetical. While a Light Signals Unit, for example, is required, a Rule of Law team could simply "be foreseen."[10]

This paper will examine the ASF's preparations in the area of rule of law. Part I discusses both what is meant by "RoL" and what particular rule of law challenges emerge in post-conflict environments. Part II addresses the development of the African Standby Force and provides a detailed analysis of the proposed structure of the civilian peace-building components. It also points to a number of flaws within the existing draft and proposes possible reasons for these gaps and oversights. Having captured the ASF's current approach to, and attitude towards, RoL, Part III will seek to provide a counter-argument. It will explain both why RoL is of vital importance for military peacekeepers and why it should be viewed as an immediate priority issue. Finally, Part IV proposes a number of basic measures that could be adopted to strengthen the Force's capacity in this area.

On paper, the ASF has the potential to change the way that conflicts are addressed in Africa. In the past, the continent was often at the mercy of outside nations, forced to wait while the UN mustered up the political will necessary to intervene. With the creation of the ASF, the AU will now, in theory, be in a position of power, able to deploy troops at the first sign of violence and put a warring country back on the road towards peace. In reality, however, the ASF's neglect of RoL could limit the Force's ability to provide substantive assistance to a conflict-ridden state. By emphasizing military peacekeeping over peace-building, and specifically RoL, the ASF is setting itself up for ultimate failure. Under its current proposed structure, the Force will be capable of stopping the immediate violence but unable to restore those elements necessary for future, lasting peace. For if a state lacks rule of law, "everything else fails; it is impossible to educate children, to foster an economy, to deliver health care, to reliably provide essential services like water and electricity, and most significantly, perhaps, to establish stable political institutions."[11] In order for the Force to have a meaningful and credible impact on conflicts in Africa and be in a position to ensure "peace, security and stability" on the continent, it must, ultimately, recognize the importance of RoL for peacekeeping operations and rectify the current gaps within its proposed structure.

I.   The Rule of Law

   a. "No person, no matter his or her position, is above the law:" A Basic Definition of Rule of Law[12]

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[9] For more on the United Nations [UN] interest in Rule of Law [RoL], *see generally* United Nations Security Council, *Report of the Panel on United Nations Peace Operations* (New York: A/55/305, 2000) [hereinafter "The Brahimi Report"]; *also* UN Secretary General. *Uniting Our Strengths: Enhancing United Nations Support for Rule of Law: Report of the Secretary General* (New York: UN, 2006) [hereinafter "Rule of Law Report"].

[10] *See* African Union, *Chapter 9: Civilian Component Other than Police* (Addis Ababa): Art. 9.1.1 (2).

[11] Clint Williamson, "When the Fighting Stops: Keynote Address," *Seton Hall Law Review* 38 (2008): 1254.

[12] David Tolbert and Andrew Solomon, "United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies," *The Harvard Human Rights Journal* 19 (2006): 34.

Before addressing the structure and subsequent failings of the ASF, it is first necessary to explain both what is meant by RoL and what role it can play within post-conflict environments. RoL is, ultimately, an amorphous and expansive concept. On the most basic level, RoL can simply be described as an issue of "I know it when I see it."[13] Most people would agree, irrespective of their legal knowledge or ability to define the idea, that the United States and Japan are nations "under the rule of law."[14] Most would, in turn, conclude that the rule of law is missing within countries like Sudan, Iraq and Afghanistan.[15] As such, the concept of "the rule of law is often used as a handy shorthand way to describe the extremely complex bundle of cultural commitments and institutional structures that support peace, human rights, democracy and prosperity."[16]

When one attempts to define the elements contained within this "bundle," however, difficulties immediately arise. Every author or organization, when discussing RoL, appears to emphasize a different facet of the ideal. Although no single definition of the concept exists, there are a number of common threads within the various explanations. First, it is acknowledged that RoL describes a state of affairs in which "no person, no matter his or her position, is above the law."[17] The laws in place must, in turn, be of "public knowledge," "clear in meaning," and "apply equally to everyone."[18] They must also be consistent with, and guarantee, universally acknowledged, international human rights norms, such as the right to a fair trial.[19] Secondly, it is agreed that a RoL state will possess "reasonably fair, competent and efficient" judicial structures and police.[20] Judges must be impartial and independent, free from the influence of outside political forces.[21] Finally, measures must be in place "to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."[22]

b. Rule of Law in Post-Conflict Settings

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[13] The inspiration for this comparison comes from the famous statement of the late U.S. Supreme Court Justice Potter Stewart. When asked to develop a standard definition for "obscenity," Justice Stewart refused, noting "I know it when I see it." Jane Stromseth et al., *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge UP, 2006), 56.

[14] Ibid.

[15] Stromseth et al., *Can Might Make Rights?*, 56.

[16] Jane E. Stromseth, "Post-Conflict Rule of Law Building: The Need For A Multi-Layered, Synergistic Approach," *William and Mary Law Review* 49 (2008): 1443.

[17] Tolbert and Solomon, "United Nations Reform," 34; s*ee also* Rule of Law Report, para. 6.

[18] *See* Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs* 77, no. 2 (1998): 95; *see also* Stromseth, "Post-Conflict Rule of Law Building,"; *see also* Joris Voorhoeve, *From War to the Rule of Law: Peace Building After Violent Conflicts* (Amsterdam: Amsterdam UP, 2007); *see also* Rule of Law Report, para. 6

[19] Carothers, "The Rule of Law Revival," *see also* Stromseth, "Post-Conflict Rule of Law Building," *see also* Rule of Law Report, para. 6.

[20] Carothers, "The Rule of Law Revival," 95; *see also* Voorhoeve, *From War to the Rule of Law*, 92

[21] Carothers, "The Rule of Law Revival,"; *see also* Stromseth, "Post-Conflict Rule of Law Building," 1452; *see also* Voorhoeve, *From War to the Rule of Law*, 92

[22] Rule of Law Report, para. 6.

Questions relating to RoL assume particular importance in post-conflict settings. In the wake of violence, a nation will often experience a massive law and order vacuum. State institutions may have weakened or collapsed. Crime is often rampant, with people taking advantage of the general chaos within society.[23] In such circumstances, RoL, as defined above, is noticeably absent. Human rights norms and fair and efficient judicial structures have, ultimately, been replaced with violence, corruption and instability. In order to establish, or reestablish, security within a post-conflict setting, it is necessary to introduce stabilizing RoL institutions and mechanisms.[24] These bodies will, in turn, typically face three primary RoL problems: "addressing the crimes committed during the conflict, reestablishing a functioning government, and healing residual animosities and divisions within society."[25]

Given the general chaos of post-conflict states, responsibility for these efforts often falls on outside peacekeeping forces. For the UN Department of Peacekeeping Operations [DPKO], addressing RoL means addressing four key areas: Police, Prisons, Courts and Human Rights.[26] Intervening forces must, ultimately, determine where justice should take place, who will administer it and according to what law.[27] Past UN missions have played a role in laying the groundwork for basic governance, reestablishing social institutions and bringing to account those who committed atrocities during the violence.[28] In the most extreme cases, such as occurred in East Timor and Kosovo, the UN discovered a complete absence of RoL within the state and was forced to act as the sole governing authority while the nation was rebuilt.

II.   The African Standby Force

a. A Brief Background

"In order to enable the Peace and Security Council [to] perform its responsibilities with respect to the deployment of peace support missions and interventions … an African Standby Force shall be established. Such Force shall be composed of standby multidisciplinary contingents, with civilian and military components in their countries of origin and ready for rapid deployment at appropriate notice."
- *Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Art. 13(1)*

When the ASF was first announced in 2003, it was determined that it would be "composed of standby multidisciplinary contingents, with civilian and military

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[23] Voorhoeve, *From War to the Rule of Law*, 19, 105.

[24] Ibid, 105. *See also* Volker Franke, "The Peacebuilding Dilemma: Civil-Military Cooperation In Stability Operations**,"** *International Journal of Peace Studies* 11, no. 2 (2006): 15.

[25] Tolbert and Solomon, "United Nations Reform," 29-30.

[26] Jeremy Farrall, "The Future of UN Peacekeeping and the Rule of Law," *ASIL Proceedings* (2007): 161.

[27] Simon Chesterman, "Rough Justice: Establishing The Rule Of Law In Post-Conflict Territories," *The Ohio State Journal on Dispute Resolution* 20 (2005): 71.

[28] In the most extreme cases, such as occurred in East Timor and Kosovo, the UN discovered a complete absence of RoL within the state and was forced to act as the sole governing authority while the nation was rebuilt. If possible, please move this into the text.

components in their countries of origin and ready for rapid deployment at appropriate notice."[29] Its use was, in turn, envisioned for operation in six specific scenarios:

    a.   Scenario 1: AU/Regional military advice to a political mission.

    b.   Scenario 2: AU/Regional observer mission co-deployed with a UN Mission.

    c.   Scenario 3: Stand-alone AU/Regional observer mission.

    d.   Scenario 4: AU/Regional peacekeeping force for Chapter VI and preventive deployment missions (and peace-building).

    e.   Scenario 5: AU peacekeeping force for complex multidimensional peacekeeping missions, including those involving low-level spoilers.

    f.   Scenario 6: AU intervention, e.g., in genocide situations where the international community does not act promptly.[30]

The first four scenarios require a force deployment within 30 days of an AU mandate. Given the comparative simplicity of these operations, the AU required that all regional organizations develop the necessary capacity by June 2006.[31] During "Phase Two" of development, from June 2006 to June 2010, the AU has shifted its focus to the multidimensional missions required for scenarios five and six. For these options, the deployment timetable depends on the nature of the mission. In the case of scenario 5, deployment must be completed within 90 days of the AU mandate.[32] Scenario 6, in contrast, requires that the AU "have the capability to deploy a robust military force in 14 days."[33]

Having established a list of the possible missions in which the ASF could operate, the AU then turned its attention to the structure of the proposed force. It was determined that each regional brigade would be composed of:

- Brigade (Mission Level) HQ and Support Unit of up to 65 personnel and 16 vehicles
- HQ Company and Support Unit of up to 120 personnel;
- Four Light Infantry Battalions, each composed of up to 750 personnel and 70 vehicles;
- Engineer Unit of up to 505 personnel;
- Light Signals Unit of up to 135 personnel;
- Reconnaissance Company (Wheeled) of up to 150 personnel;
- Helicopter Unit of up to 80 personnel, 10 vehicles and 4 helicopters;
- Military Police Unit of up to 48 personnel and 17 vehicles;
- Light Multi-Role Logistical Unit of up t 190 personnel and 40 vehicles;
- Level 2 Medical Unit of up to 35 personnel and 10 vehicles;
- Military Observer Group of up to 120 Officers; and

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[29] Member States of the Organization of African Unity, *Protocol Relating to the Establishment of the Peace and Security Council of the African Union*, 2003, Art. 13(1).

[30] African Union, *Roadmap*, Annex A, para. 1.

[31] Ibid., Art. 3.

[32] African Union, *Roadmap*, Annex A, para. 1.

[33] Ibid.

- Civilian Support Group, consisting of logistical, administrative and budget components.[34]

In addition, the military force is to be supplemented by key civilian personnel and police units.[35] At the time of writing, the five regions have achieved vastly different levels of implementation. The nations of West Africa, grouped together under the Economic Community of West African States [ECOWAS] are by far the most advanced, with preparations well underway for a standing brigade of 6,500 troops.[36] North Africa's efforts to put together a regional military force have, in contrast, failed to come to fruition.[37]

b. "An impression among some that 'civilians just arrive':" The Development of the Civilian Dimension of the ASF[38]

As previously discussed, the AU also envisioned a civilian component within the ASF. This dimension has until recently, however, been neglected within the initial preparations. While guidelines, timetables and logistical requirements were established for the military elements, the issue of civilians was largely ignored until 2006.[39]

There are a number of potential reasons for this delay. First, both the regional organizations and the African Union face legitimate logistical and funding constraints. As of July 2009, for example, only one of the Regions had a civilian planning officer within its planning body.[40] At the AU Headquarters in Addis Ababa, no such staff member exists.[41] While the AU Peace Support Operations Division [PSOD] is in the process of rectifying this oversight, the remaining regional organizations appear unlikely to address this gap in the near future.[42] As a result, there are few within positions of power who are focused on the civilian dimension of the Force.

The delay also reflects the underlying attitude of many within the ASF and AU toward civilian peace-builders. As the Head of the PSOD acknowledged in 2008, there "still seemed to be an impression among some that 'civilians just arrive' on their own accord" and thus, are outside the scope of concern for the military forces.[43] In fact, the AU made a conscious decision to omit civilian preparations during Phase One of development because it felt that "humanitarian, development and human rights elements"

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[34] Wolf Kinzel, *The African Standby Force of the African Union: Ambitious Plans, Wide Regional Disparities: An Intermediate Appraisal* (Berlin: Stiftung Wissenschaft und Politik, German Institute of International and Security Affairs, 2008), 11.

[35] African Union, *Roadmap*, Annex A, Art. 3.

[36] Kinzel, *The African Standby Force*, 20.

[37] Ibid.

[38] Yvonne Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop* (Durban: ACCORD, 2009), 10.

[39] *See, e.g.,* Ibid.

[40] The AU Peace Support Operations Division, *Concept Note: A Civilian Standby Roster for the African Standby Force* (Dar es Salaam, 2009), para. 9.

[41] Ibid.

[42] Ibid.

[43] Yvonne Kasumba et al. *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop* (Durban: ACCORD, 2009), 10.

could simply "deploy in tandem with an ASF mission."[44] While preparations are now underway to address the civilian dimension, this underlying attitude may help to explain the problems with the proposed structures discussed later in this section.

Following the recent recognition that insufficient time or money had been spent "exploring which civilian functions were required, the exact timing that they should be deployed, under which sorts of contracts and other related considerations," the ASF began to lay the groundwork for two areas of civilian involvement: at the time of deployment and in post-conflict settings.[45]

i. Civilian Involvement at the Time of Deployment

The first issue for consideration is the personnel required at the time of the initial deployment. Prior to June 2010, the ASF must determine what sort of civilian staff would be needed to support the military brigade and at what time they would need to be operational. While plans remain in the draft stages, the current consensus is that each Regional Force should develop, in addition to the military brigade, sixty civilian staff positions.[46] Of these, fifteen positions, "reflecting the most important elements without which a multi-dimensional mission should not deploy," must be prepared for rapid mobilization.[47] According to the most recent proposals, the initial wave would include the head of the mission and his or her assistant, a political affairs officer, a spokesperson, a civil affairs officer and his or her assistant, and finance, security, administration, IT and communications staff.[48] As the security environment improves, the remaining staff could then slowly be deployed.[49] Other civilian personnel considered within current drafts include two legal officers, two post-conflict reconstructions advisors, and two human rights officers.[50]

In order to ensure that such personnel are available at the time of the emergency, the ASF is in the process of developing a Civilian Standby Roster.[51] Each regional organization will be responsible for maintaining its own database of trained, vetted staff, who are capable of rapid deployment.[52] A copy of the master list would then be made available to the AU headquarters in Addis Ababa.[53] Recognizing that civilians may not always be able to deploy when the mission requires, experts recommend that each roster contain at least 300 names, thus ensuring that a minimum of five people are listed for each position.[54] Given the delayed start on the civilian preparations, the development of

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[44] African Union, *Roadmap*, Annex A, para. 4.

[45] Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop*, 10.

[46] Ibid., 21.

[47] Ibid., 21; The AU Peace Support Operations Division, *Concept Note*, para. 15 (b).

[48] Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop*, 19.

[49] Ibid.

[50] Ibid., 20.

[51] The AU Peace Support Operations Division, *Concept Note*, para. 4.

[52] Ibid.

[53] Ibid.

[54] Ibid., para. 15(c).

the Roster is still in its earliest stages and may require up to three more years to complete.[55]

ii. Civilian Involvement in Post-Conflict Settings

The AU has also begun to plan for a civilian role in the post-conflict environment. Within the draft SOP for the "Civilian Component Other Than Police," the ASF acknowledges that a Civilian Administration [CA] may be required in the wake of a military intervention to carry out such tasks as replacing governmental and administrative institutions and assuring the "safe and unimpeded return of all refugees and displaced persons to their homes."[56] The document also outlines the potential organizational structures or personnel that may be required for achieving these goals. It is important to note, however, that the provisions contained within the draft are little more than recommendations. Each position described in the Chapter is not required but rather, could simply "be foreseen in the structure" of a CA.[57] Unable to predict the nature of the mission or the emergency in question, the ASF cautions that the SOP is merely a "non-prescriptive model" that should be used for planning purposes only.[58]

One of the potential elements envisioned within a CA is a rule of law division.[59] While acknowledging that the exact details of the unit will depend upon the specific needs of the country in question, the document, nevertheless, suggests that five basic components "could be foreseen."[60] These include:

1. A legislative unit "for supporting review of local legislation."[61]
2. A court unit to support, or establish, "local court administrations."[62]
3. A prosecution unit to support, or establish, "local prosecution authorities."[63]
4. A penal management unit to support, or establish, "local penitentiary or correctional authorities."[64]
5. A human rights unit "for horizontal support to other units on human right issues as well as support to local authorities."[65]

The document, in turn, provides a basic overview of the staff required for each of the units. Job descriptions are attached as an annex to the chapter and provide an extensive, and ambitious, list of the qualifications desired for key positions. A Head of Rule of Law Mission, for example, should possess at least twelve years experience, "in-depth theoretical knowledge of international and African standards and significant experience in applying legal expertise," and "in-depth theoretical and practical understanding of the

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[55] Ibid., para. 14.
[56] African Union, *Chapter 9*, Art. 9.1.1 (2).
[57] African Union, *Chapter 9*, 9.1.2 (11).
[58] Ibid., 9.1.2 (4).
[59] Ibid., 9.2.
[60] Ibid., 9.2.2 (4).
[61] Ibid., 9.2.2 (4)(a).
[62] Ibid., 9.2.2 (4)(b).
[63] Ibid., 9.2.2 (4)(c).
[64] Ibid., 9.2.2 (4)(d).
[65] Ibid., 9.2.2 (4)(e).

independence of judiciary principle."[66] At minimum, the draft calls for "international experts" with "extensive experience and knowledge of the local legal system."[67] In theory, such expectations are reasonable. In practice, however, the descriptions contained within the SOP can only be achieved if they are combined with greater action on behalf of the civilian dimension of the Force. The planners of the ASF demand the most qualified staff but have only just begun to hire such officials or consider what their role would be within future missions. As such, they appear to have confused civilian experts, with existing jobs and families, with military personnel, who are able to deploy at a moment's notice. If the ASF is, in fact, committed to this level of expertise, it must ensure that such staff are identified in advance, their services retained and their details included within the Civilian Standby Roster. Without such advanced preparation, however, the job descriptions will matter little and the ASF will be forced to simply accept what it can get.

iii. The Problems with the Current Proposals

Having discussed the preparations as they currently stand, it is now necessary to address the gaps within the proposals and in particular, the problems that exist from a RoL perspective. With regards to the initial deployment plans, a number of potential issues emerge. First, it is important to remember that the plans remain in draft form. Although the ASF is scheduled to be operational in less than a year, the civilian deployment preparations are still in their earliest stages.

Furthermore, the plan is weak from a RoL standpoint. While the draft calls for two legal advisors and two post-conflict reconstruction advisers, no specific provision is made for RoL. The legal officers, for example, are assigned to provide legal advice to the mission, not assist with judicial or penal reform.[68] As it currently stands, the post-conflict reconstruction advisers are, in turn, not RoL specialists.[69] This perhaps hints at the underlying lack of understanding or appreciation for the civilian element discussed earlier in this paper. Post-conflict reconstruction is an enormous field, covering a diverse range of issues. Such an adviser could, in theory, specialize in everything from economic development to disarmament, demobilization and reintegration [DDR]. Such diversity is not, however, accounted for within the draft. While the military would never ask a Light Infantry Officer, for example, to perform the same duties as personnel in the Medical Unit, the implication is that the planners would expect a DDR expert to act as a RoL specialist. Such cross-over is, however, unrealistic and unlikely to bring about a successful post-conflict reconstruction.

Similar problems exist with the draft SOP for the CA. At first glance, the chapter is impressive, covering every aspect of a potential civilian mission. The rule of law issues discussed within Part I, for example, are all seemingly addressed, with provisions made for everything from penal reform to defense services. It is vital to remember, however, that the chapter is purely for planning purposes and as such, of limited value.

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[66] African Union, *Chapter 9*, Annex B, para. 1.
[67] *See, e.g.,* Ibid., 9.2.2 (4)(b).
[68] Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop*, Table A.
[69] Ibid., 19.

Asked to imagine what could prove useful within a civilian mission, the planners have been ambitious and provided a long list. There is, however, nothing to ensure that these proposals will ever become reality.

To make matters worse, early indications from the ASF suggest that the organization has no intention of adopting such a wide-ranging strategy. At the 2008 Civilian Dimension Workshop, for example, the Committee questioned whether funding would ever be available for "larger UN-type civilian components" and, therefore, recommended that the Force aim for "fewer, but more broadly functioned, civilian staff."[70] Furthermore, the ASF does not view itself as a long-term reconstruction force. The same Committee argued that "it can be deducted (sic) that the AU is likely to undertake limited stability-type operations … and that the UN may, in many cases where sufficient stability has been achieved, follow on with longer-term peace-building type missions."[71] It further stated that the missions are "unlikely to take on post-conflict reconstruction functions such as DDR, SSR and RoL reform, other than laying the foundations for these aspects in the initial stages of the transition process."[72] There is, therefore, a disconnect between what is planned for and what is imagined in reality. While the ASF has, in theory, considered what may be necessary to address RoL within a post-conflict setting, it has, at the same time, limited such declarations to a purely hypothetical realm.

III.   "If we do not get rule of law and security right, nothing else will work:"
The Importance of RoL for Peacekeeping Operations[73]

"In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in the police and courts."
        - Lord Paddy Ashdown, Former High Representative for Bosnia-Herzegovina [74]

Thus far, this paper has pointed to potential gaps within the proposed structure of the civilian component of the ASF and highlighted the underlying attitude of many decision makers toward peace-building. It has yet to explain, however, why RoL is of critical importance for a military peacekeeping force, such as the ASF. The remaining sections of this paper will discuss both why RoL should be considered a high priority issue for peacekeepers and why it should be addressed from the earliest stages of deployment.

i. Why is Rule of Law Important for Military Peacekeepers?

In many regards, this question has already been answered by the UN. Following the peacekeeping failures of the 1990's, the UN Secretary General, Kofi Annan,

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[70] Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop*, 18.

[71] Ibid.

[72] The AU Peace Support Operations Division, *Concept Note*, para. 9.

[73] Williamson, "When the Fighting Stops," 1254.

[74] Lord Paddy Ashdown, quoted in Tolbert and Solomon, "United Nations Reform," 31.

commissioned a group of high level experts to assess the shortcomings of the current peacekeeping system and recommend areas for change. The study's findings, published in August 2000 in the *Report of the Panel on United Nations Peace Operations* or "The Brahimi Report," proved revolutionary. Hailed by some as the "most important document about peacekeeping ever written," the Report critically examined both the failures and successes of past missions and ultimately, recommended broad changes in the way that missions are "conceived, planned and executed."[75] Much of its criticisms fell on the inadequacy of traditional peacekeeping. The Report acknowledged that operations were increasingly required for intra-state, rather than inter-state, conflicts.[76] As a direct result, contemporary forces "do not deploy into post-conflict situations so much as they deploy to create post-conflict situations."[77] Within this complex environment, it concluded that traditional peacekeeping, "which treats the symptoms rather than sources of conflict, has no built-in exit strategy and associated peacemaking," was insufficient.[78]

The Report instead calls for a shift in focus to complex peace operations, which combine military troops with civilian peace-building forces, such as police, judicial experts and human rights specialists.[79] Within its findings, the Report is careful to stress that the military component is not, as was previously thought, more important to the success of the mission than the civilian element.[80] Peacekeepers and peace-builders are, instead, "inseparable partners" within complex peace operations, with mutually beneficial roles.[81] From the outset, peacekeepers must create "a secure local environment for peacebuilding."[82] Peace-builders, in turn, ensure that that environment is "self-sustaining" and stable enough to permit the peacekeepers' eventual departure.[83] The Report, ultimately, explains the relationship as such: "while the peacebuilders may not be able to function without the peacekeepers' support, the peacekeepers have no exit without the peacebuilders' work."[84]

Having "acknowledged the importance of peace-building as integral to the success of peacekeeping operations," the Brahimi Report then addresses the elements required for an effective peace-building strategy.[85] One such component is rule of law.[86] There are a number of reasons for its inclusion. First, and foremost, rule of law is vital for establishing meaningful internal security within a post-conflict state. In the immediate aftermath of a military intervention, a postwar society will often face problems of crime, corruption and general instability.[87] Within Iraq, for example, the

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[75] Quoted in Dana Michael Hollywood, "It Takes A Village . . . Or At Least A Region: Rethinking Peace Operations In The Twenty-First Century, The Hope And Promise Of African Regional Institutions," *Florida Journal of International Law* 19 (2007): 123.
[76] The Brahimi Report, para. 17-19.
[77] Ibid., para. 20.
[78] Ibid., para. 17.
[79] Ibid., para. 17-19.
[80] Ibid., para. 28.
[81] The Brahimi Report, para. 28.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid., para. 35.
[86] Ibid., para. 39-40.
[87] Tolbert and Solomon, "United Nations Reform," 29-30.

collapse of Saddam Hussein's regime in April 2003 led to a wave of looting and crime throughout the country. [88] Having survived a period of violence, the general population is eager for a return to normalcy and concerned with reestablishing basic stability.[89] Although internal security is critical to "avert chaos and prevent criminal and insurgent organizations from securing a foothold in society," it is generally not an appropriate focus for a military force.[90] Peacekeepers are designed to broker agreements or monitor ceasefires, not arrest organized crime gangs and petty looters.

Such duties instead fall under the purview of three key RoL elements: the police, the prisons and the judicial system.[91] While the ASF has made provisions for a civilian police component, this force is, by itself, insufficient to establish the necessary security. In order for a police to operate effectively, the unit must have support from prisons, lawyers and judges. If the police arrest fifty criminals, they must, ultimately, "have a prison system that is capable of processing fifty new prisoners and a court system that is capable of handling fifty new cases."[92] A common analogy used to describe this relationship is that of the three legged stool: "if any one of the legs is shorter than the other, the stool will collapse" and internal security will remain an elusive prospect.[93] This dilemma was best exemplified in Liberia, where police lack the support of an effective judiciary or functioning prison system. In many regions, criminals are arrested but escape prosecution because of inactive courts.[94] Other counties lack operational prisons, forcing magistrates to release those convicted of crimes.[95]

While "getting bad actors off the street is a priority,…it is not an end in itself."[96] Having begun the process of addressing crime, a post-conflict society must then move towards developing the "self-sustaining" environment discussed in the Brahimi Report.[97] Again, RoL can play a vital role. It can, for example, contribute to political, economic and social reconstruction. In the wake of violence, outside parties are often unwilling to invest in a post-conflict state, out of fears of corruption, crime and continued instability.[98] Domestic actors can, in turn, feel little incentive to produce if they believe that the fruits of their labor will simply be taken through corruption or graft.[99] A nation's political climate can be equally stifled in a post-conflict environment. Concerned about their safety and families, many people will be unwilling to step forward and take charge of the nascent society.[100] Rule of law reforms can, however, help to address these underlying problems by introducing, or reintroducing, stabilizing institutions within a post-conflict

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[88] Jones et al., *Establishing Law and Order*, 9. .

[89] Voorhoeve, *From War to the Rule of Law*, 99.

[90] Seth G. Jones et al., *Establishing Law and Order After Conflict* (Santa Monica: Rand Corporation, 2005), 7.

[91] Williamson, "When the Fighting Stops," 1257.

[92] Jones et al., *Establishing Law and Order*, 7.

[93] Williamson, "When the Fighting Stops," 1257.

[94] International Crisis Group, *Liberia: Resurrecting the Justice System* (Dakar/Brussels: Crisis Group Africa Report No. 107, 2006), 1

[95] .Ibid, 17

[96] Williamson, "When the Fighting Stops," 1257.

[97] The Brahimi Report, para. 28.

[98] Stromseth et al., *Can Might Make Rights?*, 58; *see also* Charles T. Call, Introduction to *Constructing Justice and Security After War,* by Charles T. Call (Chicago: University of Chicago Press, 1982), 14 .

[99] Kelly, "Responsibility for Public Security in Peace Operations," 142.

[100] Kelly, "Responsibility for Public Security in Peace Operations," 142.

environment. Through the strengthening of criminal justice mechanisms, the establishment of functioning government institutions and the creation of an efficient and independent judiciary, a peace support operation [PSO] can, ultimately, begin the process of rebuilding confidence within a community and lay the groundwork for future reconstruction.

A "self-sustaining" environment also requires that a community address the crimes of its past. As has been demonstrated time and time again, "[m]ost wars sow the seeds of new violence."[101] While active conflict may have come to an end, underlying tensions may, nevertheless, remain. If these latent grievances are suppressed within a post-conflict state, rather than addressed head-on, a society runs the risk "that new structures of law will be built upon shaky foundations."[102] RoL mechanisms can, however, provide a way to address these tensions. Through criminal trials or lustrations programs, for example, a PSO can help society address the crimes of its past and ensure that potential spoilers are held to account.

For the purposes of a military peacekeeping operation, RoL is necessary to establish internal security, to lay the groundwork for larger reconstruction efforts and to prevent the reemergence of conflict. It is, therefore, a basic precondition for a nation's stability and by extension, the "self-sustaining" environment required for a peace operation's exit.

ii. Why is RoL an immediate priority issue?

The remaining question relates to timing. As it currently stands, preparations for the ASF appear premised on the assumption that the UN will assume responsibility for longer term issues of post-conflict reconstruction.[103] As a result, the Force is neither overly concerned with these problems nor prepared to handle them in the immediate aftermath of a deployment.

The delay envisioned by the ASF could, however, prove debilitating. Studies have shown that there is a "golden hour" to effect change in the wake of an intervention, "an optimal time frame or 'window of opportunity' of several weeks to a month to get a country back on track."[104] During this period, "[t]he population is hopeful. Defeated war leaders and black marketers are in hiding or on the run. Spoilers of the peace may need some time to lick their wounds and regroup before they can disturb peacebuilding."[105] By combining an eager and accommodating population with a disorganized opposition, the "golden window" can provide the necessary opening for peacekeeping missions to initiate reforms and to begin to rebuild institutions.[106] During the early stages of an operation, the intervening force is, therefore, in the strongest position to effect meaningful, and potentially widespread, change.

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[101] Voorhoeve, *From War to the Rule of Law*, 19.

[102] Jane E. Stromseth, "Pursuing Accountability For Atrocities After Conflict: What Impact On Building The Rule Of Law?," *Georgetown Journal of International Law* 38 (2007): 251.

[103] *See, e.g.,* Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop*, 18.

[104] Voorhoeve, *From War to the Rule of Law*, 118.

[105] Ibid.

[106] Jones et al., *Establishing Law and Order,* 208.

Failure to take advantage of this opportunity can, in turn, have a dramatic impact on the success of the mission as a whole.[107] It can, for example, damage an operation's credibility with the local populace.[108] As has been previously discussed, the population's first priority is often basic security. If an operation is unable to achieve this order, the public may quickly become disillusioned and disinterested.[109] Furthermore, it has been shown that reforms, in areas such as RoL, become increasingly difficult to initiate in the later stages of an operation.[110] The United Nations Interim Administration Mission in Kosovo ("UNMIK"), in particular, "found that failure to engage *immediately* with rule of law questions can eliminate the opportunity to maximize the impact of international engagement."[111] As a missions progresses, local leaders and spoilers begin to reemerge, each with their own agendas and set of goals. Once these forces become entrenched within society, "it will be difficult to get the cooperation of all parties for a better re-start of the country's future."[112] An immediate rule of law focus is, therefore, critical to securing order and solidifying peace within a post-conflict nation. While the ASF would prefer to leave such complicated issues to the better-funded and better-staffed United Nations, neither the Force nor the post-conflict state may, ultimately, have this luxury.

IV.   Recommendations

"Every conflict, every crisis, every country is unique, and thus there is never going to be a one-size-fits-all solution. Yet, we can learn from our experiences over the last fifteen years and do a much better job preparing for and fashioning our responses to the next crisis that presents itself. Because if anything is certain, there will be a next time."[113]

> *- Ambassador Clint Williamson, Former Senior Director for Relief, Stabilization, and Development (UNMIK)*

Having established the importance of post-intervention RoL reform and the need for its immediate implementation, this paper will conclude with four basic recommendations for ways in which to strengthen the ASF's capacity in this area. Many of these suggestions are based upon the lessons learned from past UN peacekeeping missions. While this paper acknowledges the key differences between the capacity of the UN and the future ASF, the experiences of the past operations are, nevertheless, relevant.

Based on the foregoing discussions, it is recommended that the ASF:
- ensure that RoL officers are included within a civilian deployment;
- consider developing a model criminal code and model criminal procedure;
- explore the option of a military RoL team; and

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[107] *See e.g.* Voorhoeve, *From War to the Rule of Law*, 118; *see also* Jones et al., *Establishing Law and Order,* 208; Chesterman, "Rough Justice," 94 .

[108] *See e.g.* Jones et al., *Establishing Law and Order*

[109] *See e.g.* Ibid.

[110] Voorhoeve, *From War to the Rule of Law*, 118.

[111] Chesterman, "Rough Justice," 94 .

[112] Voorhoeve, *From War to the Rule of Law*, 118.

[113] Williamson, "When the Fighting Stops," 1263.

- ensure that the Civilian Standby Roster reflects an appropriate focus on RoL.

i. *Recommendation 1: Ensure that RoL Officers are included within a Civilian Deployment*

The most basic, and immediate, change that can be made relates to the staffing of the civilian deployment contingent. As has been previously discussed, the current drafts call for two legal advisers and two post-conflict reconstruction officers. No provision has, however, been made for a RoL expert. If funding permits it, it may be valuable to add at least two such positions to the proposed deployment force, bringing the total number of civilian staff to sixty two. In an ideal world, a RoL section, similar to the hypothetical model discussed within the CA SOP, would be made available for immediate deployment.

In the more likely event that logistical constraints limit the number of civilian staff, the ASF must ensure that RoL is addressed by the positions currently envisioned. One of the post-conflict reconstruction officers should have experience with RoL and in particular, be versed in issues of judicial and penal reform. Although the ASF would prefer to have "fewer, but more broadly functioned, civilian staff," it is unrealistic to expect a post-conflict reconstruction adviser, who may specialize in anything from economic development to DDR, to successfully handle extensive rule of law reform.[114] In order to ensure that this issue is addressed by someone with the appropriate expertise and knowledge, it is vital that the ASF make provisions for at least one RoL staff member within its civilian deployment plans.

ii. *Recommendation 2: Consider Developing a Model Criminal Code and Model Criminal Procedure*

Although the ASF would like to avoid any "longer-term peace-building type missions," its development of the CA SOP suggests that it at least acknowledges the possibility that the Force may be required to assume control of a post-conflict state.[115] There are, in turn, steps that can be taken in advance of this type of an operation to make the transition easier for the PSO. In the area of RoL, for example, the ASF could prepare a model criminal code and criminal procedure.

The idea of developing pre-determined law came out of the UN operations in East Timor and Kosovo. In both cases, peacekeeping forces discovered, upon their arrival, a complete RoL vacuum. Key justice structures and state institutions had collapsed over the course of the conflict.[116] In the case of East Timor, for example, the nation's judicial structure had been staffed almost entirely by Indonesians during the occupation. Once violence erupted, these officials fled the country, leaving East Timor with only seventeen trained lawyers. Furthermore, Indonesian militias had destroyed official government

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[114] Kasumba et al., *Report of The African Standby Force Civilian Dimension Staffing, Training And Rostering Workshop*, 18.

[115] Ibid.

[116] *See, e.g.,* Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 16 (2003): 250.

buildings during the referendum violence, including the majority of the nation's courthouses. Trained personnel had, in turn, either fled the country or been killed during the fighting.[117] Although the United Nations was to assume governing authority within each state, the transitional administrations were unsure as the applicable domestic law.[118] As a result, extensive time, money and effort was wasted while the UN decided what laws were relevant and began to train the local and international staff on their provisions.

These problems were later documented within the Brahimi Report. Within its findings, the Panel acknowledged that the UN "currently has no answer to the question of what [a peacebuilding] operation should do while its law and order team inches up the learning curve."[119] Even in those cases where "the choice of local legal code were clear," the Report noted that a "mission's justice team would face the prospect of learning the code and its associated procedures well enough to prosecute and adjudicate in court."[120] It concluded that such training could take as long as six months.[121]

Frustrated by these initial, and potentially damaging, delays, those involved with the operations in East Timor and Kosovo have since called for the development of "quick-start" rule of law packages for future peacekeeping missions, involving readily applicable criminal procedure and criminal codes.[122] Such suggestions were later embraced by the Brahimi Report, which concluded that the missions' "tasks would have been much easier if a common United Nations justice package had allowed them to apply an interim legal code to which mission personnel could have been pre-trained."[123]

While such codes would only be required in the most extreme scenarios, they may, nevertheless, be a relevant tool in the ASF's peacekeeping arsenal.[124] First, the codes can help with the critical problems of timing and internal security. If such pre-determined law exists, the various peacekeeping and peace-building forces can be trained on the codes prior to deployment. When they arrive in country, they can then bypass the typical step of determining, and learning, the relevant domestic criminal provisions and be in a position to immediately address the law and order vacuum.[125] It is important to stress that the proposed codes would not form a permanent solution but would, instead, act as a temporary stopgap measure. The codes allow the PSO to immediately address the problems of crime and instability, while at the same moment, providing local parties with the necessary space and time to develop a long-term solution.[126] By extension, such pre-determined law allows international and internal actors to regroup, without sacrificing basic security. Given the importance of the "golden hour" previously discussed within this paper, such speed could prove critical to a successful operation.

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[117] Ibid.

[118] *See, e.g.,* Chesterman, "Rough Justice," 84-85.

[119] The Brahimi Report, para. 80.

[120] Ibid.

[121] Ibid.

[122] Hansjorg Strohmeyer, quoted in Bruce M. Oswald, "Model Codes For Criminal Justice And Peace Operations: Some Legal Issues*," Journal of Conflict & Security Law* 9 (2004): 257.

[123] The Brahimi Report, para. 81.

[124] Oswald, "Model Codes For Criminal Justice," 256.

[125] The Brahimi Report, para. 80.

[126] Oswald, "Model Codes For Criminal Justice," 256.

In addition, the use of temporary law could help to solidify and strengthen the peace. Within many post-intervention states, there is widespread distrust of the law amongst the population. Legal structures and state institutions were often used as a tool of repression during the violence, allowing one group to suppress another.[127] Choice of law can, therefore, be a major factor in helping to either contain, or reinvigorate, underlying grievances. If the peacekeepers choose to adopt the laws of one group over those of another, for example, there is a potential for one side to feel slighted, or to question the bias of the peace operation.[128] A neutral, outside law could, however, help to avoid this tension.

Given the legitimate staffing and funding constraints faced by the ASF, the practicality of a recommendation is obviously a vital consideration. The development of these codes should not, however, prove overly difficult or time-consuming. In fact, a number of international academic and research institutions have already developed sample models codes.[129] The ASF could, therefore, adopt one of these drafts and adjust the document as it saw fit. Alternatively, the ASF could develop its own codes. The self-contained geography of the African Union might, in fact, lend itself to this approach. While the UN must develop a document that is appropriate across the globe, the AU is blessed with a narrower focus. It could even ask the regional organizations to develop their own models and thus, better capture the continent's cultural, religious and geographic diversity. By limiting both the parties involved in the conflict, and the potential states in which the codes could be used, the ASF may be able to develop more applicable and appropriate pre-determined law.

iii.   Recommendation 3: Explore the Option of a Military RoL Team

One of the greatest problems with civilian deployment regards the issue of security. Military peacekeeping forces are designed and trained to operate in situations of extreme instability. Civilians, in most cases, are not. While it may be desirable to have an extensive civilian presence in the immediate aftermath of an intervention, security concerns may make this impractical. At the same time, the problems of law and order continue to be a factor. A PSO may, therefore, be forced to balance these two considerations.

One potential solution to this dilemma could come in the form of military RoL teams.[130] A judicial unit, comprised of military judges, prosecutors and defense attorneys, could, for example, be established to hold criminal trials in the immediate aftermath of an intervention. This may not, however, prove to be the best approach for the ASF. First, there is the serious issue of capacity. While the Ghana Armed Forces, for example, has a legal services component, it is comparatively understaffed. It currently has only one

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[127] Kelly, "Responsibility for Public Security in Peace Operations," 141.

[128] Oswald, "Model Codes For Criminal Justice," 256.

[129] Sample model criminal codes and criminal procedures have been prepared by organizations like the United States Institute for Peace (USIP) and the Irish Centre for Human Rights (ICHR). *See* Oswald, "Model Codes For Criminal Justice," 257-58.

[130] *See, e.g.,* Chesterman, "Rough Justice," 97 ("[I]n an immediate post-conflict environment lacking a functioning law enforcement and judicial system, rule of law functions may have to be entrusted to military personnel on a temporary basis.")

commissioned judge within its Judge Advocate Corps and no internal defense service.[131] Ghana is, ultimately, not alone in this problem and as a result, it seems unrealistic to expect the various regional militaries to be in the position to contribute fully-functioning judicial units. Even if such units were possible, there is a second potential problem with perception. Having just experienced a period of conflict, the affected population may not feel comfortable with a military-operated justice system.

While the five regions may not have the capacity to establish fully functioning judicial units, there could, nevertheless, be a RoL role for military legal officers. Given the initial security concerns, military officers, with prior training on judicial or penal reform issues, could be deployed with the peacekeeping mission to begin reestablishing basic RoL. Once the environment was sufficiently secure, civilians could then begin to arrive and assume responsibility for this area. This approach would prevent unnecessary delays in addressing RoL issues and enable the Force to take advantage of the "golden hour" previously discussed. Given that the troop contributing nations have a legal capacity within their respective militaries, it behooves the planners of the ASF to explore the ways in these staff can be used to address RoL issues within future peacekeeping operations.

iv. Recommendation 4: Ensure that the Civilian Standby Roster Reflects an Appropriate Focus on RoL

In order to take advantage of the "golden hour" discussed above, it is vital that the ASF have "a fully recruited, trained and ready-to-deploy pool" of experts.[132] While the AU has taken the initial steps to ensure that civilian personnel are available, through the introduction of the Civilian Standby Roster, it must guarantee that the list contains sufficient rule of law expertise. As discussed earlier, the current plans for civilian deployment do not account for a RoL officer. If this omission is, in turn, reflected within the Roster, the ASF may be unable to address RoL on the ground.

The ASF should also consider adding judicial personnel to the current roster. Past peacekeeping missions, such as those in East Timor and Kosovo, have discovered a decimated judicial system upon arrival and in order to ensure RoL, were forced to bring in international judges and lawyers.[133] Other operations have found that international personnel can serve as a key stopgap measure, allowing criminal trials to occur while PSOs identify and add local lawyers.[134] By preparing a list of trained and deployable judges, prosecutors and defense attorneys in advance, the ASF will be in a position, when required, to jumpstart criminal justice proceedings on the ground and thus, move toward internal security.

V. Conclusion

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[131] Lt. Commander Ali Kamal Deen, interview by author, Kofi Annan International Peacekeeping Training Center, 24 July 2009.

[132] Jones et al., *Establishing Law and Order*, 57.

[133] *See, e.g.,* Stromseth, "Post-Conflict Rule of Law Building," 1464.

[134] Voorhoeve, *From War to the Rule of Law*, 110.

Over the last decade, the limitations of the United Nations have become increasingly clear. Under resourced and overcommitted, the UN is unable to effectively address all of the world's emergencies. As a result, much of the burden for such action has shifted to regional bodies, like the African Union. The AU has, in turn, responded to this call to action with its most ambitious move to date: the African Standby Force.

In order for the ASF to move beyond an idealistic dream and become a legitimate force for change, it is vital that the body be given the tools necessary to succeed. On the military front, the African Union is moving in the right direction, with preparations underway for five regional brigades. A large troop presence is not, however, sufficient to guarantee success. As has been recognized by the UN, peacekeeping is about more than soldiers, tanks and airplanes. Once a force is on the ground, it is also about lawyers, judges and prison guards. This paper has examined the current plans for the civilian dimension of the ASF and pointed to key failures within the area of RoL. So long as these gaps remain, the ASF is primed for ultimate failure. Although its troops may be able to temporarily end the violence, the Force will lack the manpower necessary to ensure lasting peace. As the AU enters the final stages of its preparations, it must, ultimately, recognize that "[i]f we do not get rule of law and security right, nothing else will work."[135]

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[135] Williamson, "When the Fighting Stops," 1254.

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