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DEMOCRATIC GOVERNANCE



**GUIDANCE NOTE ON ASSESSING THE
RULE OF LAW USING INSTITUTIONAL
AND CONTEXT ANALYSIS**

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|---|-----------|
| Acronyms | iii |
| Acknowledgements | iv |
| Preface | v |
| Executive Summary | 1 |
| PART 1 | 2 |
| SECTION 1A. Introduction | 2 |
| Defining rule of law | 2 |
| Purpose of this guidance note | 4 |
| How does this note complement other UNDP approaches to assessment and other programming approaches? | 4 |
| SECTION 1B. Using institutional and context analysis to support the rule of law | 9 |
| Institutional and context analysis | 9 |
| Relevance of ICA in a rule of law context | 11 |
| Applying ICA to the rule of law | 13 |
| Potential areas of intervention in rule of law programming | 15 |
| PART 2 | 20 |
| SECTION 2A. Conducting a rule of law focused institutional and context analysis | 20 |
| Before starting: some practical considerations | 20 |
| Step 1: Defining the scope of the rule of law institutional and context analysis | 20 |
| Step 2: Analysis of formal and informal rule of law institutions | 22 |
| Step 3: Rule of law stakeholder analysis | 27 |
| Step 4: Engagement strategy | 32 |
| Step 5: Risk analysis and mitigation | 34 |
| Step 6: Potential for change and actions to be prioritised | 36 |
| SECTION 2B. Operationalising the rule of law ICA | 39 |
| Methods, processes and templates | 39 |
| Working with partners | 43 |
| Data collection | 44 |
| Rule of law ICA and ICTs | 45 |

TABLE OF CONTENTS

BOXES

| | | |
|----------|--|-------|
| Box I | Guiding principles for UN rule of law assistance | 3, 21 |
| Box II | What are formal and informal institutions? | 23 |
| Box III | An example of an informal institution | 24 |
| Box IV | Assessing public opinion, perceptions and experiences in access to justice in the Maldives | 26 |
| Box V | Informal governance and ICA in Yemen | 30 |
| Box VI | Identifying the best way to support security, justice and the rule of law in Nepal | 32 |
| Box VII | Understanding likely project limitations in Nepal | 38 |
| Box VIII | Example of good practice in data collection methods from Malawi | 44 |
| Box IX | ICTs and ICA in action | 45 |

TABLES

| | | |
|----------|---|----|
| Table I | How can rule of law ICA be used with other UNDP knowledge products and tools? | 7 |
| Table II | Rule of law thematic areas, activities, institutions and stakeholders | 16 |

| | | |
|--------------|---|----|
| ANNEX | Selected bibliography and further reading | 46 |
|--------------|---|----|

| | |
|----------------|--|
| ADR | Alternative dispute resolution |
| A2J | Access to justice |
| BCPR | Bureau for Conflict Prevention and Recovery |
| BDP | Bureau for Development Policy |
| CCA | Common country assessment |
| CEDAW | Convention on the Elimination of all forms of Discrimination against Women |
| CHT | Chittagong Hills Tract |
| CO | Country office |
| CSO | Civil society organization |
| DGTTF | Democratic Governance Thematic Trust Fund |
| DfID | UK Department for International Development |
| DRC | Democratic Republic of Congo |
| FLA | Free legal aid |
| GTG | Gender theme group |
| HRBA | Human rights based approach |
| ICA | Institutional and context analysis |
| ICA-GN | Institutional and context analysis guidance note |
| ICTs | Information and communication technologies |
| IJS | Informal justice system |
| MDG | Millennium Development Goal |
| M&E | Monitoring and evaluation |
| NGO | Non-governmental organization |
| OGC | Oslo Governance Centre |
| PAPEP | Political analysis and prospective analysis project |
| RoL | Rule of law |
| SGBV | Sexual and gender based violence |
| ToR | Terms of reference |
| UN | United Nations |
| UNCT | United Nations country team |
| UNDAF | United Nations Development Assistance Framework |
| UNDP | United Nations Development Programme |

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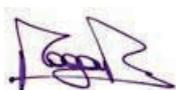
Special thanks go to the participants of the UNDP regional workshop on 'Innovating for Rule of Law, Justice and Human Rights, Institutional and Context Analysis Workshop for ECIS', which took place in Tbilisi in October/November 2013. Their valuable feedback was key to ensuring the relevance of this publication to UNDP Country Offices.

PREFACE

UNDP began developing guidance on institutional and context analysis (ICA) because of the conviction that progress towards human development requires changes in power relations and deeper understanding of politics. Understanding who is powerful, who is not and, more importantly, why, requires a careful reading of the institutional, social and political interactions in a given development setting. With these insights, factors that are likely to promote or block development become clearer, as do the reasons why certain groups of people are marginalised and excluded. Too often development practitioners have over-prioritised technical solutions at the expense of a fuller appreciation of power and its uses and, as a result, many technically-sound development programmes have failed to make a difference. The ICA guidance note recognizes this and provides support for practitioners to undertake problem-driven analysis.

The 'Guidance Note on Assessing the Rule of Law using Institutional and Context Analysis' takes UNDP's generic guidance on ICA and applies it to the rule of law. Perhaps no other development area is as defined by the use of power as the rule of law; we know that patterns of marginalisation and exclusion—including around gender—are reinforced by legal systems that reflect patterns of power in societies. Though the principles of rule of law, reflected in a framework of international norms and standards, set out that every person is subject to the law and that the laws in place in a country should be fair, non-discriminatory and respect human rights, the reality is very different. At the country level, strengthening the rule of law is really only effectively done when the diversity of national experiences and power relations is taken into consideration.

Against this backdrop, this guide will provide practitioners working on all aspects of the rule of law with valuable advice intended to improve the way UNDP works on these matters. By setting out a structured way for practitioners to address complex questions it will help to gauge what could make a project succeed or fail in a given environment. It will contribute to risk assessments and will help identify which development interventions are most likely to lead to positive change. Ultimately, this guide is a tool that will contribute to improving the effectiveness of rule of law programmes and strategies as well as support for national dialogue and policy development. Through doing so, the guide contributes to the achievement of UNDP's Strategic Plan for 2014-17, which recognises the importance of the rule of law in accomplishing the goal of poverty alleviation and the reduction of inequalities and exclusion. We hope the guidance contained herein will contribute to bringing this goal one step closer.



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EXECUTIVE SUMMARY

The rule of law is a broad and politicized area that can be difficult to engage with to achieve development ends. It is, therefore, highly beneficial for development practitioners to conduct specialized institutional and context analyses to assess rule of law contexts in order to appreciate and navigate the complex interplay of stakeholders, incentives and vested interests that affects development interventions in this area.

Laws and regulations, as well as their implementation, reflect the power structures that affect broader governance dynamics and are part of larger political circumstances. Addressing deficiencies in the courts, laws and formal justice and security sector institutions is often critical to promoting the rule of law. However, other complex problems, such as poverty, social exclusion and public sector capacity, can fundamentally impinge on the functioning of the rule of law. Undertaking a rule of law ICA can help clarify this situation, leading to a better understanding of the interests, incentives and constraints of stakeholders at the country level. It can identify areas where UNDP can realistically make a difference as well as the most suitable areas for engagement, and risk mitigation strategies, with a view to obtaining better development results.

A rule of law ICA can be undertaken by itself or in combination with other existing UNDP tools, such as the capacity development toolbox, a human rights based approach and the gender analysis and gender mainstreaming tools. Practitioners can opt to undertake a 'light' version of an ICA by focusing on one or more particular steps, or undertake a fully-fledged ICA, depending on their needs, time and resources. The ICA methodology is not a rigid framework and practitioners will frequently find themselves referring back to previous steps of the analysis during subsequent stages of the process.

This guidance note is divided into two sections: Part 1 and Part 2. Part 1 provides practitioners with the theoretical background to a rule of law ICA and the relevance of ICA in rule of law programming. It provides information on the complementarity of ICA with other UN and UNDP tools as well as the potential areas of programming for rule of law interventions. Part 2 is the practical section of this guidance note. It provides a step-by-step guide on how to conduct a rule of law ICA, providing tips and recommendations, suggestions for guiding questions and general advice for practitioners, including advice on planning and budgeting and a sample terms of reference (ToR). More experienced rule of law practitioners and those with some previous ICA knowledge and experience may be able to skip Part 1 and focus only on Part 2.

In summary, ICA is a useful tool for practitioners to have when designing and implementing rule of law projects and programmes. It is aligned with the new UNDP Strategic Plan 2014-17, which calls for more context specific, holistic and relevant programming. It complements other UNDP tools and can be used in conjunction with Information and Communication Technologies (ICTs).

As the rule of law is prominent in UNDP's Strategic Plan 2014-17, it is crucial that UNDP's rule of law programming is strategic, effective, human rights based, context specific and adopts a do-no-harm approach, while seeking to minimize and mitigate risks. While it is not a panacea, undertaking a rule of law ICA can assist practitioners meet all of these goals.

PART 1

SECTION 1A: INTRODUCTION

Summary of Section A

Section A defines the rule of law as per UN definitions and provides the guiding principles applicable for UN rule of law assistance. It presents the purpose of this guidance note and its intended audience. It recognises that this is the only generic UNDP guidance that has been adapted specifically to the rule of law. It also defines ICA.

Rule of Law ICA complements more specific rule of law assessments by providing detailed information on the scope of the problem and how to achieve the desired outcome. In this context the section concludes with illustrating how rule of law ICA can be used with other UNDP assessment knowledge products and tools.

UN definition of ‘the rule of law’

“For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of 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.”

UN Secretary-General, 2004

For UNDP, the rule of law is both a development tool and a key enabler of the MDGs. UNDP’s Strategic Plan for 2014-17 recognizes the importance of the rule of law to the agency’s overall goal of poverty eradication and the reduction of inequalities and exclusion. It commits support for ‘citizen expectations for voice, development, the rule of law and accountability’ and recognizes that rule of law institutions deliver basic services that require universal access.¹

Support for the rule of law has advanced development through the enforcement of laws and regulations, and has enabled development outcomes by creating favourable conditions. UNDP supports rule of law projects and programmes—including legal empowerment², access to justice³ and citizen security—in more than 100 countries worldwide. This extensive portfolio spans developing, fragile and crisis-affected settings.

1 http://www.undp.org/content/undp/en/home/librarypage/corporate/Changing_with_the_World_UNDP_Strategic_Plan_2014_17.html

2 UNDP defines legal empowerment in line with the Commission of the Legal Empowerment of the Poor (2008) and the Secretary-General. “Legal empowerment of the poor can be understood as the process of systemic change through which the poor are protected and enabled to use the law to advance their rights and their interests as citizens and economic stakeholders. Strengthening the rule of law is an important contributor to the legal empowerment of the poor. While it is not a substitute for other important development interventions, legal empowerment of the poor can be a necessary condition to create an enabling environment for providing sustainable livelihoods and eradicating poverty.” Report of the Secretary-General Ban Ki Moon on Legal Empowerment of the Poor and the Eradication of Poverty, 13 July 2009

3 UNDP defines access to justice as “the ability of people to seek and obtain a remedy, through the formal or informal justice system, and in accordance with human rights principles and standards.” See ‘UNDP Practice Note on Access to Justice’ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ (S/2004/616), pg.4

Rule of law, justice and security are overlapping and interconnected concepts. This guidance note will rely on the Secretary-General's definitions of the 'rule of law'⁴, 'justice'⁵ and 'security sector'.⁶ Throughout, this text will use "rule of law" to refer to all three of these concepts.

The 2008 guidance note of the Secretary-General on the 'UN Approach to Rule of Law Assistance' provides the guiding principles and framework for UN rule of law activities at the national level that apply in all circumstances. This note is derived from United Nations norms, standards and guidance and is based on the guiding principles that shape the UN's approach.

Strengthening the rule of law through applying the aforementioned principles requires an appreciation of the underlying incentives that influence the behaviour of people working with institutions.⁷ These incentives are often a complex mixture of factors including access to economic resources, political power relationships, the construction of gender roles and relations, cultural understanding, religion and identity. While UNDP has many tools available for results based management, capacity assessment, risk analysis and others, there has been no real tool for understanding what is going on in a country from a political point of view and how that impacts UNDP programming. The application of an institutional and context analysis that is specific to the rule of law is an important tool in developing this understanding. ICA is essentially the analysis of the political and institutional context for a country's development. An ICA can be used as an internal exercise, where the output is designed to guide UNDP's programme strategizing and design, or it can assist with more outward-focused debate leading to policy change. It can be undertaken at any stage of the programming cycle, including at the end of an initiative for monitoring and evaluation purposes.

4 'Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (S/2004/616), pg.4

5 "For the United Nations, 'justice' is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interest of victims and for the well-being of society at large." Ibid.

6 'Securing peace and development: the role of the United Nations in supporting security sector reform' (S/2008/39) refers to the security sector as "a broad term used to describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country."

7 'Institutional and Context Analysis Guidance Note', p.18

BOX I: GUIDING PRINCIPLES FOR UN RULE OF LAW ASSISTANCE

1. Base assistance on international norms and standards
2. Take account of the political context
3. Base assistance on the unique country context
4. Advance human rights and gender justice
5. Ensure national ownership
6. Support national reform constituencies
7. Ensure a coherent and comprehensive strategic approach
8. Engage in effective coordination and partnerships

1A.2 Purpose of this guidance note⁸

This guidance note provides guidance on how to apply ICA to strengthen the rule of law. Conducting an ICA is particularly important when working in this sector, because the rule of law tends to be at the heart of political contestation of power and so interventions require both a technical and a political approach. Development practitioners should take into account and directly address the political and power dynamics that drive or impede efforts to strengthen the rule of law. Consequently, this guidance note is focused on how ICA can be used to assist UNDP in the development of strategic rule of law initiatives and programmes.

This guidance note is aimed primarily at UNDP practitioners, including staff and consultants, working in rule of law contexts. It may also be of interest or use to other stakeholders and development partners. It is applicable to those working in both development contexts and fragile, transitional or crisis affected areas.¹⁰ It responds to a growing demand for development programming grounded in a deep understanding of the context, including political and power dynamics and existing capacities, assets and needs. It also responds to the rising demand for strategic planning in rule of law.

This guidance note has been divided into two sections, Part 1 and Part 2. Part 1 is focused around the theory of ICA and its relevance in a rule of law context. It provides practitioners with examples of the complementarity of ICA with other UNDP tools, and with examples of possible areas of intervention in rule of law programming. Part 2 provides step-by-step practical guidance for practitioners on how to undertake a rule of law ICA. Practitioners should be aware that conducting an ICA is a fluid process and that they will be going back and forth between the steps as the analysis progresses. More experienced rule of law practitioners with context specific knowledge and those with more knowledge and experience of ICA may want to skip straight to Part 2 of this guidance note.

1A.3 How does this note complement other UNDP approaches to assessment and other programming approaches?

Although any rigorous analysis should contribute to better overall development outcomes, UNDP and UN analyses often describe what a country lacks without questioning the interests and incentives that keep the situation as it is. Rather than undertaking a situation analysis that relies on vague notions of political will, an ICA applied to rule of law contexts instead tries to unpack 'political will' and focus attention on what some stakeholders stand to lose if a rule of law programme is

Within UNDP, ICA is detailed in the 'Guidance Note on Institutional and Context Analysis', which presents practical guidance to UNDP Country Offices (COs) on how to assess the enabling environment by carrying out ICA. Practitioners are referred to this publication for elaboration of all key aspects of ICA.⁹

⁸ The baseline for the development of this note is the 'Institutional and Context Analysis Guidance Note', which provides practical guidance on how to assess the enabling environment by carrying out an ICA, and the 'Experiences and Good Practices in Measuring Performance of Rule of Law, Justice and Security Programmes', which provides the results of a mapping that collated examples of good practice and lessons learned from UNDP Country Offices that have set baselines or undertaken assessments, surveys and studies in this sector. This note has been designed on the basis that satisfactory country analysis, also using institutional and context analysis, has previously been undertaken.

⁹ 'Institutional and Context Analysis Guidance Note', September 2012, UNDP

¹⁰ In low and middle income countries or those undergoing post-authoritarian transition the main rule of law development goals diverge quite substantially from goals focusing more on confidence building or laying the groundwork for transitional justice. There are specificities for rule of law in both types of political settings. Practitioners working in crisis and conflicted affected areas are also referred to UNDP's 'Institutional and Context Analysis in Fragile and Crisis-Affected Areas' (forthcoming).

successful and on what other stakeholders stand to gain.¹¹ ICA on the rule of law can help COs add rigour to regular programming procedures such as situation and risk analyses, and help understand how the various rule of law stakeholders' interests and forces can influence the delivery of outputs at the project level, which entry points may prove most fruitful, whether the formulation of win-win scenarios is possible, and alternative courses of action if things do not go as planned and a change in strategy is needed. Ultimately, an ICA on the rule of law can help identify the extent to which development interventions can and will strengthen the principle of the rule of law applying equally to all sectors of society.

While all tools are relevant when planning a rule of law intervention—for example in understanding the specific conflict conditions or capacity needs, or the nature and complexities of gender based discrimination—the rule of law ICA is the only generic guidance that has been adapted and specifically tailored to the rule of law field. In general, UNDP's generic assessment tools are tailored towards the provision of technical assistance, whereas the ICA, gender analysis and mainstreaming, and to some extent the capacity development approach, are more suited towards broader development objectives and goals.

A rule of law ICA can be used by itself or in combination with any of the other existing tools discussed below. For example, a rule of law ICA can complement UNDP's capacity development approach by better identifying the enabling environment, i.e., the relationship between formal and informal systems, and rules and cultural norms, and the incentives or disincentives that can enable or disable a development intervention. UNDP's capacity development approach presents a holistic framework for understanding and supporting capacity development as a process through which individuals, organizations and societies obtain, strengthen and maintain the capabilities to set and achieve their own development objectives over time.¹² It considers capacity development as an endogenous process, hence capacity development needs to be nationally owned and/or driven, with support building on existing capacities and using relevant assets found within individuals, organizations and the enabling environment. UNDP's approach recognizes that capacity development is a process of transformation from within that cannot be driven from the outside, is based on nationally determined priorities, policies and results, and consists of comprehensive and long-term support that results in sustainable development. ICA can be seen as an integral element of UNDP's support to national partners and a pre-requisite for technical assistance and capacity development, as well as the next step in UNDP's move away from simply providing technical assistance and towards thoroughly analysing the enabling environment.

From a human rights-based perspective, ICA adds value to the formulation of development interventions by helping UNDP staff unpack the concept of 'political will' and identify means to address problems for rights holders¹³ or to change strategy if the vested interests of duty bearers prove too powerful to challenge. For example, a RoL ICA may find that change benefitting the most vulnerable is

11 'Institutional and Context Analysis Guidance Note', p.2

12 The capacity development approach is a five-step process, with a framework and methodology for assessing capacity assets and needs, a 'toolbox' of specific capacity development responses, and a framework for measuring results.

13 For an explanation of the Human Rights Based Approach applied to the justice sector see http://www.unrol.org/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf

likely to face deep opposition from powerful groups. The question that then must be asked is what is UNDP likely to achieve given the context and which actions should thereby be prioritized. In these cases there may be a need to focus on actions that have the potential to empower marginalized groups and, at the same time, work closely with those who have the power to change the state of affairs. The main value of an ICA is in making more visible the risks of working on different issues and with different groups so that the CO can make better informed decisions.

In some instances, an ICA can show that the situation of the most vulnerable claims holders is unlikely to change in the short term due to powerful economic interests. In these cases the aforementioned approach may be best: working to empower marginalized groups while simultaneously engaging, through advocacy, compensation or other behavioural-change incentives, with those positioned to change the state of affairs. Lessons learned from UNDP's provision of assistance on access to justice for the most vulnerable show that often the expectations of vulnerable groups were raised by UNDP programmes that failed to deliver due to powerful vested interests. In such cases the reputational and financial losses to UNDP provided a strong argument to do better risk analysis through ICA. This is also a reminder of the importance of gender analysis being applied throughout the process of conducting a rule of law ICA; power relations lie at the heart of gender-based discrimination, which is present in all societies and should be understood in rule of law programming and approaches.

Rule of law ICA complements more specific rule of law assessments by helping to define and identifying detailed information relevant to the scope of an intervention and how best to achieve the desired outcome. A rule of law ICA does not aim to provide baseline data or inform ongoing measurement to determine the effectiveness of a project or programme. Rather, it has been designed to be used jointly with the 'UNDP User's Guide to Measuring Rule of Law, Justice and Security Programmes'. Together, these two products form a set of guidance for Country Offices, which will provide the tools required to help complete the preparatory stage of project, programme and sector design and development. A rule of law ICA can be used at the design stage of a project or initiative or mid-project or programme, or even towards the end as part of the M&E process. A rule of law ICA can strengthen and inform further assessment intended to set baselines, indicators and generally provide the foundations on which measurement of programme effectiveness can take place. This can further contribute to the use, formulation or development of other programmatic tools such as the M&E structure, the results and resources framework and programme phases as appropriate.

Table 1 illustrates how to use this guidance note with other UN and UNDP knowledge products. The upper section of the table presents complementarity with generic UN and UNDP tools while the lower section presents more specific rule of law tools.

TABLE 1: HOW CAN RULE OF LAW ICA BE USED WITH OTHER UNDP ASSESSMENT KNOWLEDGE PRODUCTS AND TOOLS?

| Knowledge Product/Tool | Purpose | Complementarity with ICA |
|---|--|---|
| Capacity development approach; capacity assessment methodology; capacity measurement framework ⁽¹⁾ | Views capacity development as the 'how' of making development work better. Addresses supporting capacity development for sustainable development at the level of the individual, the organization, and the enabling environment. UNDP's capacity development approach is designed for use by national partners in developing their capacity and UNDP support for such. | Because capacity development is both a political and technical process it is important to understand the political and power dynamics in a national context and to identify the drivers and barriers to policy reform and institutional change. The rule of law ICA generates these insights by undertaking detailed analysis of the enabling environment and thereby strengthens the relevance of capacity development programmes and projects, the likelihood of their success, and the sustainability of their results. The RoL ICA also helps explore the incentives that individuals and organizations might act upon. |
| Human rights based approach (HRBA) to development ⁽²⁾ | Analyses and addresses the inequalities, discriminatory practices and unjust power relations that are often central to development. | An ICA should be designed and conducted in accordance with the principles of the HRBA. An ICA may find that change for the most vulnerable is likely to face deep opposition from powerful groups. This will beg the question of what is realistic for UNDP to achieve in a given context and what actions should be prioritized. The ICA also sheds light on the formal and, particularly, the informal institutions, which might indirectly or directly exacerbate or ignore certain practices that are not aligned with human rights principles. |
| Human Rights Due Diligence Policy (HRDDP) on UN support to non-UN security forces ⁽³⁾ | Provides guidance to UN entities that are contemplating or involved in providing support to non-UN security forces. | A RoL ICA can assist with the assessment process to identify the risks involved in providing or not providing support. |
| Gender analysis; gender assessment; gender audit; gender mainstreaming tool. | There are a range of gender tools that should be utilised independently of other forms of analyses, or integrated into other frameworks and tools. For instance, gender analysis is used to examine the similarities and differences in the impact of development on women and men to ensure that interventions are framed to take these into account and to ensure that women and men will both benefit from development. Gender assessment strengthens the non-discrimination and gender equality aspects of development interventions, particularly at the local level. | The integration of gender and discrimination issues in a rule of law ICA will make the analysis more thorough, robust and better suited to the needs of different users. Failure to systematically analyse gender has been seen to result in interventions that do not meet women's needs, and in some cases that have negative impacts on women. Whether or not a separate gender analysis is applied, the ICA should ensure that existing gender inequalities are not exacerbated. |
| Conflict-related development analysis (CDA) | CDA is an analytical tool targeted at UNDP practitioners and other development agencies working in conflict prone and affected situations. It is a practical tool to better understand the linkages between development and conflict with a view to increasing the impact of development in conflict-affected situations. It aims to integrate conflict assessment into existing programming tools and procedures at all levels to ensure UNDP operates under 'do no harm' principles and develops conflict sensitive programme responses. | CDA is used more at the country-level design stage rather than sector or project level or at any other stage of the programme or project cycle. This is different to a rule of law ICA, which can be applied at any stage of the cycle to drill down deeper into the underlying effects of the conflict on rule of law stakeholders and how this might influence any proposed intervention. This goes some way to ensuring UNDP follows a do no harm approach and does not aggravate existing tensions through its programming. |

TABLE 1: HOW CAN RULE OF LAW ICA BE USED WITH OTHER UNDP ASSESSMENT KNOWLEDGE PRODUCTS AND TOOLS?

| Knowledge Product/Tool | Purpose | Complementarity with ICA |
|--|---|--|
| Political Analysis and Prospective Scenarios Project (PAPEP) | PAPEP is a high-level knowledge network, producing strategic political analysis and advice for development. PAPEP believes that politics matters, and aims to strengthen political capacities for development management and the effectiveness of democracies in addressing the needs of citizens. The key concept underpinning the project is that politics matters for development and that political analysis makes sense if it leads to action. PAPEP's main strength is its capacity to foster political interaction and advice. | PAPEP is useful for analysing the political situation in a country; ICA focuses on what is feasible for UNDP, given stakeholders' interests and constraints, which may or not be of a political nature (for example, religious values may influence the feasibility of a programme to empower women in some contexts). An ICA of the rule of law will look specifically at the causes of the given situation and will gauge the incentives and disincentives of undertaking a particular course of action in the rule of law area. |
| Governance assessments and governance indicators. ⁽⁴⁾ | Governance indicators can be very useful in providing a broad assessment of the level of governance in a country. | Governance indicators do not provide the detail and depth of analysis needed to define operational implications, and do not provide information on underlying drivers. An ICA will provide information on these aspects. Governance indicators can be useful as an input to ICA. |
| 'Access to Justice Assessments in the Asia Pacific: A Review of Experiences and Tools from the Region' | Reviews a number of access to justice (A2J) assessments in the region, which examine whether and how marginalized and vulnerable populations access justice to meet their legal and other critical needs. In particular, the report examines the value of approaching justice assessments in a holistic manner, going beyond formal justice structures and understanding A2J from a broader perspective. The user can design an assessment based on the most suitable and appropriate model contained in the Review. | ICA can contribute to better results by identifying where the main opportunities and barriers to policy reform exist, while playing a key role in risk mitigation. ICA is focused on understanding what can make projects succeed or fail, with an emphasis on power relations, incentives, and formal and informal processes. |
| 'A User's Guide to Measuring Rule of Law, Justice and Security Programmes' | The purpose of the Guide is to provide practical guidance on better ways to measure programme effectiveness by clarifying the nature, methodologies, feasibility, benefits, limitations and practical considerations of measurement. | A comprehensive ICA, which can be undertaken at any stage of the project-programme cycle, can lead to more targeted interventions, with more realistic prospects of success. A rule of law ICA can strengthen and inform further assessment intended to set baselines, indicators and generally provide the foundations on which measurement of programme effectiveness can take place. |
| 'Practitioner's Guide to A Human Rights Based Approach to Access to Justice' | Aims to help practitioners design human rights-based access to justice projects | An ICA should be designed and conducted in accordance with the principles of the HRBA (see above). |

(1) For further information, please see <http://www.undp.org/content/undp/en/home/ourwork/capacitybuilding/overview.html>

(2) In 2003, the United Nations Development Group adopted the 'UN Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming' (the Common Understanding). The purpose behind the Common Understanding was to provide a consistent and coherent definition of the human rights-based approach across all UN agencies, funds and programmes. See <http://www.undg.org/index.cfm?P=221>,

(3) For further information see

http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/110&referer=http://www.un.org/en/sc/documents/letters/2013.shtml&Lang=E

(4) Please see the UNDP Oslo Governance Centre website:

http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/oslo_governance_centre/governance_assessments/

PART 1

SECTION 1B: USING INSTITUTIONAL AND CONTEXT ANALYSIS TO SUPPORT THE RULE OF LAW

1B.1 Institutional and context analysis¹⁴

Institutional and context analysis (ICA) is a term that refers to analyses that focus on political and institutional stakeholders as well as processes concerning the use of national and external resources in a given setting, and how these have an impact on the implementation of UNDP's programmes and policy advice.

What is ICA?

- **ICA is a powerful tool that can contribute to improving the effectiveness of aid.** It seeks to ground development interventions in country realities by identifying the underlying stakeholders that shape political processes.
- **ICA is focused on understanding what made or can make projects succeed or fail,** with an emphasis on power relations, incentives, and formal and informal processes. Its added value is that it can be undertaken at any stage of the project/programme cycle and it **provides a structured way to address a broad set of questions about the development context, processes and options, which can be tailored to fit different purposes and circumstances.**

What are the purposes of ICA?

- Through analysing the interests and incentives of different groups and individuals in society, the role that formal and informal social, political and cultural norms play, and the impact of values and ideals (including political ideologies, religion and cultural beliefs), **ICA can support more effective and politically feasible development strategies and programming, and inform more realistic expectations about the risks involved.**
- For UNDP to contribute effectively to the efforts of its national partners, its 'upstream' policy engagement needs to be managed as systematically as the 'downstream' programme delivery. **ICA can be a key input to UNDP's support for national dialogue and policy development.**

¹⁴ It is worth noting that ICA is different to the Political Analysis and Prospective Analysis Project approach used in many Latin American countries. The PAPEP carried out by UNDP-RBLAC since 2003 is a high-level knowledge network for strategic political analysis and advice for development. The network specializes in the production of short- and medium-term prospective political scenarios in order to assess the impact of political activities on development and public policies; the promotion of high-level debates on strategic issues in public agendas; and capacity-building for prospective political analysis within key national institutions. The project is characterized by a number of actions, which range from the production of substantive knowledge inputs (applied research and analysis) to the fostering of dialogue and consensus building for decision-making (political advice) on strategic issues in national development activities. Source: <http://www.papep-undp.org/drupal/en/content/what-papep>, last accessed on 2 November, 2012

Summary of Section B

This section defines institutional and context analysis and considers its relevance in a rule of law context. Through considering its purpose, it provides guidance on how to use and apply ICA to support rule of law. The Section informs readers about the six steps in conducting an ICA and suggests six key questions to frame a rule of law-focused ICA. The Section provides examples of potential areas of intervention in rule of law programming and illustrates this with a table, presenting readers with rule of law thematic areas, activities, institutions and stakeholders.

- **ICA can contribute to better results by identifying where the main opportunities and barriers to policy reform exist**, while playing a key role in risk mitigation and ensuring that UNDP avoids any harmful practices, thereby incorporating the 'do-no-harm' philosophy.

While ICA is not a panacea to achieving better results, it can help prevent failures and contribute to risk management, which is a central element of UNDP's accountability architecture.

What can an ICA on the rule of law do?

- It can help **unpack the 'political will'** question and frame UNDP's political engagement on rule of law issues, maximising its impact by ensuring that it is strategic and realistic, and, as much as possible, builds on an understanding of the interests, incentives and limitations of national counterparts.
- It can **identify opportunities for leveraging policy** change and supporting reform within rule of law contexts. By helping to understand how incentives, institutions and ideas shape political action and development outcomes, ICA is extremely useful when thinking about the feasibility of policy reform and institutional change.
- It can **help foster enhanced national ownership** and contribute to the improved prioritisation and sequencing of reform efforts. For example, ICA can identify areas for **creating dialogue** between stakeholders in rule of law and development practitioners toward understanding the underlying causes of rule of law weaknesses, or it can **identify ways of forging alliances for change** between national stakeholders, such as by bringing civil society groups, including women, together to discuss rule of law from this perspective.
- It can **contribute to a much deeper and broader identification, understanding and mitigation of risks** than can be achieved through a project level risk log. Frequently, risk analysis is poorly done and only based at the project level, with risk mitigation actions not taken. ICA can be used to anticipate risk in the rule of law area even before the design of a given programme intervention. Once risks are identified through the ICA, mitigation strategies can be developed and implemented.
- It can **assist in the formulation of public policies** and the strengthening of institutions related to rule of law, creating competencies and capacities and conveying to citizens the impact of rule of law and how it directly affects their lives.
- A rule of law ICA **provides practitioners and COs with a product to adopt a rule of law programme approach**, as opposed to developing stand-alone initiatives. ICA can be practical and **useful in moving away from project-based** support for elements of rule of law and **moving towards a more strategic approach** to strengthening rule of law for development. A rule of law ICA can be used to develop an integrated programme approach rather than institution-specific programmes.
- It can **assist UNDP in developing holistic programmes and projects** that are not focused only on the provision of technical assistance but support the development of national capacities that contribute to sustainable and long-term development results.

- It can generate insight on what capacities exist and where, and where and how they need to be strengthened, as well as identify areas that should be explored in more depth through subsequent capacity assessment(s) and capacity development support.

1B.2 Relevance of ICA in a rule of law context

Conducting an ICA is particularly pertinent in the rule of law field because rule of law is at the heart of the political contestation of power. This contestation can happen between political opponents or religious and cultural groups, but also occurs within groups in society as interests and power are challenged. The framework of rules and regulations that constrain behaviour at all levels, including the constitution, the body of law, and also unwritten cultural codes and values that affect perceptions of justice and safety, reflect the power balances in society and are often forged through agreement between elite groups.

Legal systems reflect patterns of power in society, including between men and women, and can reinforce marginalization and exclusion. Power brokers who influence this institutional framework (who are generally men) and those who control security and justice provision can also control access to and the quality of a whole range of other resources that can either facilitate maintenance of or disturbance of the power balance. Control over, and access to, security and justice by women, men, girls and boys from all groups, are issues central to any society and hence subject to controversy and diverging interests.

In addition, work intended to strengthen the rule of law is politically sensitive and often poses high risk and a high level of uncertainty. Domestic legal frameworks, justice systems and security policies are sometimes viewed as sovereign national interests and are therefore not always open to direct development support. Similarly, traditional codes and cultural values are often unknown to development actors, or at least not well considered in terms of their impact on potential development interventions. A country may, for example, request very specific assistance to train judges or provide radio-communication equipment for the police, but resist more comprehensive dialogue on security sector governance or the separation of powers influencing the judicial, executive and legislative branches of government. Or women's groups may draw attention to deficits in women's legal rights to land, housing and property, but legal reform and work on improving women's access to justice can stall due to a lack of willingness in society and amongst male power-brokers to increase women's empowerment.

Comprehensive reform to the framework of rules and laws and their enforcement, as well as due consideration of cultural codes and norms, will likely impact the foundations of political power and societal and elite interest and can require a fundamental transformation of culture and power relationships on many fronts. In countries in transition, for instance, it can be a challenge to move from a government that may have had unlimited discretion and power to one that is constrained by rules and regulations that are enforced according to the principle of equality before the law. And in situations where conflict has devastated the institutional framework, the social fabric and the delivery of services, particular attention should be paid to how peace-building creates new political agreements that set up or reconstruct institutional frameworks. Establishing, for instance, a new constitution or revised laws in the aftermath of conflict, as well

as the mechanisms to deliver justice and uphold rights, is likely to impact the principle of equality before the law.

ICA is also particularly relevant in a rule of law context due to the myriad of stakeholders and players, and the incentives involved. These include all three branches of government including the independent judiciary, which has the responsibility to provide a check on executive and legislative power, adjudicate the law and protect the rule of law. The judiciary, prosecution, police and lawyers (who in many contexts are primarily men, particularly in decision-making positions) must retain various levels of independence from the executive and from each other, but are also inter-linked and mutually dependent in the exercise of maintaining a functioning justice system. The incentive structures are thus particularly complex and there are specific trade-offs and tensions to be managed in the rule of law area. The political, social and economic impact of improving justice and security most likely results in changes where the multiple players involved in the rule of law lose or gain power and resources. Furthermore, in many rule of law contexts, the informal sector can be more accessible, affordable, appropriate and accountable in providing justice and dispute resolution needs than the state or formal system, but often linkages between the two are more pronounced than initially assumed.¹⁵ ICA can usefully explore these dynamics to inform programming in a relevant manner.

Legal systems end up excluding people if they do not meet the specific needs of the women and men, girls and boys in the given context and do not correspond to social, political and economic realities. Just laws are a fundamental building block of rule of law, but where they exist they are often not implemented, and where they do not exist it is likely an expression of the prevailing power balance rather than capacity constraints. That is why it is crucial to undertake a comprehensive ICA of the rule of law, to highlight the needs and interests of all potential stakeholders—both formal and informal—the balance of power, who is likely to gain or lose from potential reform and what the incentives and disincentives that can enable or disable the potential reform are.

When should an ICA be conducted?

ICA is envisaged as an input to programming that is used to help UNDP be strategic in programme planning and design or during a programme/project review. ICA can be used in a number of circumstances in the context of an assessment¹⁶ or separately as a distinct analytical process and tool. An ICA is ideally conducted before the development of a new rule of law programme, and likewise in the context of advancing or changing the focus of an existing project or programme. However, it is critical to note that ICAs do not have to be tied to the project cycle, and COs may wish to undertake a 'light' ICA if a change with implications for the success of a project or programme occurs. For example, if there is a change in

¹⁵ See UNDP, UN Women and UNICEF's: 'Informal Justice Systems: Charting a Course for Human-Rights Based Engagement' (2012)

¹⁶ 'Assessment' refers to a set of data collection and analytical activities typically completed during the design phase before a project is implemented. Assessment activities are used to: (1) explore the scope of a problem; (2) determine how to design a project to achieve desired outcomes (e.g., increase access to courts among women, decrease number of people in pre-sentence detention) while minimizing unintended consequences (e.g., damaging relationships with stakeholders, losing funding for a project); (3) collect baseline data to enable the documentation of change over time, whether positive or negative; and 4) inform the design of ongoing evaluation activities by determining programme objectives, assessing the availability of data, and designing process and outcome evaluation measures. 'UNDP User's guide to Measuring Rule of Law, Justice and Security Programmes', 2012

Assessing Lao people's access to justice

In the Lao PDR, a 'People's Perspectives on Access to Justice Survey' was conducted. The survey's approach was rooted in the local context and was respectful of people's actual needs. It examined justice from the citizen's perspective while being cognisant of the mechanisms that people actually rely on. The survey provided policy makers, the legal system, civil society and development partners with a snapshot of the capabilities of the Lao people to take full advantage of their rights. In particular, the survey was concerned with people's abilities to seek and obtain remedies for grievances that constrain the fulfillment of those rights, including family conflicts, violence, theft, land disputes, debt and other issues.

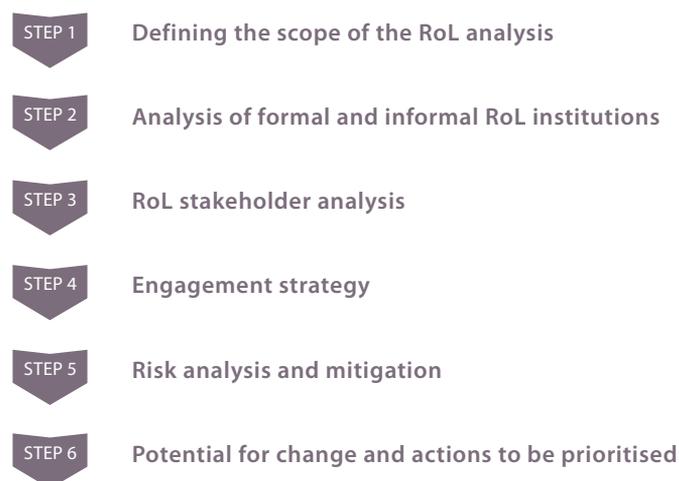
Source: 'People's Perspectives on Access to Justice Survey', UNDP Lao PDR

government or the composition of the supreme court, or if there is a major reform process or crisis in the rule of law sector such as a vetting of the judiciary, or if social or gender based violence has broken out in a region. Depending on the needs and requirement of the CO, a light ICA could, for example, only focus on the analysis of formal and informal institutions (see Step 2 below), or it could focus on the stakeholder analysis part of the process (Step 3 below). A limited version of an ICA has will cost less and be quicker, however, it will lead to a less comprehensive analysis than a full ICA.

For Country Offices with projects they want to further develop or change the focus of, an ICA undertaken during a mid-term or end-of-project evaluation can be useful in assessing how context specific dynamics could influence or have influenced project results. The failure of projects and programmes is often attributed to poor context analysis and the wrong starting assumptions, such as who has the power or will to effect a particular change. Undertaking an ICA can assist greatly in identifying opportunities for positive change as well as risk mitigation by understanding the various incentives of the relevant stakeholders.

1B.3 Applying ICA to the rule of law

There are six steps to conducting an institutional and context analysis, as illustrated below. When designing a rule of law focused ICA, the same steps should be followed, but with the rule of law in mind rather than a wide-ranging country stakeholder analysis.



Step 1: Defines the scope of the analysis and identifies the problem, opportunity or weakness to be addressed. This step identifies the depth of the analysis and asks the ‘why question’ of the development challenge. For example, ‘Why is a piece of legislation not implemented?’ or ‘Why is there no access to justice for vulnerable groups?’

Step 2: Analysis of formal and informal rule of law institutions. i.e., mapping the institutional and governance arrangements and weaknesses. This includes more than just organizations, it looks at the rules of the game, i.e., power relations, cultural norms, gender based discrimination, incentives and disincentives, etc.

Step 3: Rule of law stakeholder analysis—identifying those who can affect the outcome of the project in the area identified. Think about the relative ability of each stakeholder to influence the project and their interest in seeing progress in that area. This will illustrate the degree and type of engagement required as well as alliances, which staff can then foster.

Step 4: Engagement strategy—how to best engage with each stakeholder, including potential ‘allies’ or ‘spoilers’, how best to foster alliances for change among them and what to do about those actors or factors that may present obstacles to the project.

Step 5: Risk analysis and mitigation—identifying obstacles to progressive change and defining appropriate mitigation strategies.

Step 6: Potential for change and actions to be prioritised - the conclusions and recommendations that have come up through conducting a rule of law focused ICA and the next steps to take these forward.

The steps of a rule of law ICA are not independent components and practitioners will find themselves referring to previous steps throughout the entire process. For example, reference should be made to the scope of the analysis (step 1) throughout to ensure the mapping of formal and informal institutions (step 2) and the stakeholder mapping (step 3) remain relevant and focused. Practitioners may find that they go back and modify the scope of the analysis as they delve deeper into the issue and more light is shed upon it. Similarly, practitioners may find that during the stakeholder analysis they realise they did not consider certain formal or informal institutions, so will revert back to this stage of the analysis. Undertaking an ICA is a fluid process and practitioners will need to adapt and remain flexible throughout. At all stages of the ICA specific consideration should be given to gender dimensions.

When designing a rule of law focused ICA it is crucial that the ICA team adopts a practical approach to analysing the rule of law field so that recommendations can focus on specific issues, such as identifying the most promising entry points for programming, identifying national partners that UNDP can work with, and identifying areas where change may not be currently realistic. The ICA should also identify stakeholders who could potentially hinder the proposed reform, as well as potential risks so a comprehensive risk mitigation strategy can be incorporated.

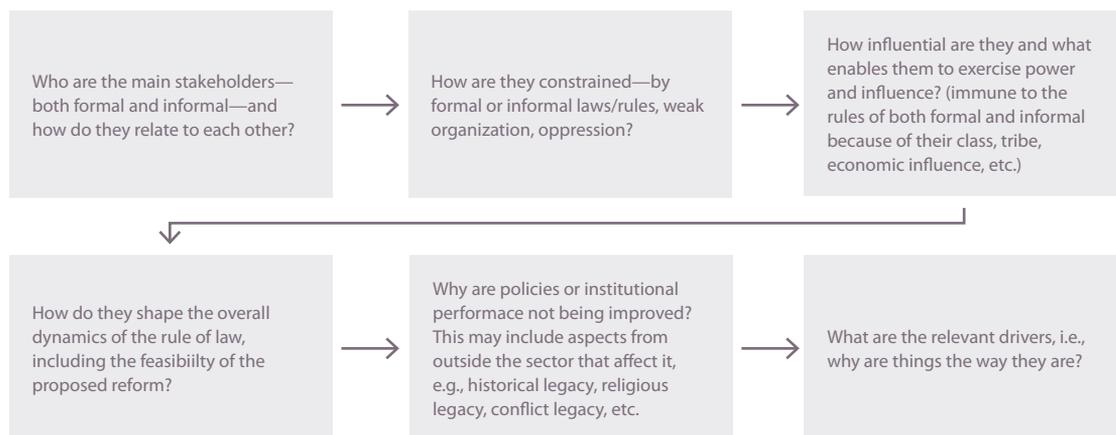
Applying ICA to support peace talks in Bangladesh

For the UNDP Chittagong Hill Tracts Development (CHT) Facility in Bangladesh, an ICA helped develop the strategies to support implementation of the CHT Peace Accord. The ICA was conducted to examine 10 key policy areas related to the Peace Accord implementation. It helped UNDP provide targeted support to the parties to the Peace Accord as well as all other stakeholders so they could participate effectively in the dialogue on what was needed to achieve development progress and peace in the region. The use of ICA supported UNDP in the effective management of its policy engagement as a whole. Specifically, UNDP now has a framework for engaging with each major stakeholder and can convene dialogue in a more effective manner. Also, through applying a systematic process for analysis UNDP now engages with new stakeholders and in different ways.

Source: Henrik Larsen, Director for the Chittagong Hill Tract Development Facility

The following six questions can be used by practitioners to frame their rule of law ICA methodology. They are not directly linked to the six steps of an ICA but can be used as guidance to help shape the process.

Six questions to frame a rule of law ICA methodology



2.4 Potential areas of intervention in rule of law programming

Rule of law reform involves different levels of consultation, co-operation, communication and co-ordination between institutions and stakeholders at both the operational level and the strategic, policy, planning and resource allocation level. For example, within the justice sector, key challenges for institutions seeking to work together can include: the need to maintain the functional independence of the judiciary and of national human rights institutions without exempting them from institutional accountability requirements; community-based dispute resolution mechanisms, paralegals and other informal justice mechanisms not being recognized as part of the justice sector; and limited sectoral policy-making and planning capacity, including budget planning. There may be no single institution responsible for leading the justice sector, or there may be several, possibly competing, bodies—typically the Ministry of Justice, the Ministry of Internal Affairs and the judiciary.

Although specific areas of intervention will vary according to context, there are a number of common thematic areas within the rule of law, some of which are detailed in Table II below. The Table also lists potential activities within these thematic areas and the main institutions and stakeholders involved. **The Table is intended to be illustrative; it is certainly not exhaustive.**

TABLE 2: RULE OF LAW THEMATIC AREAS, ACTIVITIES, INSTITUTIONS AND STAKEHOLDERS

| Thematic area | Potential programming areas | Institutions/ stakeholders for rule of law programmes | Other relevant stakeholders |
|---|--|---|---|
| International and national legal frameworks/normative frameworks | <ul style="list-style-type: none"> - Constitutional, legal and regulatory reform - Adherence to international HR treaties - Addressing legislative gaps in relation to international conventions - Reform of administrative laws, statutes and procedural rules; police and corrections legislation, including oversight and ethics - Supporting the development and implementation of national rule of law, security and/or justice policies and plans - Building strategic planning and budgeting capacity - Strengthening civil oversight and accountability mechanisms - Strengthening financial management systems - Improving human resource management - Anti-corruption strategies and plans | <ul style="list-style-type: none"> - Justice sector institutions - Ministry of Justice - Ministry of Internal Affairs - Judiciary - Legislature - Government officials - Judicial systems (including court support and infrastructure) - Parliamentary, judicial, and administrative management and oversight bodies - Regulatory bodies - National women's machinery | <ul style="list-style-type: none"> - Media/social media activists - Religious groups and leaders - Schools and universities - Political parties - Social movements and advocacy groups - Women's organizations - Trade and labour unions - National/international NGOs - Traditional authorities - Corporations and businesses/business associations - Professional bodies - Individual business leaders - Financial institutions - UN agencies - The Military |
| Criminal justice effectiveness | <ul style="list-style-type: none"> - International criminal justice standards - Judicial system organization and efficiency - Legal frameworks for police and prisons - Criminal investigation policing and specialized functions, e.g., forensics, including for SGBV - Execution of sentences - Conditions of imprisonment - Rehabilitation of offenders - Alternatives to imprisonment - Management and vetting of staff - Increasing the numbers of women staff, including in decision-making - Reforming and implementing procedural codes in accordance with human rights and international standards - Improving investigative capacities of police and prosecutors - Enforcing judgements - Victim/witness protection programmes | <ul style="list-style-type: none"> - Justice sector institutions - Ministry of Justice - Ministry of Internal Affairs - Judiciary - Legislature - Government officials - Judicial systems (including court support and infrastructure) - Parliamentary, judicial and administrative management and oversight bodies - Intelligence services - Police forces; - Law enforcement agencies - Prisons/penal system - Prosecutor's Office - Public defenders | <ul style="list-style-type: none"> - Media/social media activists - Religious groups and leaders - Providers of ADR - Informal justice providers - Schools and universities - Political parties - Trade and labour unions - National/international NGOs, including women's groups - Traditional authorities - Corporations and businesses - Business associations - Professional bodies - Individual business leaders - Financial institutions - UN agencies and other donors - The Military - Donor and international organizations |

TABLE 2: RULE OF LAW THEMATIC AREAS, ACTIVITIES, INSTITUTIONS AND STAKEHOLDERS

| Thematic area | Potential programming areas | Institutions/ stakeholders for rule of law programmes | Other relevant stakeholders |
|------------------------------------|---|--|--|
| Civil justice effectiveness | <ul style="list-style-type: none"> - Supporting an equitable and competitive environment for enterprise development - Reforming and implementing procedural codes - Developing specialized tribunals and courts (family, environmental, electoral, labour, land and property) - Management and vetting of staff - Increasing the numbers of women staff, including in decision-making - Improving transparent and efficient administration of the justice system - Linkages with social and human services, family protection units and public administration - Administrative courts and tribunals | <ul style="list-style-type: none"> - Justice sector institutions - Ministry of justice - Judiciary - Legislature - Government officials - Judicial systems (including court support and infrastructure) - Parliamentary, judicial, and administrative management and oversight bodies - Ministries of social services, - National women's machinery | <ul style="list-style-type: none"> - Media/social media activists - Religious groups and leaders - Schools and universities - Political parties - Social movements and advocacy groups - Women's organizations - Trade and labour unions - National/international NGOs, including women's groups - Corporations and businesses/business associations - Professional bodies/individual business leaders - Financial institutions - UN agencies and other donors/ international organizations - The Military |
| The judicial system | <ul style="list-style-type: none"> - Establishing, rebuilding or expanding judicial institutions - Establishing or strengthening independent judicial bodies - Upgrading or reforming systems of judicial education and judicial career processes - Improving working conditions for judicial personnel | <ul style="list-style-type: none"> - Government officials - Judicial systems (including court support and infrastructure) - Parliamentary, judicial, and administrative management and oversight bodies - Sector institutions - Ministry of Justice - Judiciary - Legislature - Judicial training institutions - Professional associations | <ul style="list-style-type: none"> - Media/social media activists - Religious groups and leaders - Schools and universities - Political parties - Social movements and advocacy groups - Women's organizations - Trade and labour unions - National/international NGOs - Corporations and businesses/business associations - Professional bodies - Individual business leaders - Financial institutions - UN agencies and other donors/ international organizations - The Military - Informal justice providers/ADR providers |

TABLE 2: RULE OF LAW THEMATIC AREAS, ACTIVITIES, INSTITUTIONS AND STAKEHOLDERS

| Thematic area | Potential programming areas | Institutions/ stakeholders for rule of law programmes | Other relevant stakeholders |
|--|--|---|--|
| Legal aid, awareness, informal justice and alternative dispute resolution | <ul style="list-style-type: none"> - Expanding access to legal services through raising awareness - Creating a system of free legal aid - Improving the quality of private defence - Improving the capacity of the informal justice system - Supporting or expanding alternative dispute resolution | <ul style="list-style-type: none"> - Judicial system - Informal justice institutions (indigenous, tribal, customary, religious or other non-state) - Human rights organizations - Public interest law groups - Public advocacy organizations - Law schools and bar associations | <ul style="list-style-type: none"> - ADR providers - Informal justice providers - UN agencies and other donors/ international organizations - Media/social media activists - Religious groups and leaders - Schools and universities - Political parties - Social movements and advocacy groups - Women's organizations - Trade and labour unions - National/international NGOs - Traditional authorities - Corporations and businesses/business associations - Professional bodies - Individual business leaders - Financial institutions |
| Security sector reform, citizen security and violence prevention. | <ul style="list-style-type: none"> - Violence prevention, including SGBV, community security and civilian policing - Democratic governance of the security sector - Support to security strategy and policy planning - Community oriented policing - Control of small arms and light weapons | <ul style="list-style-type: none"> - Government officials - Judicial systems (including court support and infrastructure) - Parliamentary, judicial, and administrative management and oversight bodies - Military and paramilitary forces - Intelligence services - Police forces - Border guards/customs services - Law enforcement agencies - Prisons/penal system - Local government authorities - Informal leaders - Informal security and dispute resolution providers (indigenous, tribal, customary, religious or other non-state) - Human rights organizations - Public advocacy organizations | <ul style="list-style-type: none"> - Donors/international organizations - Media/social media activists - Religious groups and leaders - Political parties - Informal security providers - Social movements and advocacy groups - Women's organizations - Trade and labour unions - National/international NGOs - Community-based organizations - Traditional authorities - Corporations and businesses/business associations - Professional bodies - Individual business leaders - Financial institutions - UN agencies |

TABLE 2: RULE OF LAW THEMATIC AREAS, ACTIVITIES, INSTITUTIONS AND STAKEHOLDERS

| Thematic area | Potential programming areas | Institutions/ stakeholders for rule of law programmes | Other relevant stakeholders |
|---|---|---|--|
| Gender justice | <ul style="list-style-type: none"> - Women's land, property and inheritance rights - Marriage, divorce and family law - Sexual and gender-based violence - Traditional justice versus formal justice - Transitional justice - Legal aid and counsel - Legal representation | <ul style="list-style-type: none"> - Justice sector institutions - Judiciary - Legislature - Parliamentary oversight committees - Government officials (health, women's affairs, social services, indigenous affairs) - Local government authorities - Informal leaders - Informal justice institutions (indigenous, tribal, customary, religious or other non-state) - Human rights organizations - Public interest law groups - Public advocacy organizations | <ul style="list-style-type: none"> - ADR providers - Informal justice providers - UN agencies and other donors/ international organizations - Community-based organizations - National/international NGOs - Media/social media activists - Schools and universities - Political parties - Social movements and advocacy groups - Women's organizations - Health and social services - Police |
| Transitional justice and complementarity | <ul style="list-style-type: none"> - Truth-seeking and reconciliation processes - Institutional reform - Prosecution initiatives - Gender justice - Vetting and lustration - Reparations - National consultations | <ul style="list-style-type: none"> - Justice sector institutions - Ministry of Justice - Judiciary - Legislature - Government officials - Judicial systems (including court support and infrastructure) - Parliamentary, judicial, and administrative management and oversight bodies - Local government authorities - Informal leaders - Informal justice institutions (indigenous, tribal, customary, religious or other non-state) - Human rights organizations | <ul style="list-style-type: none"> - Civil society organizations - National/International NGOs - Community-based organizations - UN agencies - Donors/international organizations - Social movements and advocacy groups - Media/social media activists - Women's organizations - Professional bodies - Schools and universities |
| Human rights | <ul style="list-style-type: none"> - Increasing citizen awareness of human rights standards and issues - Establishing and strengthening human rights institutions | <ul style="list-style-type: none"> - Judicial systems - Informal justice institutions (indigenous, tribal, customary, religious or other non-state) - Human rights organizations - Public interest law groups - Public advocacy organizations | <ul style="list-style-type: none"> - Providers of ADR/informal justice systems - UN agencies and other donors/ international organizations - Media/social media activists - Religious groups and leaders - Schools and universities - Political parties - Social movements and advocacy groups - Women's organizations - Trade and labour unions - National/International NGOs - Traditional authorities - Corporations and businesses/business associations - Professional bodies - Individual business leaders/ financial institutions |

PART 2

SECTION 1B: CONDUCTING A RULE OF LAW FOCUSED INSTITUTIONAL AND CONTEXT ANALYSIS

Summary of Section 2A

Section 2A provides practical guidance on how to conduct a rule of law-focused ICA. It provides some practical considerations on how to define the scope of the rule of law ICA. Through defining formal and informal institutions, the Section details how to undertake a comprehensive institutional mapping. It highlights areas where close attention should be paid and presents guiding questions to shape the mapping. Using CO experiences and examples to help illustrate, the Section details how to undertake a stakeholder analysis and how to identify entry points and risks. It considers how to identify and mitigate risk and how ICA can be used as a tool in risk mitigation. The Section concludes with guidance on how to identify the potential for change and action to be prioritized.

2A.1 Before starting: some practical considerations

Planning the design and execution of an ICA raises a number of practical questions. Who will conduct the analysis? How long will it take? What will it cost? Should the analysis be treated as an internal document or should it be shared with partners? The answers to these questions will vary according to the resources available, context and the type of analysis in question.¹⁷ Before starting the analysis create a profile of the team who should do it, and after their selection decide when the analysis will be done and the methods that will be used for data collection. This might change as the analysis proceeds, for example, it may be found that stakeholders are better engaged through focus groups or surveys rather than interviews. The methodology should be drawn up for different stakeholders and an ICA team should be set up under the Country Office's close supervision.

Step 1: Defining the scope of the rule of law institutional and context analysis

The first step in the process of conducting a rule of law focused ICA is to define the scope of the analysis, i.e., to identify the problem, opportunity or weakness in the rule of law to be addressed. The term 'scope' refers to the depth of the analysis or the 'why question' behind the development challenge. This could be a broad analysis of the functioning of national justice and security systems if the initiative is potentially an overall reform programme for the rule of law. It could also be specifically targeted at the most critical issues facing the sector, for example, responses to sexual and gender based violence, the functioning of the informal justice system, a high pre-trial detainee population and backlog in the criminal justice system, or access to justice for women in inheritance cases. Rather than asking 'what', the scope should focus on the reasons why there is a certain challenge or obstacle.

Once the scope is defined, the key question(s) or issue the analysis is trying to address needs to be formulated. Since the ICA is intended to shed light on the causes of problems, it is important that the motivating questions asks 'why' rather than

¹⁷ More detailed answers to these questions are provided in Part 2, Section B, below.

'who' or 'what' as 'why' will require an explanation while 'who' or 'what' will lead to descriptions that may not be detailed enough to ensure programmes are sufficiently context specific.

The priorities of rule of law reform and the depth of reform required will be determined by, for example, whether the legal system is based on common law or civil law (or a blend of both); whether the country is high, low or middle income, the level and nature of inequality within and among groups, the existence and locus of poverty, including extreme poverty, and trends in discrimination and exclusion; whether the country is post-conflict, fragile, stable or in crisis; whether it is transitioning from a one party system to multi-party democracy; or whether it is moving from central planning to a more open, market based economy. These general categorisations need to be refined and thoroughly contextualised. For example, a country might be only partially affected by conflict, with other parts of the country challenged more by political transition. Similarly, a country may contain small areas afflicted by high levels of violent crime, such as an urban area troubled by gang violence or a porous border area known for cross-border incursions, while the majority of the country remains comparatively stable.

Integrating gender and discrimination into the scope of the ICA

Regardless of the scope of an ICA, such as whether its approach is broad or targeted, it is essential to integrate gender and discrimination components. This is particularly important when working on the rule of law as RoL projects are often focused on supporting the most vulnerable and discriminated against sections of society. For example, the ICA could consider why the capacities of the judicial system to justly deal with the grievances of women, persons with disabilities and minorities are so low. Without the necessary legal frameworks and access to justice, women and minorities (and particularly women from minority or other vulnerable groups) are unable to have their voices heard, exercise their rights, challenge discrimination or hold decision-makers accountable.¹⁸ The ICA should therefore include a sound

¹⁸ In order to ensure a gender component within the ICA, the ICA team can refer to the following: a) The gender analysis in the Common Country Assessment; b) The gender outcomes in the United Nations Development Assistance Framework; c) Any gender analysis that has been undertaken under previous ICAs, for example, at the country level; d) Coordination opportunities with UN Women or the UN Gender Theme Group where it exists; e) Liaison opportunities with gender focal points in the relevant ministries; f) Opportunities to align the gender aspects with any national commitment to gender.

BOX I: GUIDING PRINCIPLES FOR UN RULE OF LAW ASSISTANCE

1. Base assistance on international norms and standards
2. Take account of the political context
3. Base assistance on the unique country context
4. Advance human rights and gender justice
5. Ensure national ownership
6. Support national reform constituencies
7. Ensure a coherent and comprehensive strategic approach
8. Engage in effective coordination and partnerships

analysis of the attitudes and behaviours that exist towards vulnerable sectors of society in a rule of law context, as well as the laws, formal and informal rules, and institutions, etc., that often reflect and reinforce gender based discrimination. This could address attitudes towards women broadly as well as specific issues such as women's position in the judiciary or women's inheritance rights in formal and informal justice systems.

Step 2: Analysis of formal and informal rule of law institutions

Before looking at how to map formal and informal institutions it is crucial to understand exactly what is being mapped and what is meant by 'formal' and 'informal' institutions. Institutional mapping in a rule of law context involves looking at the institutional framework and the relevant rules and services being upheld and delivered. This should be done with a view to understanding a particular issue, such as a policy, specific project, programme issue or opportunity.

Like formal institutions, informal institutions are also rule-based systems. They differ in that they are usually unwritten, although widely known. Examples include household and family structures, kinship and patronage systems, and tribal and customary decision-making and dispute resolution. All are heavily influenced by gender, which is expressed through social norms and attitudes. Although this is often the case with formal institutions as well, the public/private distinction can make the informal system a more powerful arbiter of gender bias.

In many countries, the relationship between formal and informal rules systems is complex, formal rules being present but often observed only selectively while informal rules are influential in shaping and guiding behaviour. In a rule of law context, such rules include formal laws and regulations, established processes such as the criminal justice system and civil court procedures, as well as informal rules that are more derived from social norms and practices. These include a wide range of systems outside classic state structures, such as hybrid models of customary, religious and state-run 'para-judicial' systems. Informal justice mechanisms can be divided between (i) customary and tribal/clan social structures, (ii) religious authorities, (iii) local administrative authorities, (iv) especially constituted state customary

Defining 'institutions' and 'rules'

For the purposes of an ICA, 'institutions' refers to far more than simply organizations; it also includes the rules of the game and cultural norms. In the context of this note, institutions "consist of a set of constraints on behaviour in the form of rules and regulations; a set of procedures to detect deviations from the rules and regulations; and, finally, a set of moral, ethical, behavioural norms, which define the contours that constrain the way in which the rules and regulations are specified and enforcement is carried out."

Rules refers to institutions, which can be formal or informal. Any set of rules that regulate relationships between groups or individuals by providing incentives and sanctions can generally be described as an institution. Formal institutions include, for example, constitutions, which describe the division of governing power between the executive, legislative and judicial branches; the electoral system; local government units; or laws.

Douglass North 'Transaction Costs, Institutions, and Economic History' in Journal of Institutional and Theoretical Economics, 140, p.8, (1984).

courts, and (v) community forums specially trained in conflict resolution, particularly in mediation.¹⁹

Box II provides further information on the differences between formal and informal institutions.

In many countries, formal laws and regulations play a very ambiguous role. On the one hand, laws can be significant, and may be frequently invoked. On the other hand, not all laws are enforced equally, or particular laws may be enforced partially or selectively—tax laws, for example. Frequently, the implementing regulations for a law to be effective are incomplete; or existing regulations may be little known, even within government agencies; or they are difficult to access, even if they are very important for citizens, such as regulations on how to register property. A rule of law focused ICA can help to systematically analyse the web of rules and how they are applied in given situations.

A chief characteristic of informal justice systems (IJS) is their degree of adaptation to socio-economic, political and cultural contexts. Consequently, programming for informal justice systems needs to take its outset in the context in which they operate, including how they interact with formal systems. In addition, recognition of the value of IJS to a society or a community and of their flexibility to individual circumstances can help avoid programming that would distort the positive elements of the IJS. Rigorous analysis of official and unofficial linkages, and explicit policy and operational choices based on these realities, are thus a prerequisite to programming. What is likely to work or succeed is highly context-specific and programmes should be open to a wide range of tools.²¹

19 Informal rules are often referred to as the de jure rules; while the combination of formal and informal rules governs de facto the way in which things are done. For further information, please see 'Informal Justice Systems: Charting a Course for Human Rights-Based Engagement', UNDP 2012

20 See 'Political Economy Assessments at Sector and Project Levels, How-To-Notes', March 2011, GAC in Projects

21 'Informal Justice Study: Charting a Course for Human Rights-Based Engagement', UNDP, UN Women and UNICEF (2012).

BOX II: WHAT ARE FORMAL AND INFORMAL INSTITUTIONS?²⁰

Formal institutions are codified—e.g., under laws and regulations—and usually have formal sanctioning mechanisms to make them effective.

"Informal institutions are family and kinship structures, traditions, and social norms. They not only matter for development, but are often decisive stakeholders in shaping policy outcomes in environments of weak states and poor governance structures." (OECD, 2007)

Informal institutions are norms and social practices rooted in history, tradition and culture; but they can also emerge as the result of the weakness, erosion or collapse of formal institutions. The enforcement mechanisms for informal institutions range from an adherence to internalised norms and expectations of reciprocity, to social shunning and ostracism, and threats and the use of violence including gender based violence.

The relationship between formal and informal institutions

Informal institutions exist in any society, as not all rules can or should be codified. However, the relationship between formal and informal institutions is very important, because their interaction often shapes outcomes such as policy decisions or the implementation of policies. Inefficient institutions (and inefficient interactions between formal and informal institutions) can persist because they are linked to power structures and to distributional benefits. For example, preserving informal powers can yield high immediate benefits to a country's president, particularly if the powers are broad.

BOX III: AN EXAMPLE OF AN INFORMAL INSTITUTION

In Serbia, despite the existence of a clear overall policy and legislative framework for promoting the rights of women and gender equality, including laws, regulations and a set of strategic documents, and despite gender equality mechanisms being in place at national, provincial and local levels and the basic normative framework relevant for institutional regulation of gender equality being established, in practice, women remain discriminated against, particularly in the labour market. There has been an increase in the number of reported cases of domestic violence in Serbia and victims are usually women. Administrative authorities often resort to gender-related stereotypes in their organizational structures and methods of work, and treat domestic violence as a private matter, which leads to the inappropriate application of available statutory powers. These cultural practices and values represent one kind of informal institution.

Source: 'Strengthening Judicial Integrity through Enhanced Access to Justice: Analysis of the national studies on the capacities of the judicial institutions to address the needs/demands of persons with disabilities, minorities and women', UNDP 2013

How to map formal and informal rule of law institutions

When mapping formal and informal rule of law institutions, close attention should be paid to the following:

1. Carry out a desk review of legal and/or regulatory frameworks to identify governing issues that have a bearing on the issue defined by the scope of the ICA.
2. Undertake interviews with focus groups, key experts—these should be both female and male and could be government officials, academics, members of the judiciary etc.—users of the system, and informants to acquire information on the implementation of existing legislation and the record of reforms in the area concerned in order to identify structural issues and informal institutions.
3. Undertake community level consultations (including women and men—this can be done both in mixed groups as well as with groups of women only). Mapping formal and informal systems is a complex and a time consuming task, but is vital in conducting a rule of law ICA. It is important to include focus group discussions with the beneficiaries. Often, in the pre-programme analysis, there is a tendency to ignore the community level; thus care should be taken to prevent such gaps when conducting a rule of law ICA.
4. Identify structural issues related to the stakeholders involved and the rules by which they govern relationships such as party affiliations, personal ties, patrimonial politics, ethnicity or kinship that may prevent the enforcement of the formal rules in part or in full.
5. Identify any informal institutions, for example, cultural traditions, religious traditions, moral or ethical beliefs, and the gender dimensions of all of these that are relevant to the issue and can be used to improve the likelihood of success.
6. Consider the potential impact of culture, religion, gender dynamics, etc. Identify those institutions that could support as well as those that may constrain the proposed reform.
7. Highlight the inter-relations between formal and informal institutions.

Informal justice dynamics in Malawi

For example, a Malawi country study, undertaken as part of the Informal Justice Study, describes how women were more likely to bring certain cases to village mediators (IJS facilitated by NGOs) rather than to traditional chiefs because the mediation process offered confidentiality, whereas the traditional IJS offered by local chiefs involved public discussion of personal and intimate matters. The prominence (or absence) of women among the village mediators was also an important factor.

Source: 'Informal Justice Study: Charting A Course For Human Rights Based Engagement UNDP, UN Women, UNICEF 2012

Guiding questions for mapping rule of law institutions:

1. How did the legal framework come about? How was it introduced, by whom, and why? How has it evolved over the years?
2. Are relevant laws being implemented? For example, if the ICA is looking at issues of discrimination, is there an adopted anti-discrimination law and is it being implemented? Is there sufficient public awareness of the law for it to be invoked? How is the sector regulated (what are the rules and institutional structures)? Does existing regulation—including the informal/de facto rules—provide effective oversight? Are the regulations fair, do they discriminate against any groups in society, are they applied evenly? Does existing regulation allow the sector to maintain or expand services in line with demand (and commitments to poverty alleviation)? What interests drive/maintain the current regulatory system (including its weaknesses or gaps)? These interests could, for instance, be individual, at party, elite or ethnicity level, and they could include power and influence, resources, financial interests or other aspects. Are men and women equally involved in enforcing and adjudicating the laws and rules?
3. What factors have inhibited/are inhibiting policy reform and institutional change from being fully implemented? What efforts, if any, have been made to address these factors? Have they been successful? If not, why not?
4. Which groups challenge or question the legal or regulatory status quo either through advocacy or action (e.g., women's organizations, human rights groups)? Have reforms in this particular area been attempted before? If so, by whom, why, and with what results? If not, why were they resisted and why are they being attempted now? What are the relevant policy processes linked to past or proposed reforms?
5. How are formal and informal responsibilities for rule implementation distributed between the national and sub-national/local levels? How are formal and informal responsibilities for rule implementation distributed among the various institutions at the national level, for example, between the ministries of interior and justice, police, attorney general, judiciary and the penal system?
6. How are the sector and its components being funded? (For instance, user fees, taxes/general budget, earmarked taxes, informal revenue generation and petty corruption from consumers.) Which organizations or individuals have the power to decide on budgets for which institutions? For example, does the judiciary have a say in its own budget, does the ministry of finance decide on the budget of the ministry of interior, what is the role of the parliament? Does aid play a key role in financing the sector?
7. What opportunities for rent-seeking²² and patronage are related to the sector? Who appears to benefit from these rents and how is the patronage being used?

22 'Rent-seeking is an attempt to obtain economic rent by manipulating the social or political environment in which economic activities occur, rather than by creating new wealth, for example, spending money on political lobbying in order to be given a share of wealth that has already been created.' Conybeare, John A.C. (1982). 'The Rent-Seeking State & Revenue Diversification,' *World Politics*, 35(1): 25-42.

PART 2: SECTION 2A

8. What are the reform legacies of the sector? What reforms have been attempted and/or undertaken in the past? What were the results—and how does this experience appear to shape current expectations of stakeholders? Who funded the reforms—are they donor funded or funded through public finances?
9. What arrangements, mechanisms and incentives are there for cooperation and collaboration in pursuing the/a reform agenda?
10. What are the particular social or ethnic divisions within the society that directly influence rule of law related dynamics? For example, are women and minorities, and women within minority groups, represented in the police service and the judiciary, or do women have equal rights to own land and inherit property?
11. What is public opinion regarding the performance of rule of law institutions and/or the proposed reforms (including issues of trust/expectations that a reform would bring improvements)? This is a broad question, which can be tackled in different ways. For example, public opinion surveys may have encapsulated this type of data, questionnaires to ascertain the public's perceptions can be undertaken, and actual experiences of users can be sought. An access to justice survey undertaken in the Maldives used a number of different techniques to obtain such data—see Box IV below. All methods used should ensure the opinions of women are fully reflected.
12. What are the informal rules enabling or preventing implementation of relevant legislation and regulatory frameworks? These can include cultural, traditional or other norms that may not be codified in legislation but determine how groups interact in the public and private spheres, from the national to the local and domestic levels.
13. Is addressing the issue likely to, directly or indirectly, challenge the authority of certain informal institutions?

BOX IV: ASSESSING PUBLIC OPINION, PERCEPTIONS AND EXPERIENCES IN ACCESS TO JUSTICE IN THE MALDIVES

In the Maldives an access to justice survey was conducted using a mix of qualitative and quantitative methods to provide an extensive and in-depth analysis of access to justice and related issues. The centrepiece of the data collection was a poll of the population administered by enumerators to a randomly selected sample of approximately 2,150 Maldivian citizens. The interviewees were chosen from a random selection of households, with one member interviewed per household. The poll consisted of two questionnaires. The shorter questionnaire, which was designed to measure general perceptions and knowledge of law, specific perceptions of the judicial system and some basic experiences with it, was answered by approximately 2,000 people. The longer questionnaire, which was designed to probe in-depth about respondents' attitudes towards, and knowledge of, the law, as well as their experiences in resolving disputes, particularly within the judicial system, was answered by approximately 150 people. Other sources of data included questionnaires administered to and specifically tailored for migrant workers, prisoners, court users and professionals from the judicial system (judges, court staff, police, staff of the Attorney General's office, Prosecutor General's office and private lawyers), as well as case studies of criminal, civil and family cases in the Maldivian judicial system.

Source: 'Access to Justice Assessments in the Asia-Pacific: A Review of Experiences in the Region'

Step 3: Rule of law stakeholder analysis

Once the formal and informal institutions have been mapped, a stakeholder analysis can shed light on the key groups and actors that influence the specific rule of law area within the country, as defined by 'scope' in Step 1. A stakeholder analysis provides information about different types of stakeholders, what their interests and abilities to act are, how UNDP should engage with them and what types of interactions UNDP can help promote. It has three parts: i) stakeholder mapping; ii) understanding stakeholders' incentives and constraints; and iii) identifying the best way to engage with different types of stakeholders and foster coalitions for change. Ultimately, the success of all UNDP programmes and projects depends on the provision of support to partnerships with key stakeholders from government and civil society who have requested support and who are best placed to jointly work towards achieving the goals of the project and/or programme, as well as other UN entities and development partners engaged in the same areas of work. It is important to refer back to the scope of the issue to ensure that the stakeholders being mapped are those that are truly relevant to the scope of the issue. Similarly, this step will require reference back to the analysis of formal and informal institutions in order to help identify who the most relevant stakeholders are.

How to undertake stakeholder mapping

List all relevant stakeholders, i.e., individuals, organizations, authorities, who are:

- Concerned in any way with the rule of law and in particular within the scope of the proposed project.
- Hold an influential position with regard to the scope identified.
- Able to affect the project directly or indirectly. This can include influential individuals or groups as well as those who may not have much influence but whose interests and collective action could make the project succeed or fail.
- Affected by the problems addressed in the programme, so automatically hold a high degree of interest in resolving these issues.

Refer here to Table II above, which details potential stakeholders, including institutions, organizations and individuals, in the rule of law. When mapping stakeholders, it is often useful to divide them into three categories: public sector, private sector and CSOs. This list is not definitive and often interviews with the first round of identified stakeholders will lead to the ICA team being informed of additional stakeholders not identified in the original mapping. For example, additional NGOs might be discussed, different departments within a certain ministry, additional professional associations, traditional leaders, influential journalists or social media activists. The list of stakeholders could potentially be very long, and if there is not the time, money or mandate/scope to talk to all the interested parties, the ICA team should prioritize based on the perceived level of interest, influence and relevance of the stakeholders and in reference to the scope of the analysis. It is also important to disaggregate large stakeholders or groups of stakeholders, for example, it may be that the Ministry of Justice is not relevant as an entity, but a certain department or key individuals within it are. Collective stakeholders (groups, organizations) are not homogeneous entities and while individuals within them may have some shared interests and agendas they also may diverge greatly in views and interests with regard to other aspects.

Understanding stakeholders' incentives and constraints

Once the stakeholders are identified, the analysis team should design interview questionnaires for each stakeholder in order to determine the stakeholders' power or ability to influence the implementation of the reform and how much interest they have, or do not have, in the reform goals, i.e., how much would the respective stakeholder like to see change in the area being considered. The Country Office should discuss to see whether these transaction costs for the participants should be avoided, for instance by doing only one interview per person and including questions on both institutions and stakeholders. In other situations, two interview rounds are appropriate or even more useful, since the first round provides a good foundation for the questions in the second. With regard to any interview, it is extremely important for the ICA team to have 'soft skills' so that interviewees do not feel like they are being interrogated on sensitive issues. An interview can start with a question such as "Please tell me about your work in the area of X or Y. What challenges are you facing?" This type of open question can initiate discussion in a more relaxed and informal manner.

Guiding questions for a stakeholder analysis include:

These questions should only be used as a guide and need to be adapted in accordance with the cultural context.

Take a closer look at the stakeholders and select the most important, i.e., those expected to have particularly strong influence over the issue who cannot be ignored. Analyse these groups or key individuals according to:

1. Characteristics: social (members, social background, religion, cultural aspects), status of the group (formal, informal, other) and structure (organization, leaders, etc.). Consider, for example, these characteristics in relation to government ministries, NGOs, professional groups and the Ombudsman. Also, are the groups homogeneous or are there divisions within them (e.g., between women and men or based on ethnicity, caste, age, rural-urban divide)?
2. The main problems affecting or facing the group or individual (economic, ecological, cultural, challenges to fulfil his/her mandate). For example, the low salaries of judges but high expectations, or the relative position of police officers within society.
3. The main needs and wishes, interests (openly expressed, hidden, vested or material or reputational, or those related to a specific agenda), motives (hopes, expectations, fears) and attitudes (friendly, neutral or hostile towards implementation agencies and others) as seen from the individual or group's point of view. This information is often provided when interviewees are asked about the challenges they are facing and what it would take for these to be addressed. For example, courtrooms may not be suitable for their purpose, or there may be tensions between the ministry of justice and sections of the judiciary.
4. The potential in terms of both strengths (resources and capacities) and weaknesses of the group or the individual and what they could contribute or withhold with respect to the issue. Also, the linkages indicating the main conflicts of interests, patterns of cooperation, or dependency between individuals and groups, among individuals, or among distinct groups.

5. To whom does the individual or group concerned owe their position/privileges/power? Who can remove their position/power? This will help map power relationships and identify which groups/individuals can form alliances to help or block the proposed project.
6. What are the main interests of the stakeholders? Interests can be of a material or reputational nature, or related to a specific agenda (for example, the interests of party leaders may be different to those of human rights organizations, or the interests of those who gain from corruption may be different to those of religious leaders).
7. Who gains from the status quo? Who stands to gain what from reforms? Who loses with a change in the state of affairs? What do they stand to lose? For example, what incentives does a government have to introduce merit-based hiring in the judiciary if they rely on non-merit based hiring to reward supporters?
8. For those with the most to gain or lose, what is their capacity to act on their incentives? Capacities are often constrained by institutional limits on power or by the inability of groups and individuals to act collectively.
9. If reforms in this area have failed in the past, what makes stakeholders support it now? How and why have their interests and capacities changed? For example, a change in government may facilitate enhanced reform efforts or may deter reform efforts, or capacities may have been strengthened enabling further reforms to be enacted. As another example, when establishing a judicial training institution there may not be sufficient support at the outset to make the training mandatory. However, once the institution has been established and institutionalised there may be additional support for making the training it provides mandatory and/or linked to career progression.
10. Which stakeholders are (officially and unofficially) involved in discussions over rule of law reform and what are their interests? What veto points exist in the decision-making and the implementation process?
11. What stake does the government/top executive/key political factions have in the reform, if any? A government may not want to increase access to justice for vulnerable and marginalised groups, for example, if this will mean highlighting the level of discrimination within the country.
12. What risks exist in terms of reform failure and/or of negative unintended consequences of the proposed reforms? For example, is there sufficient support among the relevant stakeholders for the proposed reform, is there sufficient public awareness? Unintended consequences can also include damaging relationships with stakeholders or losing funding for a programme.

Stakeholders power/interest grid

Once this stage of the analysis has been completed, it can be useful to draw a diagram to help visualize the types of stakeholders that may affect the project and the best way for UNDP to engage with them. This technique is particularly useful if practitioners would like to validate the findings of the analysis with others, whether they were part of the ICA exercise or not.

BOX V: INFORMAL GOVERNANCE AND ICA IN YEMEN

Against the backdrop of uprisings and transformative change, Yemen has embarked on a national dialogue in order to negotiate a new social contract, re-defining the relationship between society and the state and setting out their mutual roles and responsibilities. To support this, national and international partners should understand in greater detail the stakeholders, roles and perceptions of informal governance systems. In this context, UNDP supported a qualitative and quantitative baseline assessment of the perceptions, stakeholders and structure of Yemen's informal governance systems, which include informal mechanisms to arbitrate disputes and deliver justice. This assessment was used to inform national policy formulation and planning as well as to assist development partners in the design of a programme of support for governance in Yemen. The assessment included a political economy and drivers of change analysis of the informal and formal governance structures in Yemen (including aspects of justice and safety provision like prosecution, court services and community policing) in order to explore how best these two systems could work together. The findings and analysis of the study informed not only UNDP's programming but also the Government of Yemen, relevant national stakeholders (including the private sector), the UNCT, and international partners in their planning and development of strategies, policy and assessments.

To carry out the formal and informal governance assessment, UNDP Yemen developed a survey instrument with input from UNDP advisers based outside the country. Practitioners in Yemen used the ICA lens to develop questionnaires for the survey, recognizing the influence of informal structures on national politics, policy-making, political appointments and resource allocation. A 50-strong team of data collectors and analysts, led by two lead researchers and three coordinators, was put together to implement the survey. The approach was to pilot the survey in five cities before rolling out into four districts per Governorates in all of the Governorates.

Source: Gert Danielsen, UNDP Democratic Governance Specialist, Bureau for Development Policy, Oslo Governance Centre

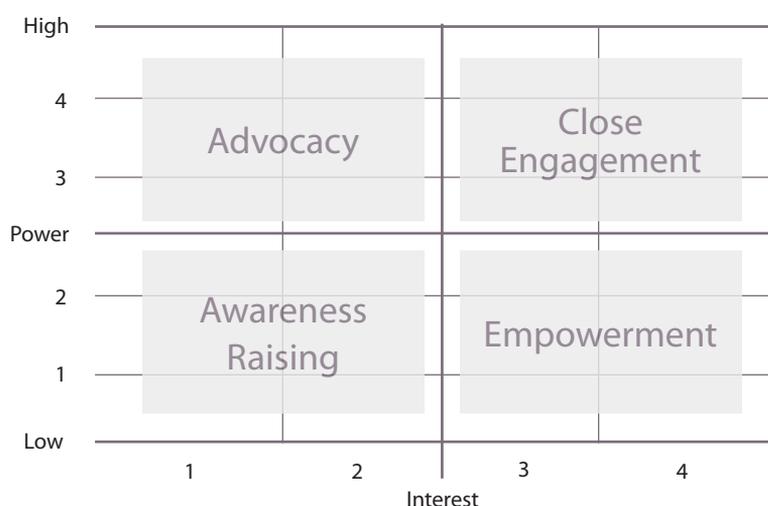
To do this, list all key stakeholders (as discussed above) and answer these questions:

1. How much formal or informal power does each stakeholder have (i.e., to what extent can they influence the outcome of the project concerned, what is their ability to affect or prevent change) on a scale from 1 to 4?
2. How much interest does each stakeholder have in the success of the proposed project (i.e., how much would the respective stakeholder like to see change in the area being considered) on a scale from 1 to 4?
3. Based on the answers to the first two questions, how should UNDP engage with different sets of stakeholders?

In order to do this, practitioners should consider the relative power of each stakeholder and their interest in seeing progress in the scope area identified. For example, a Minister of Justice may have a high degree of power but relatively little interest in improving women's access to justice. Conversely, marginalized women in rural areas may not have much power but be very interested in gaining better access to courts and free legal aid. In the ICA, 'power' refers to a stakeholder's ability to influence a project and help it become successful or unsuccessful, while 'interest' indicates how much the respective stakeholder would like to see change in the area being considered. Some stakeholders may not only have limited interest in a particular project, they may also actively oppose it and would then have 'negative

interest'. But for all practical purposes, this is the same as 'no interest' and will require a risk mitigation strategy (see sections below on engagement strategy and risk mitigation). The score assigned to each stakeholder should be given in relation—as relative power or relative interest—to that of all the other actors in the country who could influence or engage in the problem. This often means the stakeholders' scores can be modified and the actors shifted around on the stakeholder analysis grid (see below) as new stakeholders are assigned their respective scores.

If there are no stakeholders interested in progress in the area being analysed, UNDP should consider whether its assistance in this area can realistically lead to change, or, be prepared to undertake a high-risk project that requires a high volume of advocacy-related work. This is important because experience has shown that a signature on a project document does not always mean there is genuine interest in changing the status quo in the area the project seeks to address.



Be aware that different scopes or different projects would assign different scores to the same stakeholders. On the analysis grid, the likely expectation of how the stakeholder will respond to development initiatives and relative scores are the most important observations—they represent how stakeholders relate to each other and compare to each. Practitioners may find these shift as more stakeholders are added to the grid, and that it will become apparent that some stakeholders are more 'powerful' than others already scored and placed in the grid. In the end, each quadrant should have some stakeholders in it so that the tendencies and relative power/interest between different stakeholders can be emphasized.

Once practitioners have assigned a rating from 1-4 to each stakeholder's power (ability) and interest in the project, they need to place each stakeholder on a power/influence grid, as seen below). This will illustrate the degree and type of engagement required, as well as alliances, which UNDP can help to foster. To continue the example cited above, the Minister of Justice might be assigned a score of: Power: 4, Interest: 2; while women's groups might get: Power: 1, Interest: 3.

Those who have a high degree of power will require more, and a particular type of, engagement from the Country Office. Stakeholders with high power and high

interest in the success of the project are potential 'champions' and UNDP should engage with them closely. Those who have low power but high interest are potential allies of the 'champions' identified. UNDP can work to empower allies through project activities and at the same time facilitate dialogue and 'coalition building' among like-minded stakeholders in order to foster coalitions for change.

Stakeholders with a low degree of interest in the success of the project will require a different type of engagement. Those with high power and low interest have the potential to block or slow down the project, and UNDP should engage with them through advocacy whenever possible. There will be situations when, despite efforts by the Country Office, there will still be no change in the behaviour or attitude of these stakeholders as the project may not be of interest to them or may go against their interests. In such cases, analysis is still useful because it will reveal realistic paths that can be pursued with different sets of stakeholders and help UNDP managers make informed decisions when prioritizing actions and allocating resources. Meanwhile, stakeholders with low power and low interest may simply be unaware of the potential benefits of the project, and engagement with them can primarily entail raising awareness.

During the life of a project, the ideal scenario is that all stakeholders move toward the upper right corner of the grid, i.e., develop a high degree of interest in the project's success and become more empowered in their different capacities to contribute to positive change. In that sense, stakeholder and engagement analysis can also be used during a project's mid-term review as a monitoring tool.

While the stakeholder analysis and the power/influence grid reflect tendencies, it is important to also identify which stakeholders may desire to spoil or actively block a project. 'Spoilers' are easily identified through discussion. When this occurs, it is important to explore engagement strategies that seem suitable in such a situation, as well as consider options to neutralize the antagonists or exclude them from engagement entirely, if appropriate.

BOX VI: IDENTIFYING THE BEST WAY TO SUPPORT SECURITY, JUSTICE AND THE RULE OF LAW IN NEPAL

In Nepal, an analysis of the institutional context recommended donors prioritize two activities; the Nepal Police Reform Programme and the Courts Reform Programme. The four primary reasons cited were that both institutions were reasonably well-disposed to receiving external assistance; both had ongoing reform processes; these activities of these programmes would—more than other support efforts in this sector—have a major positive effect on citizens' security and wellbeing; and, from a systemic perspective, both institutions could potentially influence aspects of the security, justice and the rule of law sector beyond their specific mandates.

Source: Paul Donnelly, 'Access to Security, Justice and Rule of Law in Nepal: An Assessment Report', DfID, UNCT, Danida HUGOU, October 2011

Step 4: Engagement strategy

Once analysis of the stakeholders is complete, the next step is to identify engagement strategies with each of them. The stakeholder analysis has identified the 'who' and this step of a rule of law ICA will help identify the 'how', 'where' and 'when'.

Identifying the best ways to engage with different types of stakeholders and foster coalition for change

Once the first three steps have been completed, the ICA team should have a good understanding of the individuals or groups who are potential allies in the achievement of change related to the issue, and those who might pose an obstacle to change. In practical terms, the stakeholder analysis should help identify agents of change to support and help mitigate the risks that certain stakeholders might block achievement of programmatic objectives related to the issue at hand. Additionally, enough information will now be available to identify which stakeholders may find an alliance with UNDP mutually beneficial, and to use the convening power of the UN to foster dialogue and coalition-building towards change.

The idea of the engagement strategy is to identify the webs of relationships that development practitioners were previously not aware of or did not understand and to use this information to plan how to best engage with each stakeholder. This information should be used to lay out an engagement strategy to plan such things as: With whom will the CO engage, when, where and how? How will the CO approach potential champions and what can be done to persuade, neutralize or isolate potential opponents? What alliances can be forged among the stakeholders identified? For example, if the Ministry of Justice is not on board, is it possible to work with the associations of judges and prosecutors, or is the Supreme Court supportive? It is important to understand and always keep in mind the stakeholders' incentives and constraints with regards to the proposed reform, and to consider what can be done to combat the factors that are likely to block, impede or slow down a project.

It is also important to note that the stakeholder analysis can be used down the line as an important input to capacity assessments and capacity development activities.

Guiding questions for devising an engagement strategy include:

With whom will the CO engage, when, where and how?

1. How will the CO approach the possible champions and what can be done to persuade, neutralize or isolate potential opponents? What alliances can be forged?
2. Are there powerful and interested actors that can be approached to help persuade less interested actors or help empower less powerful stakeholders?
3. For the expected opponents of the initiative or project, what incentives—monetary or otherwise—might realign their interest towards supporting it?
4. What are the most feasible engagement strategies with the various stakeholders (including individual partners and organizations) for interventions in this sector?
5. Would linking up with external actors or other programmes or projects possibly make a difference in terms of bringing potential opponents on board?

It is important to consider stakeholders other than the 'usual suspects'. A RoL ICA should help identify potential new alliances that can be created, as well as develop a better understanding of stakeholders' needs and interests in order to support future programming.

Step 5: Risk analysis and mitigation

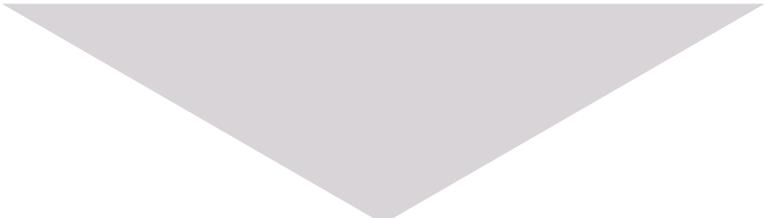
In identifying and mitigating risks, practitioners should consider the following guiding questions:

What are the main risks involved in making progress in this area, especially in the choice of engagement strategies?

What can be done to avoid these risks?

If risks are anticipated (corruption, lack of engagement of stakeholders, blockages by political/economic vested interests), how can the possible adverse effects be mitigated?

By analysing the previous questions, what are the recommended ways forward?



Circumstances affecting certain stakeholders and the engagement strategy overall may change during project implementation, so it is important to consider risk mitigation strategies and commit to regularly monitoring risk. A rule of law ICA requires asking what can be done to combat those factors that are likely to block, impede or slow down a project. This goes farther than a traditional risk mitigation tool. For example, stakeholder groups may be affected by informal rules that privilege some group members over others and result in layers of different interests. When rule of law stakeholders' interests and incentives are identified in Step 3 of the ICA it becomes easier to monitor issues that may have an impact on these interests and to seek to change these issues over time. In this sense the ICA should not replace, but complement, the Human Rights Due Diligence Policy, which requires all UN entities providing support to or considering supporting non-UN security forces to undertake a risk assessment informing potential interventions.²³

In addition, stakeholders that may not favour a change in the state of affairs may pose risks of their own. Based on analysis of their interests and constraints, the ICA team should devise engagement strategies for these stakeholders in order to neutralize, co-opt or try to minimize their influence. If these options are not possible, the ICA team should consider whether the risk of engaging in a specific area is worth taking in view of limited resources and increasing pressure to demonstrate positive results.

Monitoring and evaluation as a tool for mitigating risk

Monitoring and evaluation (M&E) is another traditional tool for monitoring risks and taking appropriate action when possible, and is an item from the suite of tools that the rule of law ICA seeks to complement. If M&E is weak, the ability to understand change, measure performance and demonstrate results will be weak. A solid M&E structure will lead to improved performance management, with CO management using the strong M&E system to support evidence-based decision-making and to inform programmes and policies. However, a traditional M&E system is often far from enough to mitigate political risks and outright opposition from groups who are against a project. Practitioners are referred to UNDP's 'User's Guide to Measuring Rule of Law, Justice and Security Programmes', which provides information on better ways to measure programme effectiveness by clarifying the nature, methodologies, feasibility, benefits, limitations and practical considerations of measurement.

Guiding questions for risk analysis and mitigation include:

1. What can be done to combat those factors that are likely to block, impede or slow down a project or proposed reform?
2. Are there external events that may affect the strategy?
3. Which risks link to incentives, and what can UNDP do to shift or help create incentives?
4. What are the risks that UNDP can control or help mitigate? How?
5. How can risk be monitored?

²³ http://www.un.org/ga/search/view_doc.asp?symbol=S/2013/110&referer=http://www.un.org/en/sc/documents/letters/2013.shtml&Lang=E

Step 6: Potential for change and actions to be prioritised

In identifying the potential for change to which any given project-level intervention in the rule of law can contribute, it is important to be clear about what UNDP can do to help promote change and, equally important, what it cannot do. Providing an honest assessment of the potential for change through a project is where an ICA on the rule of law can make an important contribution to risk management. As well as referring back to the scope of the ICA and the institutional and stakeholder analyses, this requires an assessment of the feasibility of objectives in relation to rule of law reform more broadly and options for working with reform champions where they exist and a broader constituency of interest groups outside government, especially where reform champions do not exist. Having mapped the sector and analysed the key trends the Country Office will be in a better position to design rule of law interventions that are both technically sound and politically feasible.

At this stage, the ICA team, based on discussions with the Country Office and a better understanding of what is feasible in the given context, can consider the available options and the most promising rule of law engagement strategies. The previous steps of the ICA should provide the ICA team with an analysis of the formal and informal institutions and the relationships between key stakeholders. On this basis it should now be possible to identify the programming implications and to define objectives of the engagement and expectations of the proposed reform, and therefore to determine the most feasible approach for the rule of law project or programme.

This should not take the place of a rule of law needs assessment,²⁴ which, unlike an ICA, does not deeply assess the broader enabling environment, i.e., the relationship between the formal and informal systems, rules and cultural norms, and the incentives or disincentives that can enable or disable a development intervention. However, when considering actions to be prioritized it is useful to keep in mind the human rights based approach²⁵ to programming and the capacity development approach in order to balance activities to support both rights holders and duty bearers, i.e., the demand and supply side of development, and to ensure local ownership and the sustainability of the initiative.

For this step of the ICA, practitioners should focus on the engagement strategies as laid out in the stakeholder power/interest grid. This will also work as a validation exercise. It can be useful to look at what has been done in terms of engagement with some of the stakeholders previously, and what can be learnt from this? Alliances are important, so consider who could help who move closer to higher interest and higher ability/power? Are there champions and external figures (media and others) that UNDP can draw on?

24 **Assessment** refers to an early exploration of an issue. Usually it is done before a program is implemented to determine what type of program is likely to result in desired outcomes (e.g., increased access to courts among women, decreased number of people in pre-sentence detention) while minimizing unintended consequences (e.g., damaging relationships with stakeholders, losing findings for a program). These types of measurements are often called 'needs assessments' and they can help practitioners explore a problem and decide which type of program design is most appropriate for the issue at hand.

25 For further information please see the UN Practitioners' Portal on Human Rights Based Approach to Programming at <http://hrbaportal.org/>

Guiding questions for shaping a RoL project in relation to RoL ICA findings

1. Based on the information collected so far, what are the most feasible entry points for interventions? Examples of these include the establishment of a judicial training centre, updating criminal and civil rules of procedure, support to transitional justice processes, reform of the legal aid system, or developing a police training academy. Considering the stakeholder analysis in particular and the dynamics at hand, what can be realistically achieved through these activities so that they contribute to results at the outcome level?
2. If resources are limited, what are the pros and cons of each possible entry point? This will involve drawing up a list and trying to identify which potential initiative is likely to have the most impact and have the strongest results against the backdrop of the ICA's first five steps. For example, if the judiciary is embroiled in political challenges to its independence at a national level building its capacity centrally may not have much impact, but, provided local politics is conducive, it may be possible to work with lower level courts to effect a positive improvement in service delivery.
3. Which activities have the potential to lead to change in the short, medium, and long term, and how likely or possible are these changes? Immediate short term changes may be favoured over long term changes in some circumstances, for example, provision of training to police on how to deal with cases of domestic violence in order to strengthen women's security may be identified as an initial entry point, prior to establishing refuge centres or drafting a law on domestic violence with a corresponding strategy and action plan. This approach may be favoured in contexts where there is no normative or institutional framework to support domestic violence and where immediate, short-term gains can ultimately feed in to desired long-term changes.
4. Considering the risk analysis and mitigation exercise carried out in Step 5, how sensitive are these entry points to changes caused by the external environment, such as the economy, disasters, or changes in government due to elections?
5. How will the Country Office ensure an appropriate gender balance for the proposed interventions?
6. In which areas does UNDP have a comparative advantage, bearing in mind what other donors are doing and the national priorities?
7. Are there any 'quick wins'?
8. Which strategies seem more likely to affect change?
9. With consideration to the risks, what should be prioritized?

Identifying potential for change can help reveal unintended but potentially harmful effects, which should be considered when formulating a project. This is particularly relevant in crisis and post-conflict countries. It is also relevant in the context of promoting gender equality, as projects may unintentionally impact negatively on women (or men) if no proper analysis of gender issues was done at the start, or if the conclusions from such an analysis were ignored.

Assessing the likely limitations of a development initiative, and anticipating any potentially harmful effects is important in managing expectations and achieving development impact.

BOX VII: UNDERSTANDING LIKELY PROJECT LIMITATIONS IN NEPAL

To develop and implement a comprehensive gender justice strategy embracing the entire Criminal Justice Process in Nepal

While the possibility of the relevant legislation, policies and procedures being put into place is relatively good, the reality is that institutional inertia and deep seated social prejudices will provide considerable resistance. Donors should support initiatives in this area from policy development through to implementation, but their expectations for success should be limited by the social realities and the expectation that reform will come slowly.

To develop and expand current initiatives in respect of the care of victims and the protection of witnesses

This covers a wide spectrum of need from victims of domestic violence to informants in respect of organised crime, and current provision is patchwork. Donors should provide targeted support to efforts to support women, children, and marginalized and vulnerable groups, but there is no perceptible benefit from supporting high tariff witness protection schemes in the foreseeable future.

To ensure effective implementation of anti-discriminatory laws and procedures

For these to be effectively implemented will require considerable changes of behaviour and attitude on the part of Nepali society in general and on those responsible for their enforcement. Donors should support this because it is the right thing to do, but should not expect early results.

Source: Paul Donnelly, 'Access to Security, Justice and Rule of Law in Nepal: An Assessment Report', DfID, UNCT, Danida HUGOU, October 2011

PART 2

SECTION 2B: USING INSTITUTIONAL AND CONTEXT ANALYSIS TO SUPPORT THE RULE OF LAW

2B.1 Methods, processes and templates

For information relating to different methods and the practical requirements necessary for carrying out an ICA, readers are referred to Chapter 3 of the generic 'ICA Guidance Note'²⁶, which provides concrete how-to guidelines and templates. It contains detailed terms of references, information on data collection methods, and knowledge on how to oversee the design and implementation phases of an ICA, how to strengthen the quality assurance process and how to best make use of an ICA. It also provides the knowledge required to identify the best service provider when outsourced technical expertise is required. Some of this key information is detailed below.

Who should be in a rule of law ICA team?

A good ICA requires a team to undertake the analysis from beginning to end. Depending on the scope, purpose and methodology of the analysis, a core team combining international and national experts can be enlarged at different points as required, such as when specific expertise is needed. The core team should include UNDP staff for quality assurance and to avoid over-reliance on external consultants or risk jeopardising relationships with national partners.

How does a rule of law ICA operate—Planning and budgeting for the RoL ICA

There are many different ways in which a rule of law ICA can be undertaken. The option of undertaking a light version of an ICA that focuses on just one or two steps of the process has already been mentioned. Depending on the time and

26 For further information, please see 'Institutional and Context Analysis Guidance Note', pp.34-36

Summary of Section 2B

Section 2B provides readers with the methods, processes and templates necessary for carrying out an ICA. It presents the minimum requirements for conducting a rule of law-focused ICA and considers who should be in the ICA team. The Section discusses the advantages and disadvantages of working with partners on a rule of law ICA and concludes with advice regarding data collection methods.

Drawing on informal sources of justice sector knowledge in Vietnam

In Vietnam, an informal institutional and context analysis of the justice sector was undertaken. The policy advisor on access to justice convened a group of key experts and stakeholders in the sector, such as professors, government officials, champions of reform from NGOs and CSOs, lawyers and judges and gathered them together on an informal basis to provide information and data relating to the justice sector. This group met regularly for more than a year to discuss reform options, policy and sector level developments. For example, the group met in July 2012 to discuss the implications of UNDP supporting same-sex marriage in Vietnam. In this way, UNDP was able to constantly stay informed through a variety of stakeholders with differing views on reform and policy options. No formal reports were produced and no sign off from the government was sought.

Source: Interview with Nicholas Booth, Policy Advisor for Governance, Human Rights and Access to justice, UNDP Asia

PART 2: SECTION 2B

| STEPS IN INSTITUTIONAL AND CONTEXT ANALYSIS ON THE RULE OF LAW | | |
|--|---|--|
| Timeframe | Preparation | Participant(s) |
| 6 weeks before mission | Identify a dedicated focal point in CO | Input from Democratic Governance Group and regional colleagues |
| 6 weeks before mission | Develop ToR for the consultant(s) | CO with support from regional centres and HQ |
| 6 weeks before mission | Agree on funding for the ICA | DGG in collaboration with regional and country colleagues |
| 4 weeks before mission | Recruit national and international consultants ⁽¹⁾ | Agree on whether this is done by CO or DGG |
| 3 weeks before mission | Send background material to the consultants | DGG and CO |
| 2 weeks before mission | Start identifying relevant stakeholders | CO and consultants jointly |
| 1-2 weeks before mission | Set up interviews | CO |
| 2 weeks before mission | Read background documentation | Consultant |
| 1 week before mission | Prepare work plan for ICA | Consultant |
| | During the mission | Participant(s) |
| | The first day of the mission should be scheduled for preparations between the consultants and the CO to ensure: <ul style="list-style-type: none"> - Proper introduction of the ICA approach, purpose and scope of the study, and the relevance once the report is produced (i.e., uptake) - Agreement on roles, interview questions and approach to each interview and deadlines | Consultants and CO |
| | Interviews | Consultants with optional CO participation |
| | ICA brown bag lunch/presentation to CO (optional) | Consultants |
| | Debrief/presentation to partners (optional) | Consultants |
| Timeline | Writing the report | Participant(s) |
| 2 weeks after mission | Analysing findings and first draft of report according the ToR | Consultants |
| 3 weeks after mission | Comments to first draft | DGG and CO |
| 4 weeks after mission | Final report | Consultants |

(1) Recruit national and international consultants

resources of the CO and the purpose of the ICA, different options and formats, ranging from three days for a light ICA to a three-month comprehensive exercise, can be considered. Similarly, costs will depend on, for instance, whether the consultant(s) involved is/are hired locally or internationally, and whether travel is required. In any case, it is important to draw up a budget in advance and identify sources of funding. These may include TRAC (assigned from UNDP's core budget) and/or funds provided by donors for this purpose. Given that many of UNDP's donors are sensitive to the importance of managing risks, managers can explore the possibility of mobilizing resources as part of the project preparations. For more information, please contact a rule of law/access to justice advisor at a UNDP Regional Service Centre or in the Democratic Governance Team.

Terms of reference for a rule of law ICA

The process of developing terms of reference provides an excellent opportunity for in-group discussion on the subject matter, the rationale for an ICA and its scope, limitations and risks. A participatory—yet manageable and time bound—process should take place within UNDP to iron out conflicting views and understandings around the ICA exercise (what it can and cannot deliver) and to find agreement on the human resources and type of expertise needed. Important substantive issues arise in the course of this consultative process, which are worth taking into account by the ICA team at a later stage.

Terms of reference could be structured around the following sections.

1. Background

- What is the breadth and depth of the issue/sector to be analysed?
- What is the overall objective and rationale of the UNDP intervention?

2. Objective of the assignment

- What is the goal of the ICA?
- Where does the need for an ICA stem from?
- How will the analysis feed into planned activity?
- What are the time, financial and methodological (or political) constraints?

3. Scope of the assignment: Activities and deliverables

Activities

- Given resources allocated, strategic interests, and constraints, what type of activities should be carried out to meet the desired objective?
- What data collection methods should be applied?
- Will the consultant(s) write interview questionnaires or guidelines for focus group discussions? If so, will they be deliverables on their own?
- To whom should the consultant(s) report?

Deliverables

- Is there a need for short, stand-alone and internal reports summarizing the findings of each method of inquiry, such as a Summary Report from Focus Group Discussion, as the process advances?
- In addition to identifying entry points, what are the specific outputs for the consultant(s) who will undertake the analysis? Keep in mind that specific recommendations on entry points, risks and a realistic assessment of actions to be prioritized should be explicit outputs so that the final report contains actionable points and the analysis is not reduced to an academic exercise.
- Will the final deliverable take the form of a report? What should be the main sections of the report?
- How will the analysis findings be disseminated? Will the consultant(s) be expected to deliver a presentation to partners (with the content to be discussed in advance with the Country Office)?

4. Competencies

Members of the research team should:

- Include both women and men;
- Display cultural, gender, race and age sensitivity;
- Demonstrate integrity by modelling United Nations values and ethical standards;
- Display comfort working in politically sensitive situations;
- Have strong oral and written skills;
- Demonstrate research, analysis and report-writing skills;
- Have a good grasp of ICA ideas; and
- Have excellent communication and inter-personal skills, particularly for building networks and partnerships.

The Team Leader should have:

- The ability to lead the formulation and implementation of projects;
- Good understanding of UNDP programming modalities;
- Fluency in the working language of the Country Office as well as the language in which the report will be published (if different), and knowledge of the local language(s) (if different from the Country Office's working language and the language in which the report will be published).

National Experts should have:

- Fluency in the working language of the Country Office as well as the language in which the report will be published (if different), and knowledge of local language(s) (if different from the Country Office's working language and the language in which the report will be published).
- A track record of relevant research.

5. Required Skills and Experiences

For a generic list of types of expertise, see the box below.

For the Team Leader, the following could be added:

- PhD or Masters in a relevant discipline, such as political science, development studies or sociology; and
- Knowledge and experience of the country or the region preferred.

For national experts, the following could be added:

- Masters in a relevant discipline, such as political science, development studies or sociology.

Minimum requirements for conducting a rule of law focused ICA

These are the minimum levels of expertise that should be present in every ICA team, including those operating in crisis and conflict affected areas

Expertise in institutional and context analysis or similar.

Experience in analysing development challenges related to rule of law and how they are linked to the institutional context.

Extensive experience applying qualitative and quantitative methods of social research.

Experience in planning and programming, notably experience in rule of law planning processes and programming.

Gender expertise. This should go beyond having a gender person in the team. All team members should have at least a basic level of understanding of gender-related issues and dynamics.

Expertise in facilitating and managing participatory processes or rule of law focus group discussions, if these are planned as part of the ICA.

Experience drafting rule of law related knowledge products, such as books, articles, research papers, toolkits, guides, methodologies, analytical documents, policy papers and notes, project and programme documents, baseline studies, desk reviews, and comparative studies.

2B.2 Working with partners

An ICA is primarily an internal planning exercise in the sense that it is intended to inform UNDP's planning and decision-making with a view to maximise effectiveness and minimise risks. Internal does not necessarily mean confidential, however, and a rule of law ICA can be useful to discuss with partners wherever possible and to share findings with relevant stakeholders. By sharing information with other development partners on rule of law ICA findings, UNDP can support changes at the political level that as a multilateral it does not have the mandate to carry out. It is also important at this stage to decide on whether to work with partners from the start or use the analysis to decide whom to approach and how.

Decisions on analysis design and on whether and how to communicate findings should be made by the senior management of the CO, bearing in mind the mandate of UNDP and its relationship with the host country. There are different ways to share findings, for example, through a presentation, in a short report or through a validation workshop. What to share and how depends on the purpose of the ICA and the country context. If the purpose of the analysis is to engage with partners for dialogue on critical issues, findings could be shared in the form of a report or presentation for external consumption. If the purpose is to identify which partners to engage with, determine viable engagement strategies and establish where UNDP support can make the greatest difference in the context of the country programme and project formulation processes, the analysis should be treated as an internal exercise, involving partners as needed. In the context of project formulation, analysis findings can be partially published excluding passages that could cause discomfort among partners, or they can be presented verbally by the ICA team to the relevant parties. Alternatively, findings can be shared with partners in a safe space as part of a strategy to start a dialogue on sensitive issues.

2B.3 Data collection²⁷

ICA relies on a combination of qualitative and quantitative data from primary and secondary sources, which can be collected using various techniques but should, as much as possible, be triangulated.²⁸ Credible ICA needs to be well evidenced. It needs to pull together a compelling 'analytic narrative' consistent with experience and systematically gathered data and information, while avoiding the pitfall of essentially providing technical analysis combined with some broad statements about governance and political economy. This requires thorough data collection and validation and should include both sex disaggregated data as well as specific gender equality indicators and data.

27 For further guidance and information, please see the 'UNDP User's Guide to Measuring Rule of Law, Justice and Security Programme' (2012), in particular chapter 3, entitled "How to measure".

28 Triangulation is a powerful technique that facilitates validation of data through cross verification from more than two sources. For interviews, this means posing a similar set of questions to multiple respondents in order to corroborate claims. It is also helpful if more anecdotal or 'soft' information can be triangulated with 'harder' sources. For further information on data collection methods please see the 'ICA Guidance Note'.

BOX VIII: EXAMPLE OF GOOD PRACTICE IN DATA COLLECTION METHODS FROM MALAWI

In 2010, upon request from the Government of Malawi, UNDP supported the undertaking of a baseline survey of the country's national justice system. The objective was to provide descriptive baseline information to the Ministry of Justice and Constitutional Affairs, other government agencies, and NGOs and CSOs involved in the administration of justice and ensuring safety and security. The survey was designed to capture a wide range of data on the rule of law, due process, access to justice, safety and internal security, and human rights. The need for the survey stemmed from a context in which the country provided an enabling environment for a fair and equitable justice system, but the justice services provided were inadequate, inefficient and ineffective. It was therefore imperative that the justice agencies develop a responsive, relevant and realistic strategy to address deficiencies in services. The study also responded to the Joint Country Review of Governance in 2007 that had identified ineffective coordination of donor support as one of the main constraints that weakened the administration of justice in Malawi. The completed Malawi baseline study was then used as an important resource to inform strategies and policies at the sector and national levels, thereby ensuring coherent decision-making and the development of programmes to meet the needs of the public.

Source: 'Examples and Good Practices in Measuring Performance of Rule of Law, Justice and Security Programmes', UNDP BDP/BCPR, 2012

2B.4 Rule of law ICA and ICTs

Information and communication technologies (ICTs) can be used to turn institutional and context analysis into action. Through the use of ICTs, a rule of law ICA can address issues such as a lack of political will among key government leaders, vested interests, lack of citizen demand for accountability, or hostile public opinion.

There are now upwards of 3.9 billion mobile phone subscriptions in the world, in a global population reaching over seven billion people²⁹. This indicates that more people have access to a mobile device than to justice or legal services. Yet this also provides those investing in strengthening the rule of law with an opportunity. Mobiles are catalytic tools that can be used to enhance and broaden development programming if they are utilized strategically. They open new channels for connecting the poor to services, new ways for citizens to have their voices heard and new opportunities for civic engagement in larger rule of law processes. Demand for the use of ICTs in rule of law programming is on the rise because they can assist in fostering human development, empowering people and building resilient societies. ICTs can also be used to identify trends, gaps and challenges in rule of law programming. Rule of law ICA relies on a combination of qualitative and quantitative data from primary and secondary sources, and ICTs can be used to assist in the data gathering process.

Access to new ICTs empower people by providing platforms, networks and communication channels that allow them to participate in decision-making and other government processes, giving voice to those who had little or none before. But while ICTs open new opportunities to foster inclusive participation, they do not directly entice people to engage and become more active in the public sphere. Further, although having voice and being able to participate in decision-making processes is essential for strengthening democratic governance and achieving key development goals in the rule of law and other sectors, institutions are not developing or modernizing at the same pace and are struggling to effectively respond to such demands.

Although public institutions can become more responsive and inclusive by embracing new technologies, what seems to be missing to further this is not the required ICT platforms, nor the demand from stakeholders, but rather the political will to make 'listening' to people's voices an integral part of policy and decision-making processes. Rule of law ICA can address this.

Data gathering through Internet-based crowd-sourcing in Serbia

In an example ICT data gathering exercise, an Internet based crowd-sourcing survey was conducted in Serbia in 2013 to gauge citizen's perceptions of judicial reform and access to justice in order to inform and shape future programming in this area. Although not scientific in nature, crowd-sourcing such as this can be used to obtain in real-time citizen's perceptions, opinions and experiences on issues related to the rule of law.

Source: Žarko Petrović, Rule of Law Portfolio Manager, UNDP Serbia

BOX IX: ICA AND ICTS IN ACTION

In 2010, working in collaboration with UNICEF's Innovation Group, UNDP funded a crowd-sourcing project in Madagascar. After facing a number of obstacles the project identified two communities and used SMS-based crowd-sourcing to involve youth in local policy and decision-making processes. Institution and context analysis had identified that in these communities the elders were in charge of all governance issues and the youth did not have the option of speaking up. Knowing this, the project reached out to local government authorities, explained the purpose of the project and secured their agreement for moving forward. In the end, more than 50,000 SMS were received from 45,000 mobile users.

Source: Raúl Zambrano, Policy Advisor E-Governance, UNDP Democratic Governance Group, DG Insights, September 2013

²⁹ 'From Connectivity to Service Delivery: Case Studies in E-Governance' UNDP 2013.

ANNEX

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UN Practitioners' Portal on Human Rights Based Approach
to Programming

<http://hrbaportal.org/>

UNDP Oslo Governance Centre

http://www.undp.org/content/undp/en/home/our-work/democraticgovernance/oslo_governance_centre/governance_assessments/



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