The Rule of Law in Peace and Capacity Building Operations: Moving beyond a Conventional State-Centred Imagination

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Abstract
Although the ‘rule of law’ is now widely recognised as indispensable to effective peace operations, its delineation remains elusive. Researchers contest its substance while those most responsible for its implementation (e.g. the United Nations) promulgate only abstract notions needed to inform detailed decisions. At its worst, this means that competing reform activities undermine each other, making long term success less likely. The questions we address are about the deficiencies in how rule of law is conceived. Particular attention is paid to the little recognised assumption that the Weberian state ideal corresponds to the societies on the receiving end of international interventions. After a review of extant academic and practitioner viewpoints, we set out a post-Weberian framework which expands the dominant imagination to include non-state rule of law ‘providers’. We argue that the optimum sources for immediate yet sustainable rule of law solutions may often be those which bear little resemblance to the conventional state-based providers that populate mainstream conceptions.

Keywords
rule of law; peace operations; capacity-building; peacebuilding; informal justice mechanisms; post-Weberian

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Introduction

A little recognised yet highly consequential challenge facing the field of peace and capacity building operations pertains to the ‘rule of law’ (RoL). On the one hand, there is now broad consensus that the RoL is critical to success. The way to redress widespread violence, all manner of social ills, and corruption is to resurrect – or erect – RoL. Its prominence has risen to the point that it has been depicted as the “preeminent legitimating political ideal in the world today”, surpassing democracy and liberal economics as the dominant paradigm in the post-Cold War era. Those interested in promoting such varied aims as human rights, development, national security, and free markets can all agree. Illustrations which bear out this lofty status include the 2005 World
Summit’s commitment to an international order based on the RoL\textsuperscript{7} and the announcement of newly inaugurated US President Barak Obama that it will comprise the touchstone of his presidency.\textsuperscript{8}

On the other hand, what is RoL? And how can it be realised? These questions frame a problem which troubles all of its many applications. The problem exists for three main reasons. Firstly, RoL’s delineation remains vague and uninstructional among those most involved with its implementation.\textsuperscript{9} A survey of the major organisations charged with restoring and maintaining peace around the globe, for instance, indicates wide-spread satisfaction with only cursory definitions. In fact, RoL is typically bundled together with democracy, good governance and human rights as a collective panacea to peaceful and stable societies, and thus it is used as a political ideal.\textsuperscript{10} Hence, for these organisations, expressing platitudes about the need for RoL appears to suffice. The result is that those charged with delivering this critical area lack sophisticated views about its meaning and therefore what may be required both to achieve and to measure it.\textsuperscript{11}

Secondly, though there is a significant amount of agreement and overlap, to-date the numerous efforts to unpack this encompassing concept have failed to develop the necessary antidote: a widely-accepted understanding which is clear while at the same time flexible and comprehensive.\textsuperscript{12} In fact, the

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\item United Nations General Assembly Resolution 60/1, ‘2005 World Summit Outcome’ (2005), para. 134 (a), p. 29.
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assumptions concerning its apparent simplicity and moral clarity belie the challenges of defining its substance. A review of these investigations reveals how difficult this task has been. Vastly different factors as well as perspectives are identified. Is RoL about the existence of formalised legal institutions, state governance across many other areas, the absence of street violence, or something else altogether? Rachel Kleinfeld likens the current state of affairs to the proverbial blind man’s elephant, whereby what is a trunk to one person is a tail to another.

Finally, largely unrecognised state-centric assumptions continue to restrain the debate from moving toward a more incisive and universally applicable understanding. That is, Western-dominated conceptions and thus programs tend to view conflict-affected areas through a self-image prism which may bear scant resemblance to the realities of the societies targeted by the interventions. It is not enough to express the need to promote local ownership but then offer nothing more than state-specific solutions.

The blind spots which emanate from these three characteristics have consequences far beyond conceptual debates. They present significant obstacles to the success of peace and capacity building operations in at least two interrelated ways: first, it means that scarce resources are too often wasted (or worse, end up having a counter-productive effect) because they go to the wrong places; second, a consequence of this misplacement of resources is that the political will of well-intending donor states and organisations – who understandably look for results yet become frustrated if progress does not materialise – is put in jeopardy.

The purpose of this article is to help redress these definitional deficiencies, since their persistence has grave real-world ramifications. ‘Sustainable peace’ remains but a wishful expression in too many parts of the globe where genuine improvements in RoL could make an enormous difference to the lives of the world’s most vulnerable. We do not expect that the universal adoption of any

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14) Kleinfeld, ‘Competing Definitions of the Rule of Law’, p. 32.


16) Kleinfeld, ‘Competing Definitions of the Rule of Law’, p. 64.
delineation will occur in the near term, due in part to the panoply of underpinning issues but also that current discussions remain dominated by state-based actors. We do however hope that, at the very least, this investigation helps usher the debate toward a more incisive (post-Weberian) understanding, capable of informing wiser practices.

The pathway we advocate marries the wealth of mainstream knowledge and experience on the one hand with the emerging insights on how to incorporate extant local mechanisms in order to facilitate the right balance between state and non-state providers. It is a hybrid form which pushes beyond the contemporary marriage of international and national to include the widest array of providers. The framework we set out hinges on the following ideas. RoL conceptions must move beyond the magnanimous aim of accommodating local sensitivities to a non-state-centric awareness which is capable of recognising all manner of ‘RoL providers’ that may already exist locally. It is not enough simply to include local voices in non-indigenous processes or institutions, the approach which marks the overwhelming majority of reform activities. Limiting resource allocation to state-based actors can cause legitimate and effective indigenous institutions to be overlooked in lieu of more expensive,

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17) ‘Post-Weberian’ herein refers to the condition in which both state and non-state actors comprise plausible sources of law and justice, with the point being to identify where and how the myriad sources operate, and potentially interact. This contrasts the Weberian ideal which presupposes that formal state mechanisms alone deliver law and justice practices. See: Joel S. Migdal and Klaus Schlitche, ‘Rethinking the State’, in K. Schiltche (ed.), _The Dynamics of States: The Formation and Crises of State Domination_ (Surrey, UK: Ashgate Publishers, 2005), pp. 1-40, p. 36-40.

18) Others before us have suggested the need to marry formal state with informal non-state mechanisms. See, for example, W. Clifford, L. Morauta, and B. Stuart, ‘Law and Order in Papua New Guinea’, (Port Moresby: Institute of National Affairs and Institute of Applied social and Economic Research 1984): who made the argument that because Papua New Guinea’s formal justice system was often entirely irrelevant to much of the population, it should be viewed within the broader context of the many informal social control mechanisms in order to enhance its performance.


20) We intend to embed robustly what many such as Stromseth et al. acknowledge (yet fail to explore in depth) in statements such as the following: “community-based accountability proceedings that both enjoy local legitimacy and respect human rights can have an important immediate impact and also contribute to the longer-term goal of strengthening the rule of law.” Stromseth, Wippman, and Brooks (eds.), _Can Might Make Rights: Building the Rule of Law after Military Interventions_, p. 308.
less sustainable and often less legitimate options. Global best practice conceptions\textsuperscript{21} must be equally relevant to the many circumstances in which the Weberian ideal of the modern nation-state has never really applied (\textit{e.g.} Melanesia).

We augment this insistence to use the most inclusive lens possible with specific principles that, together, promise the \textit{experience} of RoL.\textsuperscript{22} The intent is that managers of peace and capacity building operations begin to ask: ‘Who or what has delivered (or may be capable of delivering) RoL?’ As such, donors must come to accept that state providers can not only co-exist with non-state providers, but that they can complement each other. The framework we outline is therefore conceived specifically to enable the most efficient and sustainable use of scarce resources. It not only reduces the chance that resources will be poured into the building of ‘foreign’ institutions that may be wholly incompatible with local RoL providers when synergistic solutions are needed,\textsuperscript{23} but at the same time it can take advantage of the otherwise problematic short-term results donor culture by enabling quicker ‘wins’. In doing so a post-Weberian understanding, which interrogates the Euro-American assumption that modern state mechanisms permeate all facets of daily life, promises the most effective path to sustainable RoL.

The article is divided into three main sections. The first section reviews the current state of affairs in order to establish how RoL is generally understood. Though brief, the review is wide-reaching, encompassing the views of researchers as well as a global cross-section of the organisations that fund and implement

\textsuperscript{21} Randy Peerenboom, ‘The Future of Rule of Law: Challenges and Prospects for the Field’, \textit{Hague Journal on the Rule of Law} vol. 1, no. 01, 2009, pp. 5-14, p. 6, makes an important point that we should guard against striving for a consensus definition, preferring instead to accept multiple perspectives. While agreeing with the essence of his point, we would argue that the absence of explicit understandings contains its own problems, including the risk of making RoL meaningless, and that we should therefore move toward a consensus which allows for multiple perspectives to be housed under the same roof. We see no reason to presume that a consensus definition would necessarily strangle the capacity for diverse perspectives.

\textsuperscript{22} We are also mindful that some contest whether the causal relationship between RoL and development may actually be the converse from what RoL advocates maintain (See: Stephen Golub, ‘A House without a Foundation’, in Thomas Carothers (ed.), \textit{Promoting the Rule of Law Abroad: In Search of Knowledge} (Washington DC: Carnegie Endowment for International Peace, 2006), pp. 105-36, p. 110.

\textsuperscript{23} See Michael Kelly in Howard and Oswald (eds.), ‘The Rule of Law on Peace Operations’, p. 279, who argues that ‘We have to avoid the paradigm paralysis of attempting to impose what we are familiar with, and what has worked elsewhere.’
RoL programs. We delimit the debate according to four features, which include its state-centric lens. The second section takes up the issue of state-centricism in order to outline a way to move beyond its confines. The first two sections provide the platform for the final section in which we put forward an approach intended to redress the issues highlighted.

**Delineating RoL**

Aristotle described the RoL succinctly as: “government of laws, not men.”\(^{24}\) The evolution of the concept of RoL can be characterised by a dichotomy between *Formalist* and *Substantive* conceptions.\(^{25}\) The *Formalist* perspective relies on a government which conducts its affairs in a legally mandated and predictable fashion. *Substantivists* believe laws must be just, driven by moral vision and guarantee the common good.\(^{26}\) These sentiments resonate with similar distinctions between ‘positive’ and ‘natural’ law, ‘minimalist’ versus ‘maximalist’ conceptions,\(^{27}\) and ‘rule by law’ as opposed to ‘rule of law’. Yet, the two perspectives can be seen as complementary, since the formalist understanding of RoL is often a necessary component of substantive, morally justifiable RoL.\(^{28}\) We, however, go further by explicitly including non-state providers; whereas the previous viewpoints operate from a largely unacknowledged state-centric prism.

While the above descriptions provide a useful starting point for advancing a best practice framework, let us not equivocate about the thorniness of the challenge ahead. To be sure, many have endeavoured to redress the existing definitional gremlins. Their efforts to unpack RoL have been much needed.

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\(^{24}\) Stromseth, Wippman, and Brooks (eds.), *Can Might Make Rights: Building the Rule of Law after Military Interventions*, p. 56.


\(^{28}\) Stephenson, ‘Rule of Law as a Goal of Development Policy’.
In spite of the recent attention, the debate remains hampered by four main features. First, RoL spans a dizzying breadth of elements and issues. Its domain can be understood to contain a network of interdependent systems, incorporating multiple institutions and actors, which hold disparate interpretations of associated legal-political concepts across the world. This sphere constitutes an international phenomenon whereby numerous and diverse agencies and actors conduct programs across the globe. As such, RoL is a product of its constituent parts, often a catch-all term for a wide range of functions and foci. RoL nomenclature is used in programming that targets nearly everything ranging from anti-corruption to human rights. Most commonly the referent will be the criminal justice apparatus (particularly the police, judicial and corrections sectors), where programming ranges from judicial training, police reform, support to customs and maritime security services; prosecutors, defense lawyers, street law clinics, and legal education. Kleinfeld-Bolton stresses that RoL is not a unified good, but rather, in her view, composed of the following five discrete social goods: (1) a government bound by law (2) equality before the law (3) law and order (4) predictable and efficient rulings, and (5) human rights. Simultaneously, RoL has become a central tenet in governing the conduct of peace operations, guiding the behaviours and ensuring the accountability of peacekeepers in the field.

Second, its meaning is contested – in spite of a considerable amount of agreement and overlap. As illustrated above, it is used to describe a vast array of activities, principles, programs, and outcomes. It refers not only to the behaviour of the panoply of actors and institutions charged with its implementation but also the behaviour of the public at large, when considering that

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29) See: Blume, ‘Security, Justice and the Rule of Law in Peace Operations’, p. 718, who suggests that “Rule of Law should be seen as a set of institutions, not as single instruments and indicators.”
31) Ibid., p. 2.
34) Howard and Oswald, ‘The Rule of Law on Peace Operations’.
the level of criminal activity is a core facet of its understanding. Grote surmised that the RoL "belongs to the category of open-ended concepts which are subject to permanent debate". Indeed, there is no universal understanding of what it encompasses or excludes. Samuels points out how "...the terminology has no internationally accepted definition, and in practice is used in a fluid and uncertain fashion." The underlying point is that its definition is highly contested, and thus in need of developments that could diminish this problematic status.38

Third, the viewpoint of those in charge of its implementation remains encumbered by a vague notion, comprised largely of platitudes. Yet there should be little doubt that how these actors conceptualise the term matters. Stephenson observes that "[p]olicymakers need to be clear about they mean by the rule of law because answers to many of the questions they are interested in...depend crucially on what definition of the rule of law is being used." The multitude of rule of law concepts breeds confusion between donors and recipients. The risk to political support follows inevitably.

A brief yet wide-reaching scan across the Americas, Africa, Europe and Asia, illustrates the abstract nature with which RoL is understood. As the pre-eminent international organisation for peace and security, the view held by the United Nations is undoubtedly vital. Importantly, RoL programming is conspicuous throughout the UN system. Reflecting a heightened emphasis, the Department of Peacekeeping Operations (DPKO) created the Office for Rule of Law and Security Institutions (OROLSI) in 2007. Perhaps the most renowned definition was proffered in a 2004 Report of the Secretary-General.

38) Kleinfeld, ‘Competing Definitions of the Rule of Law’.
40) See for example UNDP, UN OHCHR, OCHA, etc.
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.\(^\text{41}\)

This articulation represents perhaps the most holistic and authoritative definition among the organisations charged with RoL operations. According to the Vera Institute, “[t]his definition of the rule of law thoughtfully presents the concept as a collection of principles that can be used to inform the structure, operation, reform, and evaluation of law-related institutions across societies. It emphasizes equity, accountability, and avoidance of arbitrariness and is rooted in fundamental principles of human rights as well as the more traditional concept of the supremacy of the law.”\(^\text{42}\) The upshot however is that while the UN stresses the importance of RoL, their delineations remain at a high level of abstraction, meaning that its conception remains uninstructive, particularly for such a complex term.

Another key player in the RoL programming is the European Union. And while the emphasis on RoL is similarly high to the UN, the EU has not yet developed a clear definition.\(^\text{43}\) Indeed, it uses the term to connote a number of different things depending on the structure and mandates of its missions.\(^\text{44}\) Such inconsistencies are indicative of the wider discourse whereby RoL terminology is used to refer to any support offered in the criminal justice and security sectors.

The Organisation for Security and Cooperation in Europe (OSCE) conducts numerous field operations whereby RoL objectives are made explicit.\(^\text{45}\) As with the UN and the EU, there is continual emphasis on the central importance


\(^{42}\) Parsons et al., ‘Developing Indicators to Measure the Rule of Law: A Global Approach’, p. 3.


\(^{44}\) For example, current SSR processes in DRC and Guinea-Bissau are discussed as activities in the realm of RoL, no different to the police, judiciary and customs focus in their Kosovo programs, despite the significant distinctions between what each entails.

of RoL to peace and security.\footnote{OSCE, Strategic Police Matters Unit: Background (December 2006) \url{http://www.osce.org/publications/spmu/2004/11/13565_64_en.pdf}, accessed 31 March 2009.} Under this banner, the OSCE approach identifies its support for “anti-corruption actions” and “launching strategies for law enforcement” as its core-business.\footnote{\url{http://www.osce.org/activities/13049.html}, accessed 31 March 2009.} Moreover, the OSCE is clear in its commitment to a ‘free market’ economy as part of its RoL conception.\footnote{The OSCE, as with the World Bank and multinational corporations, stress the free market aspect of the sanctity of private property and enforcement of contracts. See: Stromseth, Wippman, and Brooks (eds.), \emph{Can Might Make Rights: Building the Rule of Law after Military Interventions}, p. 58.} Yet again, however, we come to find the lack of a clear definition is evident in any number of documents.\footnote{‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’, Copenhagen 1990, paragraph (2), p.1, \url{http://www.osce.org/documents/odihr/2006/06/19392_en.pdf}, accessed 31 March 2009. (NB: The OSCE was then called the CSCE.)} This vagueness unsurprisingly transfers across to its actions.\footnote{For example, describing its on-going RoL activities, the OSCE proclaims that: “The concept of rule of law forms a cornerstone of the OSCE’s human rights activities. It not only describes formal legal frameworks, but also aims at justice based on the full acceptance of human dignity,” \url{http://www.osce.org/activities/13049.html}, accessed 31 March 2009.}

The African Union (AU) represents another globally significant regional organisation both engaged in and the recipient of peace operations with RoL components. Here too, RoL is also seen as integral to the achievement of peace. For example, its Political Affairs Department states how: “…The rule of Law, if managed well and successfully implemented at the level of Member States, will prevent conflicts and promote sustainable peace and development on the continent.”\footnote{AU Political Affairs Department, \url{http://www.africa-union.org/Structure_of_the_Commission/depPOLITICAL%20AFFAIRS%20DIRECTORATE.htm}, accessed 31 March 2009.} However, no different to the others above, there is little by way of detailed explanation of its meaning.\footnote{See, for example, ‘AU Constitutive Act’, the Preamble, \url{http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm}, accessed 31 March 2009.}

Moving westward, the Organization of American States (OAS) is a key regional organisation, comprised of all 35 independent countries of America, including the USA. As with the organisations mentioned above, RoL is explicit in its foundational documents.\footnote{See Articles 3 &4 for example. ‘Inter-American Democratic Charter’, Organization of American States (OAS), \url{http://www.oas.org/charter/docs/resolution1_en_p4.htm}, accessed 31 March 2009.} Not unusually, human rights, democratic
governance and RoL are mentioned as inextricably tied. Unlike OSCE and others however, OAS avoids conflating democracy with the liberal commitment to free markets; they instead maintain that economic growth should be “based on justice and equity”. Yet despite these contrasting economic principles, RoL terminology is used – like the others above – with equally high levels of ambiguity and importance.

The Commonwealth of Independent States (CIS), a heavily Russian influenced regional organisation comprising 12 states from the former Soviet Union, provides an interesting contrast in that it serves as an example of an important actor which resists, for somewhat obvious reasons that the internal political make up of its main members are able only to satisfy ‘rule by law’, the otherwise global uptake of RoL. That is, while CIS is a significant player to be sure, having conducted a number of peace support operations in its sphere of influence, it has had very little to say about the RoL. With a few exceptions, CIS highlights a tension that accompanies those states or inter-state organisations which lack robust political commitments of their own to democratic governance and human rights (e.g. China).

One might ponder where the Association of South-East Asian Nations (ASEAN) might fit concerning this tension over espousing RoL versus internal political ideologies and practices. The reality is that it straddles the divide. While it does not explicitly define RoL, reference has been made to it in numerous organisational documentations and speeches of the Secretary-General. Hence, ASEAN provides another instance whereby the significance of RoL is clear, even though the detail of its definition is found wanting.

This brief but broad survey of major peace operation organisations therefore indicates that, with few exceptions, RoL occupies a core place in the

vision of peace and security, while at the same time the term itself continues to be bandied about at an unhelpfully high level of abstraction. The delineations used have come to constitute ‘definitions of convenience’; that is, they reflect the practicalities from which they materialized more than any conceptual or strategic clarity.  

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Not yet addressed however is the assumption that the state is basically the vehicle for its delivery. While the first three characteristics of the rule of law debate are problematic in their own right, this latter feature is particularly pernicious since it can cripple implementation efficiency and effectiveness though unbeknownst to interveners who may be striving diligently to do the wrong things well. Indicative of mainstream conceptions, the World Justice Project, 59 highlights the RoL elements of human rights, commercial law, and corruption while tacitly relying upon state-based actors – whether from external or internal sources – to deliver remedies to these areas. Likewise, despite stressing the need for ‘local community solutions’, David Bayley’s summary of UN community policing evaluations within peace operations puts forward recommendations that are limited to state-based actors delivering policing, rather than recognising the potential for non-state sources which may provide or complement UN community policing efforts. 60 In these ways, the orthodox imagination is narrowed implicitly by a top-down, state-centric premise. 61

Others make the state explicit, but in such a way that leaves the assumption nearly invisible. Stromseth et al., for instance, put it this way:

The rule of law describes a state of affairs in which the state successfully monopolises the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms…this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes. 62

According to this representation, RoL is achieved only through ‘modern’ (read, state) institutions and codes. Creative attempts to harness domestic capacity alongside international oversight, such as the development of ‘hybrid courts’, are often no better because they too rely on state mechanisms. We push back from this Weberian mindset.

A Critical Delineation: The Need for a Post-Weberian Evolution

Though many of the above viewpoints contain considerable merit, they remain hamstrung by these far-reaching commitments to the state. This is unsurprising given that the debate is dominated by either state-based organisations or the researchers largely beholden to these same organisations. Yet in much of the world, the Weberian state ideal is simply not relevant – neither today nor at any time in the past. In Melanesia, for example, the state is largely irrelevant to over 85% of the population. 63 We begin to see how this condition may pose significant problems when we recognise that international support to RoL reform programs has been overwhelmingly about transplanting extraneous models, presumed as the sole bastion of best practice. 64 Upham warns about the consequences:

…attempting to transplant a common template of institutions and legal rules into developing countries without attention to indigenous contexts harms preexisting mechanisms for dealing with issues such as property ownership and conflict resolution. 65

Morgan and McLeod add, paradoxically, that the entire state-building mission will be undermined if the importance of local (often non-state) circumstances is ignored. 66 Simplistic approaches to RoL reform are reliant on the idea that

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institutional change will engender social change.67 In fact, effective and self-sustaining RoL is inherently dependent upon the consent and support of the people who constitute society.68 Furthermore, it is not uncommon for the same state-based actors (which the dominant viewpoint presumes will provide the remedies) to be considered at the heart of the problem.69

Despite the fact that scholars and practitioners alike – including many of the organisations mentioned above – have increasingly emphasised the importance of appreciating local context and capacity in the realm of justice and security,70 this acknowledgement has yet to be reflected in the field.71 Rather, international initiatives have been characterised by cursory understanding of traditional forms of order and justice and existing informal mechanisms.72 This ‘lost in translation’ problem cuts both ways. As Brand points out, an often overlooked problem is that the literal translations of the term RoL itself can mean any number of different things to those not from the Anglo-American tradition; it is not hard to imagine that many practical problems

68 Brand, ‘Promoting the Rule of Law, Transparency and Fighting against Corruption’, p. 22.
69 In a 2008 survey in eastern DRC, for example, the Government military was widely seen as dangerous, with only a third seeing them as ‘protectors’ (ICTJ–Living w/Fear 2008: 26). On the other hand, when asked how justice should be achieved, 15% mentioned traditional/customary means with a further 34% mentioning other non-state mechanisms (ICTJ 2008: 45). Findings from northern Uganda show a similar need to take seriously non-state sources. Specifically, when asked who they thought could “bring justice,” 40% replied the government, whereas 44% cited various non-state sources as being best suited for the task (ICTJ Uganda 2005: 31). Yet these beliefs, and plausibly the existing institutions and capacities that underpin them, tend to be invisible to dominant models.
71 In a 2004 report on RoL (see footnote 42), the Secretary General stated that: “unfortunately, the international community has not always provided rule of law assistance that is appropriate to the country context. Too often, the emphasis has been on foreign experts, foreign models and foreign-conceived solutions to the detriment of durable improvements and sustainable capacity. Both national and international experts have a vital role to play, to be sure. But we have learned that effective and sustainable approaches begin with a thorough analysis of national needs and capacities, mobilizing to the extent possible expertise resident in the country.” See also: Howard and Oswald, ‘The Rule of Law on Peace Operations’, pp. 276-77.
72 Writing for The World Bank, Samuels acknowledges that the preference for formal over informal or traditional mechanisms are among the major lessons not yet learned. Samuels, ‘Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt’, pp. 16-23.
may flow from this cultural disconnect. Altogether, these and other impediments have meant that the extent to which customary and non-state or traditional justice mechanisms constitute part of a substantively different indigenous conception of the RoL has been extremely limited.

Upon reflection, however, this neglect appears counter-intuitive given that state RoL capacities are often entirely dysfunctional when programs are being planned and rolled out. Expressed differently, it makes little sense to rely on state-providers in the near term when the reality is more likely that in “… conflict-ridden countries, the majority of the population, and especially those outside of capital cities, may settle disputes and handle rule of law related activities through non-formal, or customary, channels.” The reliance on state-based solutions is similarly counter-intuitive when one considers that customary practices are, by definition, already widely-known and in-place; whereas the importation of institutions or models unavoidably requires a greater amount of time and resources to become equally known and practiced. The delay in uptake not only equates to a greater drain on already limited resources and continued suffering, but it increases the likelihood of sinister elements filling the vacuum, thereby further exacerbating progress toward sustainable peace.

**Non-state Providers**

The suggestion to broaden our imagination regarding viable RoL providers requires that we ask about the capacities as well as the appropriateness of non-state sources. To this point, Peake and Studdard-Brown emphasise the credibility, legitimacy and salience of non-state spheres; and they are not alone. Others have emphasised that there are tenable concepts of justice and implementing mechanisms which can and should be utilised.

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77) Howard and Oswald, ‘The Rule of Law on Peace Operations’, pp. 276-77, said: “Many of the communities that we have worked with have interesting and viable concepts of communal justice that can be utilised and drawn upon in this respect.” See also: Marenin, ‘Restoring Policing Systems in Conflict Torn Nations: Process, Problems, Prospects’, pp. 48-55, who notes the need to identify and build the capacity of locals. Further, Frank Upham, ‘Mythmaking in the Rule-of-Law
What, however, do we mean when we discuss non-state (i.e. customary, traditional, and so forth) RoL ‘deliverers’? And what might they look like on the ground? Mobekk suggests that traditional justice structures are the “mechanisms for solving disputes, conflicts and crime at community level in which a village or tribal council, community meeting or council of elders deals with crimes committed against the community or individuals, or focuses on resolving conflicts such as marital disputes; such mechanisms can be restorative as well as retributive.”78 This idea is consistent with the view which recognises that “The rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of the ordinary people as of legal codes.”79

One example is the local justice system (called ‘Ailuc’) among the Iteso peoples of Uganda. It is applied to a wide variety of justice issues ranging from murder and incest to disrespecting parents. Its purpose is both to punish and deter wrongs. Its many facets include investigations, the opportunity for all parties to be heard, formal apologies, compensation, and importantly, safeguards to ensure fairness for all the parties involved as well as that the compensation mechanism must be clearly spelt out and applied equally to protect the weak.80 The striking overlaps with the conception of RoL held by the Western orthodoxy are apparent. On the other hand, the emphasis on harmony rather than blame, and getting past offences in order to restore peace are redeeming qualities not often associated with Western solutions.

Similarly, Bruce Baker’s work on African policing identifies myriad sources that would fit a post-Weberian awareness. He points out that each of the following sources are known to provide ‘policing’ services: local councils (state actors); Uganda police (state); the Violent Crime Crack Unit (state); crime prevention panels (citizens); commercial security (private) traders associations (citizens); and (illegal) mob justice (citizens).81 His analysis also highlights the

Orthodoxy’, in Thomas Carothers (ed.), Promoting the Rule of Law Abroad: In Search of Knowledge (Washington DC: Carnegie Endowment for International Peace, 2006), pp. 75-104, points out how Hernando de Soto’s investigations of Peru should be interpreted to highlight how well informal systems can function – in specific contrast to Peru’s formal RoL providers.


various working links between these state and non-state actors, which underscores the potential for systems and solutions which welcome both in concert. In addition, Baker, provides the type of all-encompassing definition of what constitutes policing that we suggest could be developed to work equally well for the broader realm of RoL: “any organised activity, whether by state or non-state groups, that seeks to ensure the maintenance of communal order, security and peace through elements of prevention, deterrence, investigation of breaches and punishment”.82 Expanded to RoL, this might become something along these lines: any organised activity, whether by state or non-state group, that seeks to ensure law and order or dispense justice according to internationally-accepted standards.

The final clause about acceptable standards highlights a crucial, and often vexing, point for the direction we embrace. Customary systems related to justice can be deeply flawed – no different to their state-based alternatives. Hence, they must be scrutinised to ensure they adhere to fundamental human rights standards and do not discriminate against vulnerable sections of society, since many contain practices that are entirely unacceptable in terms of inhumane punishments or marginalisation of various segments of society such as women and youth.83 Informal systems can also impede international efforts to carry out justice in numerous ways.84 Further, they too are not immune to the eroding or corrupting afflictions of conflict; and the need for support and resources in order to rebuild their capacity and legitimacy is also likely to exist.85 The key point, however, is that rather than rejecting everything that does not meet our quixotic notions of how RoL should look, and thus risking little if any near term progress, it is better to consider how to improve as quickly as possible and with our limited resources what does exist. While this is not to say that mainstream, state-building initiatives should be repudiated; it is to say that significant and unnecessary suffering may occur in the typically long periods required for them to bear fruit.

When considering RoL providers in the most inclusive sense, Joerg Friedrichs refers to a triad of potential providers of force: “the state monopoly of force, the commodification of force, and community self-help.”86 The model
offers a useful way to think of the three potential categories of RoL providers: state-based actors; privately contracted (often but not necessarily by the state) providers; and the myriad of community-based or informal providers. When combined with Black’s general theory of law, which maintains that the strength of a society’s formal legal institutions will vary inversely with the strength of its informal ones, the model can be extended to RoL to offer this specific insight: that if a society’s formal RoL institutions are weak, then its informal institutions are likely to be comparatively strong. Of course, in many cases both may be badly weakened; but this insight can nevertheless instruct program managers to consider when, where, and how best to harness local institutions. Specifically, it causes managers to consider appropriate private and community sectors when state-based options are problematic due either to their absence or their unacceptability.

As with all human practices, the above justice and policing systems are ultimately fluid, not fixed, which opens up the possibility of evolving or hybrid institutions (but not limited to state-based actors such as ‘hybrid courts’ cited above). Upham maintains that “societies must develop a mix of formal and informal mechanisms that can produce optimal results given their respective social, political, economic, and cultural contexts.” We accept that the context of RoL reform connotes that what exists is “inadequate and requires modification” and that – whether driven locally or externally – reform processes will inevitably draw on some foreign models and/or experiences. At the same time, a comprehensively participatory approach must be employed in order to maximise local ownership and capacity. The overall point for the present

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Anticipating the Future” (New York Marriott Marquis, New York, USA, 2009), p. 3. It is important to note that Friedrich’s main argument – that the state should in effect maintain exclusive control over the delivery of force – is basically the opposite of ours. Concerning the community ‘self-help’ sources, Friedrichs uses the example of the deputization of local sheikhs after the recent US-led invasion of Iraq as a warning of the unintended consequences which, to him, predictably occur when the state does not maintain a monopoly on the use of force. However his selective examples are limited to objectionable sources (e.g. Sharia law or merciless gangs). We repudiate his over-generalisation that community providers will predictably result in negative outcomes, in recognition of the many that might assist in positive outcomes.

90) See Howard and Oswald, ‘The Rule of Law on Peace Operations’, p. 279. They argue that: “From the earliest moment, international civil actors must seek to incorporate local participation and create consultative mechanisms.”
purposes is that we cannot overlook the existing institutions, norms and practices by assuming that they cannot contribute to RoL solutions. Local mechanisms have a number of benefits beyond being already in place. They tend to focus on restoration and harmony rather than contestation, offer quick settlement rather than protracted processes, and generally require significantly fewer resources for upkeep. The need to appreciate non-state RoL providers is further underscored by the fact that of the four types in Otwin Marenin’s typology of contexts for RoL programs – namely, “(1) Following period of state repression (e.g. South Africa); (2) After destructive/divisive inter-communal violence (e.g. Rwanda); (3) State failure (e.g. Liberia/East Timor/ Afghanistan); and (4) Transitional/developing societies”, the latter three are arguably circumstances in which traditional/customary systems would likely predominate. For its part, the Australian Federal Police recognises that a ‘sound understanding of traditional law and justice systems can inform the appropriateness and scope of service provision’ in such contexts. Even so, as with other intervening actors, their policebuilding approach continues to rely on narrow Western notions of RoL providers.

The above alternative contentions supply invaluable insights. They go a long way toward illuminating what may actually exist in mission areas rather than what some might wish existed. By doing so they have the potential to explain why peace and capacity building operations heretofore have enjoyed limited success. Unfortunately they reside on the margins of mainstream awareness and practice. The realities they reveal have to date flown largely under the mainstream radar. The framework proposed below aims to incorporate these perspectives into an emerging best practice RoL conception.

A Post-Weberian Best Practice Framework

The point of discussions concerning best practice developments, like that generated herein, is to articulate compelling gains in efficiency and effectiveness. In RoL terms this means not only finding better ways to (re)establish this

94 Ibid.
crucial ingredient, but ensuring its sustainability. A main goal must be eliminating the need for perpetual intervention activities and funding as witnessed in many places such as Timor Leste and the DRC. The framework we sketch out in this penultimate section aims to overcome the deficiencies highlighted above. In particular, those elements which overlook complex local realities because they view RoL through their own narrow (state-centric) image. It is often neither practical nor desirable to ignore the many non-state sources for RoL. Importantly, rather than promoting an ‘artificial consensus’ by culling alternative perspectives, our approach aims to embrace the diversity which exists across the globe, but in a way that allows for both precise and comparative evaluations.

We draw from extant views in particular ways to arrive at the initial iteration of a framework which contains three main facets. The first part maintains that RoL should be delimited to cover security, judicial, and correctional functions. For the purposes herein, security extends both to personal safety and those who provide it; judicial denotes the systems of rules and practices used to settle matters of justice; and corrections refers to mechanisms of internment and rehabilitation. These are the key organs which work together to enable RoL. In other words, similar to human organs, the health of one affects the others, and thus if the corrections functions are significantly flawed or non-existent, for instance, this will undoubtedly have a negative impact on both the security and judicial areas. In policy and praxis, this means we cannot treat any in isolation without the risk of backlash from the others.

Furthermore, these categories, understood in the most inclusive manner possible, cover the breadth of activities that comprise the mainstream’s programs. As such, it is not only an accurate way to order the rest of the framework but a productive one since it can be readily adopted by the major actors discussed throughout. Equally important, however, is its capacity to recognise and subsequently encompass the non-Euro-American institutions and processes which may approximate RoL. Among other things, this means that a single entity may provide ‘services’ across more than one function, dissimilar to the strict separations marking Western conceptions.

96) In a 2005 think-piece for the Department of Peacekeeping Operations (DPKO) Best Practices Section, Oswald refers to local criminal justice structures of police, judiciary and corrections as the contextually important “law and order authorities.” See: Oswald, ‘Addressing the Institutional Law and Order Vacuum: Key Issues and Dilemmas for Peacekeeping Operations’, p. 4.
Second, and following from the last point, we maintain that the experience of RoL can be known by the fulfilment of a set of principles.98 The crucial aspects of the rule of law that must be present in any best practice approach are the principles, such as transparency and equal access to justice,99 while at the same time the focus must be on their de facto delivery rather than de jure principles of law.100 The approach of this second facet is consistent with many viewpoints, including Marenin’s opinion that it is crucial to “stress principles and goals, not models”101 and the Substantivist viewpoint which maintains that we must go well beyond the presence of formal institutions in order to realise what RoL is about. Furthermore, the realisation of these principles should be understood across each of the three aforementioned functional categories.

With that foundation in place, the third and final facet addresses the sources that may be capable of providing RoL functions – in accordance with the RoL principles. Unlike dominant views (e.g. World Justice Project and the UN) we do not place our reliance in state based providers. An example of this underlying state dependency is presented by how Vera juxtaposes ‘Non-state justice mechanisms’, with the functional capacities of (state-based) police, prisons and the judiciary, under the principles of ‘accountability, unbiased and efficient’ delivery of justice. This approach means that though non-state sources are mentioned, it is done in a way that places them on the periphery. The clear implication is that they are always less tenable, less desirable, and therefore only to be tolerated in the absence of state systems. While concurring with the need to ensure these non-state mechanisms are “adequately resourced, accountable to high standards, fair and transparent,”102 and denying the type of cultural relativist viewpoint which may be inclined to accept customary practices

98 In this vein, see how Vera-Altus has adapted the World Justice Project’s useful but state-centric RoL Index. (WJP website http://www.abanet.org/wjp/rolindex.html. accessed 31 March 2009)
100 Ibid., p. 8. See also: David Mednicoff, ‘Middle East Dilemmas’, in Thomas Carothers (ed.), Promoting the Rule of Law Abroad: In Search of Knowledge (Washington DC: Carnegie Endowment for International Peace, 2006), pp. 251-74, p. 254, whereby he uses Arab nation examples to argue that “the most promising approaches...tie ideals to practices.”
at odds with RoL principles, we go the next step by arguing that informal sources must be fully considered within the functional categories of police/security, judicial and corrections, rather than as a separate element.

None of this is to suggest that RoL deliverers exist in a vacuum. On the contrary, our approach conceptualises RoL as a complex system comprising a multiplicity of interacting entities which exist in an even broader system of beliefs and practices. Indeed, it is the mainstream prism which problematically compartmentalises specific areas for particular activities. At the same time our framework of three functional areas examined according to the five principles described next, constitutes a less convoluted design to many who dwell in this area (e.g. Vera-Altus).

We maintain that the following selection of principles (drawn from the broader debate) can be used to comprehensively assess the way in which RoL providers behave. For example, the principle listed fourth below, transparency, may be used to query whether the judicial processes have been developed so that judges conduct their matters in a public rather than secretive environment. The only exception, as we clarify below, is the principle of ‘equal access’ when it is combined with ‘security’ functions. The upshot is that our conception of RoL is an ideal in which absolute adherence to each principle transpires across all three functional areas. As an ideal, its realisation is highly improbable, but nevertheless it provides a clear – yet flexible and comprehensive – benchmark by which to gauge any given particular circumstance, regardless of whether or not de facto providers are state actors.

The first principle (not in order of importance) is ‘equal access’. This means that each inhabitant (i.e. not just those with formal citizenship status) should be able to receive a similar level of RoL services as all others. Certain individuals or groups cannot have access to demonstrably more effective RoL functions due to, for instance, geographic location, ethnicity, or financial wherewithal. This principle offers perhaps the best opportunity to point out the advantage of a post-Weberian conception, since access to RoL is most likely to be the first casualty of donor efforts which focus principally on state actors for delivery. That is, in the many circumstances whereby the state is not (and perhaps never has been) a particularly relevant entity, access to RoL is bound to grow increasingly unequal if intervening parties ignore traditional RoL providers. Accordingly, both formal and informal sources must be taken seriously.

103) See ibid., p. 12, as they apply it to access to justice.
Simply put, do inhabitants have equal access to appropriate security, judicial, and corrections services, no matter what forms they may take?  

‘Accountability’ is our second principle. That is, each of the functional areas of police, judiciary, and prisons (including non-state mechanisms) must be accountable for their actions. The point is to ensure that those delivering RoL do not operate with impunity. They must be accountable to those whom their activities affect, in that they must be capable of being scrutinised then, if appropriate, reformed, disciplined or stopped altogether. The mechanisms to hold providers to account can of course take many forms, but the idea must be upheld regardless of delivery mode. ‘Lack of Bias’ is the third. RoL requires an absence of discrimination, which may be based on any criteria such as ethnicity or gender. Equal treatment is essential. Applied across the three functional areas, questions should be raised as to whether and how the experiences of security, judicial, and correctional functions are being provided without bias to a person or group’s multiple markers. Fourth is ‘transparency’. This refers to the public having a sound understanding of RoL functions, and the way in which they are enacted and developed. As with ‘access’, customary mechanisms are likely to have a distinct edge on imported Western notions in many societies concerning transparency, in that they are generally widely known already. Finally, it is not enough that inhabitants have equal access to an accountable, transparent and unbiased RoL system. In keeping with Vera, we maintain that the principle of ‘Participation’ must be present for the full experience of RoL to exist. Participation can be understood in conventional terms as a public which can influence state legislation in ways such as town meetings. We go beyond the implication that participation is limited to state-based systems in order to conceive participation as the general public’s

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104 As mentioned above, equal access concerning the ‘security’ function is the one exception wherein our principles do not refer solely to the behaviour of RoL providers since security conceptions should also refer to the behaviour of the public at large in terms of crime rates. We can, however, continue to enquire as to whether security providers deploy relatively equally so that access to security can be experienced equally as opposed to neglecting certain areas. The lesson to take from this distinction is that one eye should be on the levels of crime committed by the public while the other should consider the behaviour, resources and coverage of security providers.

105 For a useful discussion on the accountability of intervening parties in a peace support operation context, see: Zwanenburg, Accountability of Peace Support Operations, pp. 287-314.

ability to influence norms, conventions and practices – regardless of whether they are formalised and codified. As such, if members of a society have the capacity to participate in deciding how their RoL affairs are conducted, then we would argue that is an appropriate experience, even if none of the systems pertain to formal state processes or providers.

Hence, analyses begin by posing the question of how each of the functions of security, judicial, and corrections are going vis-à-vis the principles. First level questions ask, for instance, ‘how transparent, accountable, and unbiased are security providers?’ Second level questions might look like this: regards the security element, how transparent is policing behaviour? Or how transparent are the military type-services’ behaviour? Third level questions would then unpack the investigation further by establishing what (formal or informal) sources are or could be providing policing, and then applying each principle to each source so that the outcome is a precise analysis. For example, when the ‘unbiased’ principle is applied to the security sector, one could look at a) the state police; b) the state military; or c) a potentially vast array of non-state security providers, asking of each how ‘unbiased’ is RoL under that provider? For instance, are certain ethnic groups treated differently? The same is done for the other principles. For the security category, we can ask questions from the three perspectives about (1) the conduct of providers; (2) access to providers; and (3) the level of crime.

Within the limits of this article, we do not have room to discuss the crucial matter of how to evaluate the various aspects which comprise this framework. For the purposes herein, suffice it to say that we subscribe to a modified version of Vera-Altus’ approach designed to evaluate each aspect (and by extension, each provider) against our five RoL principles with a basket of indicators developed specifically for each context. The key is that there are a variety of indicators in each basket that utilise different methods such as data from expert opinion and public surveys, hard data from governments or non-governmental organisations, and so on. As such, analysts can arrive at straightforward yet comprehensive and realistic evaluations of each functional area of RoL – the kind which is currently lacking. Regarding the security function, for example, the various sources that ‘provided’ security could be assessed according to a basket of indicators aimed at understanding how each stacked up against the five principles. There would be further indicators to evaluate the relationships between each functional area to ensure a holistic view, which recognises each facet as a part of an overall system, is not lost.

These types of in-depth and inclusive assessments can only be achieved by synthesising the core functional components of RoL with a comprehensive list
of principles and the widest imagination of providers. Underpinned by our conception of RoL, the framework renders a precise yet flexible approach, which draws attention to the indigenous systems and practices that are normally missed by importing a culturally alien conception. Hence, it redresses the current deficiencies outlined at the beginning of the article by striking the balance between flexible and thus universally applicable on the one hand, while clear and thus instructive on the other. Moreover, it is compatible with the views and practices of the major organisations tasked with implementing RoL, which also recognise that RoL consists of interrelationships between many institutions. As aforementioned, this latter quality smooths the way for its adoption.

Conclusions

When the context for international engagement is one of supporting fragile states on the road towards self-sustaining peace, good governance, and stable economic livelihoods, we concur with Smith et al. that “the common foundation on which such institutions and outcomes must be built is respect for and deference to the rule of law.” The enormous significance of these efforts means we must get its conception right. The underlying purpose of this article has been to expand the conception of the RoL to fit in the many places on earth which do not resemble a modern Western state. This post-Weberian notion challenges the practice whereby those implementing RoL stop at asking local actors for their opinion on Western processes and institutions. It intends to correct the practice whereby the scarce resources applied to reconstituting RoL are misapplied towards building an alien ‘part’, which may be rejected in the same manner that the human body rejects an incompatible organ.

Moving global best practice understandings forward requires a hybrid delineation to inform systems that go beyond the current understanding of international and national actors combining to pursue a Weberian ideal of RoL. It needs to push past Euro-American images of security, judicial, and corrections as silos inhabited by state-based providers. Channell points out

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108) It might be better termed: ‘relevant or successful’ practices to underscore the need to leverage fully local realities as opposed to a one-size fits all supposition.
that a lack of implementation is the litmus test for failed RoL programs, and that it is a mistake to assume that the government is the key to reform;\(^{109}\) whereas we would take that point one step further to maintain that implementation commonly fails because the environment is not the Weberian ideal that interveners presume.

The vision we have put forward in this article exhorts us to look for the right balance of traditional/customary, state or international RoL providers. The extent to which non-state providers exist, are relevant and acceptable to universally held standards will of course vary depending on context. What is not context specific however is that “attempting to create all at once the full panoply of legal institutions found in developed countries is generally not the best use of limited resources.”\(^{110}\) Further research is needed to discover more the potential – or successes and failures – of this notion of hybrid systems. To be clear, this is not to suggest that the non-state sector is more important; it is to say that we cannot go forward in conceptualising RoL without taking seriously the multitude of ‘informal’ providers.

In the context of peace and capacity-building operations, the RoL domain is best located at the confluence of multiple interdependent formal and informal institutions, mechanisms and networks. It is vital that international actors not only recognise, but expeditiously harness the utility of locally-driven processes and traditional mechanisms if RoL is to prevail in the fabric of society and the mindset of its people. The recipe can be developed to ensure the most appropriate mixture. Despite the inevitable contextual differences, this promises to achieve the most immediate yet sustainable amalgam.

In conflict-ridden Uganda, someone recently said: “In my opinion peace is sleeping with one’s door open, on a full stomach, and walking on the road during day or night without fear of attack.”\(^{111}\) This notion of peace is consistent with the vision of RoL developed herein. The key point is that, like countless others made vulnerable by conflicts around the planet, it matters little which RoL providers contribute to the realisation of peace and security. What really matters is that improvements come sooner rather than later and that they last.

