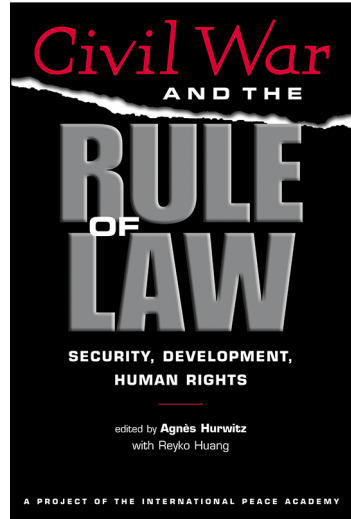


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Security, Development,
Human Rights

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Agnès Hurwitz with Reyko Huang

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Civil War and the Rule of Law: Toward Security, Development, and Human Rights

Agnès Hurwitz

In the past decade, the rule of law—a concept whose use and relevance used to be confined to the realm of legal scholarship and judicial rulings—has become a favorite notion among international policymakers and practitioners engaged in peacebuilding. A wide array of international actors, including the World Bank, the Organization for Economic Cooperation and Development (OECD), the US Agency for International Development (USAID), the United Kingdom’s Department for International Development (DfID), the Organization for Security and Cooperation in Europe (OSCE), the United Kingdom’s Foreign and Commonwealth Office, the US Department of State, the Open Society Institute, and the American Bar Association, have supported or implemented programs to (re)build rule of law institutions. The scope of these programs seems to know no boundaries, encompassing legislative, judicial, and police reforms, as well as support to nongovernmental organizations (NGOs), ombudspersons’ offices, and land and property administrations. The objectives assigned to such programs are equally broad. To quote one commentator, “The rule of law is touted as able to accomplish everything from improving human rights to enabling economic growth to helping to win the war on terror. The rule of law is deemed an essential component of democracy and free markets.”¹

The United Nations has not been spared by this unprecedented enthusiasm for the rule of law. The Secretary-General opened the fifty-ninth session of the UN General Assembly in 2004 with these words: “It is by reintroducing the rule of law, and confidence in its impartial application, that we can hope to resuscitate societies shattered by conflict.”² Since 2004, the number of statements by UN officials and member states about the fundamental importance of the rule of law as part of peacebuilding strategies has grown steadily. The Secretary-General’s report on the rule of law and transitional justice in conflict and post-conflict societies, released in August 2004 at the request of the Security Council,³ was a milestone in the recognition of the rule of law as a concept of

normative and operational significance in the work of the United Nations. The fact that the report was then discussed by the Security Council in an open debate organized in October 2004 added further prominence to an area of work in which the United Nations has only recently developed explicit capacity.

The question of the UN's role in the promotion of the rule of law was subsequently addressed in a landmark report presented by the Secretary-General in March 2005, which constituted the springboard for the reform process leading up to the sixtieth anniversary of the United Nations.⁴ This document, which sought to improve the world organization's ability to tackle a wide range of global challenges, such as terrorism, biosecurity, and underdevelopment, specifically called for the establishment of a rule of law assistance unit within the Secretariat. The 2005 World Summit's outcome document, while weaker in its formulation, still referred to the possible establishment of a rule of law assistance unit "subject to a report by the Secretary-General to the General Assembly."⁵ This proposal led, at the end of 2006, to the establishment by the Secretary-General of the Rule of Law Coordination and Resource Group within the Secretariat, mandated to strengthen capacity, enhance institutional memory, and coordinate within the United Nations and with outside actors.⁶

Despite this high-level interest and the large sums invested by international donors—leading to the emergence of a "rule of law industry"⁷—many experts agree that programs seeking to strengthen or reestablish the rule of law in peacebuilding contexts have rarely achieved their nominal objectives of delivering human rights, security, or development. The question that immediately springs to mind is whether this consensus among policymakers about the mutually reinforcing imperatives of "justice, security, and democracy," to quote the rule of law report,⁸ is reflected in the programmatic approaches that are implemented in the field and tested in many of these countries. Anecdotal evidence suggests that most rule of law programs tend to reproduce technical solutions and rely on "template" strategies that fail to integrate adequate conflict analysis in their design, in that they are not based on a thorough understanding of the political situation in a given country. The second problem is sustainability, as many programs fail the test of time, with the predictable waste of financial and human resources and the diminished credibility of the international community that ensues. While these diagnoses are well known, innovative approaches to overcome these flaws are still in their infancy. There is in other words a need to reassess current rule of law programming and to develop more systematic and in-depth knowledge of how international actors can strengthen the rule of law. This state of affairs cannot be remedied with technical fixes alone; more fundamental questions must be raised regarding the multiple objectives assigned to rule of law work and the strategies followed by international actors to promote the rule of law.

The first fundamental question that must be addressed is: What is the rule of law? This is far from a rhetorical question. As explained below, the debate

about what the rule of law entails is still raging, not only among international policymakers but also among legal theorists. In a recent lecture on the rule of law, Lord Bingham of Cornhill of the House of Lords dryly observed that while judges routinely invoke the rule of law in their judgments, “they have not explained what they meant by the expression and well-respected authors have thrown doubt on its meaning and value.”⁹ The most noticeable accomplishment of the UN’s rule of law report was that it presented a common definition for all UN agencies and departments involved in rule of law programming in peacebuilding contexts:

The “rule of law” is a concept at the very heart of the Organization’s mission. It 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.¹⁰

While slightly redundant in formulation, this definition not only has the advantage of being recent, an important quality in light of the evolutionary nature of the concept, but is also expansive in its embrace of human rights principles as a key ingredient of a society governed by the rule of law. It conforms to the most progressive interpretations of the rule of law adopted in domestic legal systems¹¹ and endorses the approaches followed by other international organizations such as the OSCE and the European Union, which have expressly emphasized the organic relationship between the rule of law and human rights.¹²

The notion of “rule of law institutions” is afflicted with similar terminological uncertainty. The problem here is a tendency to confuse the institutions that will be the object of reform with the institutions with which one needs to engage and consult to ensure the success of these reforms; the latter, of course, constitute a much broader category. A document published recently by the Office of the High Commissioner for Human Rights on “mapping the justice sector” indicates that no less than “42 different institutions were identified as part of the post-conflict rule-of-law sector”—even if it recognizes that the key institutions of this sector are the judiciary, the police, and the prison system.¹³ The paper also emphasizes—rightly—that the identity of all but the core institutions may differ in each specific country setting, hence the importance of a mapping exercise as a key starting point of rule of law programming.¹⁴

To sum, one may identify in a first circle the “core” institutions of the “bench and the bar”: the judiciary, including customary justice mechanisms, prosecutors’ offices, correctional institutions, and bar associations.¹⁵ The

second circle may include the legislature; relevant ministries (e.g., the Ministry of Justice, the Ministry of Interior); local authorities (e.g., housing and land administrations); law reform commissions; national human rights institutions; human rights NGOs, including victim's associations; academic and training institutions (e.g., law faculties, judicial training centers, research centers and think tanks, police academies); the police¹⁶ and other law enforcement bodies; and forensic institutions. Finally, the widest circle would include institutions whose engagement might prove crucial in the reform process but that are not as such the object of reform, such as the media, the military (unless it has a policing, or even a judicial role, in which case it might be included in the first or second circle), and insurgent groups.¹⁷

Objectives of the Volume

This book is part of the growing body of literature produced by think tanks working on peace and conflict issues. In past years, research institutes such as the US Institute for Peace, the Clingendael Institute for International Relations, the Carnegie Endowment for International Peace, and the Centre for Humanitarian Dialogue have all had programs devoted to the rule of law.¹⁸ As part of the International Peace Academy's Security-Development Nexus Program, the Rule of Law Project has made significant contributions to policy research and issued reports on key areas of rule of law work undertaken as part of peacebuilding, such as criminal justice and housing, land, and property.¹⁹

This volume fills a major gap in the literature by offering an innovative thematic analysis of rule of law policies adopted by international actors engaged in peacebuilding. While the themes of certain chapters, such as local ownership and corruption, go arguably beyond the rule of law ambit, these are nonetheless critical in that they provide an enhanced understanding of the specific nature of peacebuilding work and of the specific contribution of the rule of law to it. The volume does not seek to present a unified argument on the substance and outcomes of international policies to support the rule of law; rather, it examines various areas of rule of law work through a common approach and common themes, with a view to

1. assess the relevance and use of rule of law programs as a means to help provide stability in postconflict contexts and prevent the recurrence of conflict;
2. highlight some of the underlying tensions in the all-embracing claims that are commonly made about what the rule of law is expected to achieve in peacebuilding contexts; and
3. identify policy-relevant recommendations in different areas of rule of law programming, as a way to either consolidate existing practice, or

highlight important policy gaps and tensions in rule of law policies undertaken as part of peacebuilding.

Security, Development, and Human Rights: International Discourses and Policies on the Rule of Law

International programs to support the rule of law are now regarded as important components of the security, development, and human rights agendas. From a security perspective, rule of law institutions are regarded as indispensable for internal security and law enforcement purposes, and for ensuring the transparency, accountability, and control of security forces such as the police and the military. Development agencies also maintain that (re)establishing the rule of law is a prerequisite for the emergence of stable and peaceful societies and economic development. Under the human rights agenda, rule of law programs seek to promote the implementation of and enhance compliance with international human rights instruments at the national level. In other words, the rule of law agenda has now become a critical component of current peacebuilding strategies. It is primarily in its role as a “full service provider for broken societies”²⁰ that the United Nations has progressively integrated rule of law programs into its operations.²¹

The Rule of Law and Security

Policy developments in UN peacekeeping provide a telling illustration of the growing significance of the rule of law in the security realm. The integration of rule of law assistance in conflict management policy appeared in the two seminal documents of the early 1990s that drove policy development in this area, the *Agenda for Peace* and its *Supplement*. The *Agenda for Peace* mentioned efforts to protect human rights and the restoration of order among the manifold activities of postconflict peacebuilding,²² while the rule of law was mentioned as part of democratic practices.²³ The *Supplement to An Agenda for Peace* made specific reference to the collapse of state institutions, especially the police and judiciary, that characterized many of the intrastate conflicts in which the United Nations had been asked to intervene. While expressing reluctance regarding the involvement of the United Nations in these matters, it recognized that “international intervention must extend beyond military and humanitarian tasks and must include the promotion of national reconciliation and the re-establishment of effective government.”²⁴

The progressive integration of rule of law activities into peace missions started with the deployment of field operations that were mandated to monitor the implementation of the peace agreements in El Salvador, Haiti, and Guatemala.²⁵ Almost a decade later, peace operations in Kosovo and East Timor were characterized by the central role of institution building and institutional reform

in the missions' mandates and the executive authority granted to them, particularly in the rule of law area.²⁶

The UN's 2000 panel report on peace operations, known as the Brahimi Report, after the Algerian diplomat who headed the panel, helped emphasize the importance of re-establishing the rule of law for postconflict recover and opened the way for formal inclusion of rule of law components in multidimensional peacekeeping operation mandates adopted by the Security Council:

39. Where peace missions require it, international judicial experts, penal experts and human rights specialists, as well as civilian police, must be available in sufficient numbers to strengthen the rule of law institutions.
...
40. In short, a doctrinal shift is required in how the Organization conceives of and utilizes civilian police in peace operations, as well as the need for an adequately resourced team approach to upholding the rule of law and respect for human rights, through judicial, penal, human rights and policing experts working together in a coordinated and collegial manner.²⁷

These policy and institutional developments have now been almost fully digested. At headquarters, they eventually led to the establishment in 2003 of a criminal law and judicial advisory unit within the UN's Department for Peacekeeping Operations, in accordance with the recommendations of the UN's Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations, established as a subsidiary of the Executive Committee on Peace and Security (ECPS).²⁸ Recent peacekeeping mandates equally reflect these policy changes. In Liberia, for instance, the UN mission, under the rule of law component, has integrated civil affairs, civilian police, human rights, legal and judicial issues, corrections, and even the gender office,²⁹ providing a good example of the tendency to "overreach" the boundaries of the rule of law. Another case is Security Council Resolution 1542 of April 30, 2004, on the latest Haiti mission—the UN Stabilization Mission in Haiti (MINUSTAH)—which details the task of MINUSTAH in supporting rule of law institutions, including the police, the judiciary, and the prisons.³⁰

The Rule of Law and Development

Support for rule of law institutions has been part of development policy for much longer than is usually acknowledged, under the guise of public sector reforms or good governance and democratization projects.³¹ Erik Jensen identifies three waves of rule of law reforms that emerged between the end of World War II and the end of the Cold War.³² The first wave, rising after World War II and lasting until the mid-1960s, focused on the reform of bureaucratic machineries, with marginal support for the judiciary. The second wave, which became known as the "law and development" movement and lasted from the

mid-1960s through the 1970s, promoted both economic and democratic development by, *inter alia*, emphasizing legal education for lawyers in the civil service. The third wave, in the 1980s, was the first to reach postconflict countries and limited its scope to legal institutions *per se*.

At the United Nations, the end of the 1960s saw the progressive integration of the human rights and the development discourses, as reflected in the methodology of the UN Development Programme (UNDP); the adoption of the 1968 Proclamation of Tehran, which declared that underdevelopment impeded the full realization of human rights around the world; the 1986 General Assembly resolution on the right to development; and culminating with the mainstreaming of rights-based approaches into development policies.³³

It was after the end of the Cold War that the rule of law “became the big tent for social, economic, and political change generally—the perceived answer to competing pressures for democratization, globalization, privatization, urbanization, and decentralization.”³⁴ This evolution was formally acknowledged in the UN Secretary-General’s *Agenda for Development*, which listed a series of “typical” rule of law activities as part of UN work on good governance, such as constitution drafting, support to domestic human rights laws, enhancing judicial structures, and training human rights officials.³⁵ By 2003, 60 percent of UNDP funds were being used for democratic governance, which included “justice and human rights” programs.³⁶

Donor governments and agencies were also quick to ride on this latest wave. The rule of law focus was particularly evident in the work of USAID, one of the most active development agencies in this field. Its involvement in this area started in the 1980s in Latin America, including countries in the wake of the peace settlements brokered with the support of the international community, such as El Salvador and Guatemala.³⁷ USAID programs focused on criminal justice and judicial reform, and were implemented by subcontracted consulting firms.³⁸ One of the most distinctive characteristics of USAID’s approach was its early emphasis on democracy—also promoted by prominent US think tanks and academics—as one of the primary rationales of its work,³⁹ together with free-market reforms. This set it apart from multilateral agencies such as the World Bank and the United Nations, the former being constrained by its mandate, the latter by the highly volatile nature of the democracy debate among its membership. The Secretary-General’s 2005 report on UN reforms was a watershed in this respect, in that it proclaimed democracy to be a central objective of the United Nations, asserting that the world body “does more than any other single organization to promote and strengthen democratic institutions and practices around the world, but this fact is little known,”⁴⁰ a statement that is indeed borne out by the work of the UN Electoral Assistance Division and UNDP.⁴¹ The report also led to the establishment of a fund to assist countries in their democratization efforts.⁴²

The Rule of Law and Human Rights

While various international agencies have emphasized the organic relationship between the rule of law and human rights, this relation is perhaps most evident in the UN context. At the normative level, the connection between human rights and the rule of law was formally acknowledged in the very first human rights instrument adopted by the United Nations, the 1948 Universal Declaration of Human Rights, which proclaimed that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”⁴³ Since then, the United Nations has supported the conclusion and implementation of a flurry of international human rights instruments,⁴⁴ which demand compliance with due process and fair trial standards considered to be defining characteristics of the rule of law.⁴⁵ In 1993 the General Assembly declared that “the rule of law is an essential factor in the protection of human rights” and supported the role of what was then called the Center for Human Rights, now known as the Office of the High Commissioner for Human Rights (OHCHR), in strengthening rule of law institutions at the national level.⁴⁶ This original resolution was followed by seven others in the next ten years, which reiterated *mutatis mutandis* this statement of support and further emphasized the high priority granted to rule of law activities.⁴⁷

The role of UN human rights institutions has also been crucial at the operational level. As is explained in further detail in this volume, rule of law components in peacekeeping missions find their origins in human rights monitoring missions, which compiled information and drew up reports on country human rights situations in order to provide recommendations toward enhanced protection and promotion. This approach, mostly reactive in nature, eventually moved toward more proactive assistance on human rights and institutional reforms.

The UN’s role in supporting transitional justice mechanisms, defined by the Secretary-General as the “full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation,”⁴⁸ has been another area where the UN has been able to implement the very principles it has promoted since 1948. The establishment of the ad hoc tribunals for the former Yugoslavia and Rwanda in 1993 and 1994⁴⁹ reflected the international community’s recognition of its responsibility in holding accountable those responsible for the most serious international crimes—and eventually led to the adoption of the Statute of the International Criminal Court, which entered into force in 2002. In addition to its backing of international criminal justice, the United Nations has also been involved through its various agencies and programs in supporting transitional justice mechanisms and rule of law institutions established at the national level, which may be re-

garded as more effective in addressing human rights violations, seeking reconciliation, and preventing further abuses in the long term.⁵⁰

The apparently harmonious bond between the rule of law and human rights is slightly deceptive, however, and divergences between human rights objectives and rule of law programs surface in several of the thematic chapters of this book, above all where overriding security objectives, such as the fight against terrorism, dominate the policy agenda. These tensions can be explained by the ill-defined nature of the rule of law highlighted earlier. As noted by Thomas Carothers:

The rule of law appeals broadly across political and intellectual lines. The right, left and centre can all find what they want in the concept, or interpret it in a manner favourable to their interests. Scholars, civic activists, law practitioners and government officials can all find reasons to embrace the concept and assign part of the task to themselves. Like the equally ubiquitous concept of civil society, it is a mellifluous ideal whose pan-ideological or post-ideological quality is unusually well-suited to the post-cold war era.⁵¹

Given this all-encompassing, mass-appeal nature of the rule of law, the existence of tensions between various aspects of the concept and with regard to its operationalization, while problematic, is unsurprising.

The Rule of Law: An Overview of Academic and Policy-Relevant Literature

It is fair to say that research on international rule of law programs is still in its infancy. A preliminary review of existing literature reveals the relative dearth of academic work on the conception, underpinning principles, implementation, and outcomes of rule of law programs in peacebuilding contexts. Many available sources on the subject tend to consist of unpublished consultancy reports and lessons-learned studies, based on narrow terms of reference and therefore of limited relevance for gaining a better understanding of the broader issues at stake. This being said, it would not be accurate to infer that academic scholarship and rigorous applied research on the rule of law is non-existent. At least four subareas have received extensive treatment over the past decades.

Any inquiry into the meaning and conceptual relevance of the rule of law must begin with legal theory, or jurisprudence. Also known in the civil law tradition, the rule of law is primarily a normative principle of the common law system formulated by Albert Venn Dicey in 1885.⁵² While acknowledged to be “exceedingly elusive,”⁵³ the rule of law has remained a constant subject of inquiry by such philosophers as Ronald Dworkin, and has received renewed—albeit critical—interest in recent political and legal theory scholarship.⁵⁴ As will

be explained in further detail in this volume, the theoretical arena is basically dominated by the long-standing tension between a minimalist or “rule-book” approach of the rule of law, which demands that state authority be exercised in accordance with clear, publicly available rules, and a maximalist or “rights”-based conception of the rule of law, as “the ideal of rule by an accurate public conception of individual rights.”⁵⁵

Several parts of this collective work highlight the relevance of theoretical considerations for policymakers and practitioners. First, the understanding and contours of the rule of law as a principle of some significance in international affairs and particularly in peacebuilding is still affected by the uncertainties revolving around the notion and its programmatic reach. While the expansive definition adopted by the aforementioned UN rule of law report seems to embrace the “rights” conception of the rule of law,⁵⁶ some experts in the development and security realms are still wary of such a rights-based approach, perhaps because success becomes far more difficult to achieve and to measure. Further, philosophical analyses of the rule of law as a mechanism of power distribution between political forces and state institutions may provide important insights for wider peacebuilding goals. Thus in the words of José María Maravall and Adam Przeworski: “The rule of law emerges when, following Machiavelli’s advice, self-interested rulers willingly restrain themselves and make their behaviour predictable in order to obtain a sustained, voluntary cooperation of well-organized groups commanding valuable resources. In exchange for such cooperation, rulers will protect the interest of these groups by legal means.”⁵⁷

Theory aside, a second category in the existing literature focuses on efforts to promote the rule of law as part of development policies. In most cases, the focus is on countries that have experienced transitions to liberal democracy and free-market economy, such as Eastern Europe, Latin America, and, in the latter sense, China.⁵⁸ This largely reflects the regional focus of bilateral rule of law assistance, provided most prominently by USAID. While integrated within the broader category of democratization or governance policies, the judicial and legal reform programs of the 1990s reflected to some extent a revival of the “law and development” movement sparked by US academics in the 1960s,⁵⁹ with added components inspired by the human rights movement. The two approaches are indeed remarkably similar insofar as these reforms were primarily conceived with a view to replicate the liberal democracies’ institutional frameworks. While much of the regionally focused literature concentrates on US programs, the nature and objectives of programs implemented by other bilateral actors are comparable.⁶⁰

Compared to the theoretical realm, this category of the rule of law literature is marked by a relative absence of controversy. Two recent collective publications are nonetheless worth particular attention, as they seek to question some of the fundamental assumptions about a field where technical approaches

have too often prevailed at the expense of more in-depth analyses. In *Beyond Common Knowledge*, Erik Jensen and Thomas Heller offer a stringent critique of the approaches of development actors, noting that “basic questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity.”⁶¹ Jensen and Heller notably question the importance of the role of courts in economic growth and democratic politics, and advocate more rigorous methodologies to measure performance.

A recent compilation by Thomas Carothers of papers published by the Carnegie Endowment for International Peace as part of the Democracy and Rule of Law Project, while slightly different in focus, is also notable for its critical appraisal of international efforts to strengthen the rule of law and related academic endeavors.⁶² Thus, Frank Upham challenges some of the main rule of law “orthodoxies” and the assumptions that Western countries have legal systems that are devoid of political influence.⁶³ New propoor approaches are also advocated by Stephen Golub in his piece on legal empowerment.⁶⁴ Most relevant for this volume, Rachel Kleinfeld Belton’s contribution stresses the discrepancy between definitions that emphasize the ends of the rule of law and those that focus on the institutional features that are necessary “to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies).” In her analysis, Kleinfeld Belton rightly points at the conceptual confusion of policymakers and practitioners with respect to the multiple and even divergent objectives of rule of law programs and suggests that as a result of this confusion, outcomes tend to be measured on the basis of institutional attributes, which lead to technocratic reform strategies.⁶⁵

Third, the area that has undoubtedly attracted the greatest attention is transitional justice. This might arguably be the domain where the international community has been able to achieve the most tangible results thus far, starting with the establishment of international ad hoc tribunals for the former Yugoslavia and Rwanda, followed more recently by truth and reconciliation mechanisms such as in Sierra Leone and Burundi, “hybrid” tribunals created through an agreement between the United Nations and the national government (e.g., Sierra Leone and Cambodia), and the International Criminal Court. Transitional justice literature has proliferated to such an extent that it would be impossible to cover it adequately here. What is perhaps most striking is the multidisciplinary nature of this relatively new field of inquiry, which goes well beyond legal scholarship to encompass politics, international relations, anthropology, and psychosocial studies. The question of how to address past abuses and how to find redress for victims continues to generate a fierce yet healthy debate within and between these different disciplines.⁶⁶

Finally, a fourth category of the literature focuses on international policies to strengthen the rule of law, focusing generally on postconflict contexts, criminal justice, and specific institutions, primarily the judiciary and the police. Many of the earlier studies in this category were policy- and practitioner-driven in terms of both authorship and targeted readership,⁶⁷ and sought to synthesize lessons learned and provide advice on programmatic design and implementation. Academic interest in these questions is in fact quite recent, such as Charles Call's edited volume that examines, on the basis of case studies of the most prominent peacekeeping operations, whether societies emerging from armed conflict can create "systems of justice and security that ensure basic rights, apply the law effectively and impartially, and enjoy popular support."⁶⁸ Another recent academic monograph, by Jane Stromseth, David Wippman, and Rosa Brooks, looks at the plight of the so-called new imperialists, and their attempts at (re)-building the rule of law after a military intervention, with a focus on a number of broad themes, including the legality and legitimacy of intervention, the security imperative, judicial reform, transitional justice, "rule of law culture," and local ownership.⁶⁹

Structure and Overview of the Volume

This book is divided into four parts. Part 1 is devoted to a conceptual analysis of international efforts to support the rule of law, opening with Rama Mani's examination, in Chapter 2, of some of the theoretical underpinnings of rule of law programs and their current state. In Chapter 3, Balakrishnan Rajagopal reflects on the increasing prominence of the rule of law as a policy-relevant concept in international affairs through a thought-provoking analysis of the development, security, and human rights discourses.

Part 2 addresses the question of the contribution of rule of law programs to peacebuilding. While there is wide agreement on the existence of specific needs and the relevance of specific strategies in the immediate aftermath of conflict, there is still considerable debate revolving around the longer-term objectives of peacebuilding, a concept that has undergone major conceptual transformations since its original formulation in the UN's 1992 *Agenda for Peace*, which has recently been institutionalized through the establishment of the UN Peacebuilding Commission.⁷⁰ In Chapter 4, Chandra Sriram reviews the evolution of the conflict prevention discourse and examines whether and how the rule of law has featured in these new policies. In Chapter 5, William O'Neill reflects on the origins and development of rule of law components in peacekeeping operations and on the many challenges still faced by practitioners in reestablishing law and order in the immediate aftermath of conflict. In Chapter 6, Colette Rausch and Vivienne O'Connor illustrate how rule of law programs can address the key challenges faced by practitioners in peacebuilding contexts, namely the identification of applicable law, by developing rigorous methodologies that are conflict sensitive and adjustable to changing circumstances.

The next two chapters deal with two of the fundamental objectives of international actors involved in peacebuilding: reconciliation and effective sovereignty. In Chapter 7, Simon Chesterman examines the work of transitional administrations on rule of law reforms, casts a critical eye on the discourse of “ownership,” and proposes more precise criteria to assess progress in handing over power to domestic actors with a view to achieving full sovereignty. In Chapter 8, Pablo de Greiff, rather than attempting a general treatment of the whole ambit of transitional justice, focuses on reparation programs. Such programs may provide an important and enduring contribution to reconciliation processes, and are a less well known and appreciated mechanism than prosecutions or truth and reconciliation commissions.

Part 3 addresses a series of more specific topics that have acquired heightened relevance for rule of law experts working in countries affected by conflict. In Chapter 9, I advocate a more proactive approach to housing, land, and property disputes by UN policymakers and practitioners through the use of a variety of rule of law tools. In Chapter 10, Madalene O’Donnell examines the advances made by international actors to combat corruption, which is essential to enhance both access to justice and equality before the law. In Chapter 11, Reyko Huang provides an analysis of international efforts to combat terrorism in the wake of the events of September 11, 2001, and the implications of these policy choices for rule of law programs.

Finally, I highlight in the conclusion the key findings that emerge throughout the chapters of the volume with respect to the relevance and use of rule of law programs, the underlying tensions in the all-embracing claims commonly made about their expected achievements, and the identification of policy-relevant recommendations for rule of law programs undertaken as part of peacebuilding strategies.

Notes

I thank Reyko Huang, Adam Lupel, and James Cockayne for their comments on earlier versions of this chapter. All errors are my sole responsibility. The views expressed herein are those of the author and do not necessarily represent the views of the United Nations or of the International Criminal Tribunal for the former Yugoslavia.

1. Rachel Kleinfeld Belton, “Competing Definitions of the Rule of Law: Implications for Practitioners,” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, edited by Thomas Carothers (Washington, D.C.: Carnegie Endowment for International Peace, 2006), p. 31; see also Charles T. Call, Introduction to *Constructing Justice and Security After War* (Washington, D.C.: US Institute of Peace, 2006), p. 4.

2. United Nations, *Report of the Secretary-General on the Work of the Organization*, UN Doc. A/59/PV.3 (September 21, 2004).

3. United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc. S/2004/616 (August 23, 2004), para. 1.

4. United Nations, *In Larger Freedom: Towards Development, Security, and Human Rights for All—Report of the Secretary General*, UN Doc. A/59/2005 (March 21, 2005).

5. United Nations, *2005 World Summit Outcome Document*, UN Doc. A/RES/60/1 (October 24, 2005), para. 134(e). See also UN General Assembly Resolution 61/39 (2006), para. 4, on the rule of law at the national and international levels, which urges the Secretary-General to submit a report on the establishment of a rule of law assistance unit within the Secretariat.

6. United Nations, *Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law*, UN Doc. A/61/636-S/2006/980 (December 14, 2006), paras. 48–50. The report also identifies (para. 38) three main baskets of rule of law activities for purposes of coherence and coordination: rule of law at the international level, rule of law in the context of conflict and postconflict situations, and rule of law in the context of long-term development.

7. To my knowledge, there are no comprehensive reports on the sums invested in rule of law programming that detail expenditures of both bilateral and international agencies. There is tremendous difficulty in calculating a reliable figure because agencies tend to define differently what is included in “rule of law programs.” Rachel Kleinfeld Belton, relying herself on Thomas Carothers, notes that “developed countries and international organizations have spent more than a billion dollars over the last twenty years trying to build the rule of law in countries transitioning to democracy or attempting to escape underdevelopment.” Kleinfeld Belton, “Competing Definitions of the Rule of Law,” p. 5. However, this figure may not be that large, since it spans a period of twenty years.

8. United Nations, *The Rule of Law and Transitional Justice*, p. 1.

9. Lord Bingham of Cornhill, “The Rule of Law,” Sixth Sir David Williams Lecture, University of Cambridge, November 16, 2006, <http://cpl.law.cam.ac.uk/media/the%20rule%20of%20law%202006.pdf>.

10. United Nations, *The Rule of Law and Transitional Justice*, para. 6.

11. Lord Bingham of Cornhill, “The Rule of Law,” p. 2.

12. European Union, “Communication from the Commission to the Council and the European Parliament: The EU’s Role in Promoting Human Rights and Democratization in Third Countries,” COM (2001) 252, May 8, 2001, http://ec.europa.eu/external_relations/human_rights/doc/com01_252_en.pdf. In this communication, the Commission identifies democracy, good governance, and the rule of law as some of the priorities of the European Union. In 1990 the OSCE adopted the following statement: “The rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for their full expression.” “Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the CSCE,” p. 3, see also p. 2, point 30, p. 18.

13. UN Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector* (Geneva, 2006), p. 5.

14. *Ibid.*

15. David Tolbert and Andrew Solomon, “United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies,” *Harvard Human Rights Journal* 19 (2006): 29–30, 45.

16. Note that the OHCHR’s *Mapping the Justice Sector* report includes the police among the key institutions of the justice sector. See also Call, *Constructing Justice and Security After War*, pp. 6–7.

17. The list of rule of law institutions—but not the three “circles”—presented here is loosely based on the OHCHR’s *Mapping the Justice Sector* report. See Chapter 5 of this volume, which also adopts an expansive approach of “rule of law institutions.”

18. See <http://www.isip.org>, <http://www.clingendael.nl>, <http://www.ceip.org>, and <http://www.hdcentre.org>. On rule of law and peace operations, see also Jessica Howard and Bruce Oswald, eds., *The Rule of Law on Peace Operations* (Melbourne: Asia Pacific Centre for Military Law, 2002).

19. Project reports include Agnès Hurwitz and Kaysie Studdard, “Rule of Law Programs in Peace Operations” (New York: International Peace Academy, August 2005); Agnès Hurwitz, Kaysie Studdard, and Rhodri Williams, “Housing, Land, Property, and Conflict Management: Identifying Policy Options for Rule of Law Programming” (New York: International Peace Academy, October 2005); Reyko Huang, “Securing the Rule of Law: Assessing International Strategies for Post-Conflict Criminal Justice” (New York: International Peace Academy, November 2005). All project publications are available at <http://www.ipacademy.org/publications/publications.htm>.

20. Ruth Wedgwood, “United Nations Peacekeeping Operations and the Use of Force,” *Washington University Journal of Law and Policy* 5 (2001): 69, 73.

21. Agnès Hurwitz and Gordon Peake, “Strengthening the Security-Development Nexus: Assessing Policy and Practice in the 1990s” (New York: International Peace Academy, April 2004), p. 13, <http://www.ipacademy.org/publications/publications.htm>.

22. United Nations, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping: Report of the Secretary-General*, UN Doc. A/47/277-S/24111 (June 17, 1992), para. 55; see also United Nations, *Supplement to An Agenda for Peace: Position Paper of the Secretary-General on the Occasion of the Fiftieth Anniversary of the United Nations*, UN Doc. A/50/60-S/1995/1 (January 3, 1995), para. 47.

23. United Nations, *An Agenda for Peace*, para. 59.

24. United Nations, *Supplement to An Agenda for Peace*, paras. 13–14.

25. The UN Observer Mission in El Salvador (ONUSAL) (July 1991–April 1995) was established under UN Security Resolution 693 (1991). The UN Mission in Haiti (UNMIH) (1993–1996) was established under UN Security Council Resolution 867 (1993). It was followed by the UN Support Mission in Haiti (UNSMIH) (1996–1997), established under UN Security Council Resolution 1063 (1996); the UN Transitional Mission in Haiti (UNTMIH) (1997), established under UN Security Council Resolution 1123 (1997); and the UN Civilian Police in Haiti (MINOPUH) (1997–2000), established under UN Security Council Resolution 1147 (1997). Finally, the UN Verification Mission in Guatemala (MINUGUA) (1994–2004) was established under UN General Assembly Resolution 48/267 (1994).

26. See Chapter 5 in this volume; UN Transitional Authority in Cambodia (1992–1993); UN Security Council Resolution 74 (1992); Simon Chesterman, *You, the People: The United Nations, Transitional Administration, and State-Building* (Oxford: Oxford University Press, 2004), 74.

27. United Nations, *Report of the Panel on UN Peace Operations*, UN Doc. A/55/305-S/2000/809 (August 21, 2000).

28. United Nations, Peacekeeping Best Practices Unit, Department of Peacekeeping Operations, *Handbook on United Nations Multidimensional Peacekeeping Operations* (December 2003), p. 97; *Final Report of the ECPS Task Force for Development of Comprehensive Rule of Law Strategies for Peace Operations* (August 2002) (on file with author).

29. The UN Mission in Liberia (UNMIL), established under UN Security Council Resolution 1509 (2003). For further information, see <http://www.unmil.org>.

30. UN Stabilization Mission in Haiti (MINUSTAH), UN Security Council Resolution 1542 (2004); see also UN Assistance Mission in Afghanistan (UNAMA), UN Security Council Resolution 1401 (2002); UN Organization Mission in the Democratic

Republic of Congo (MONUC), UN Security Council Resolution 1291 (2000); UN Security Council Resolution 1493 (2003); UN Security Council Resolution 1565 (2004); UN Operation in Burundi (ONUB), UN Security Council Resolution 1545 (2004).

31. Erik Jensen, "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses," in *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, edited by Erik Jensen and Thomas Heller (Palo Alto: Stanford University Press, 2003), pp. 336, 345–346.

32. *Ibid.*

33. *Proclamation of Tehran* (1968), para. 13, http://www.unhchr.ch/html/menu3/b/b_tehern.htm; *UN Declaration on the Right to Development*, UN General Assembly Resolution 41/128 (1986). See Chapter 3.

34. Jensen, "The Rule of Law and Judicial Reform," p. 347.

35. United Nations, *An Agenda for Development: Report of the Secretary-General*, UN Doc. A/48/935 (May 6, 1994), para. 124.

36. Call, *Constructing Justice and Security After War*, p. 4. See also <http://www.undp.org/governance/sl-justice.htm>. See Chapter 4.

37. USAID, *Achievements in Building and Maintaining the Rule of Law* (Washington, D.C., 2002), pp. 64–74.

38. Funding for USAID's Latin American programs totaled roughly US\$200 million between 1983 and 1993. Between 1994 and 1998, another US\$196 million was provided in the region. Lynn Hammergren, "International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers," in *Beyond Common Knowledge*, edited by Jensen and Heller, pp. 295–296; Charles T. Call, "Democratization, War, and State-Building: Constructing the Rule of Law in El Salvador," *Journal of Latin American Studies* 35, no. 4 (2003): 827, 849.

39. USAID includes rule of law work under the umbrella of "democracy and governance." See Chapter 2.

40. United Nations, *In Larger Freedom*, paras. 148–151.

41. For an overview of the division's work, see <http://www.un.org/depts/dpa/ead/overview.html>.

42. United Nations, *In Larger Freedom*, para. 151. The UN Democracy Fund was established within the UN Fund for International Partnership in March 2006; see <http://www.un.org/democracyfund>.

43. Preamble to *Universal Declaration of Human Rights*, General Assembly Resolution 217 A (III), UN Doc. A/810 (December 10, 1948), recital 3.

44. A list of core international human rights instruments is available at <http://www.ohchr.org/english/law/index.htm>.

45. Other principles adopted by the United Nations are fundamental elements of a system based on the rule of law. See, for example, *International Covenant for Civil and Political Rights*, esp. art. 2, which prohibits discrimination; art. 16, which establishes the right to be recognized as a person before the law; and art. 26, which establishes the principle of equality before the law.

46. UN General Assembly Resolution 48/132 (1993).

47. UN General Assembly Resolution 49/194 (1994); UN General Assembly Resolution 50/179 (1995); UN General Assembly Resolution 51/96 (1996); UN General Assembly Resolution 52/125 (1997); UN General Assembly Resolution 53/142 (1998); UN General Assembly Resolution 55/99 (2000); UN General Assembly Resolution 57/221 (2002).

48. United Nations, *The Rule of Law and Transitional Justice*, para. 8.

49. UN Security Council Resolution 808 (2003); UN Security Council Resolution 955 (1994).

50. United Nations, *The Rule of Law and Transitional Justice*, para. 44. See also OHCHR, *Rule of Law Tools for Post-Conflict States: Prosecution Initiatives* (Geneva, 2006).

51. Thomas Carothers, "The Many Agendas of Rule of Law Reform in Latin America," in *Rule of Law in Latin America: The International Promotion of Judicial Reform*, edited by Pilar Domingo and Rachel Sieder (London: Institute of Latin American Studies, 2001), pp. 11–12.

52. Albert Venn Dicey, *An Introduction to the Law of the Constitution*, 8th ed. (London: Macmillan, 1915). For an overview of the term in Germany, France, the United Kingdom, and the United States, see Rainer Grote, "Rule of Law, Rechtsstaat, and Etat de Droit," in *Constitutionalism, Universalism, and Democracy: A Comparative Analysis*, edited by Christian Starck (Baden-Baden: Nomos, 1999), p. 271.

53. Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), p. 3; Lord Bingham of Cornhill, "The Rule of Law," pp. 2–3.

54. See, for example, José María Maravall and Adam Przeworski, eds., *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003).

55. See Chapter 2 of this volume. The distinction between the "rule-book" and the "rights" conception is proposed in Ronald Dworkin, *A Matter of Principle* (London: Harvard University Press, 1987), pp. 11–12; Kleinfeld Belton, "Competing Definitions of the Rule of Law," p. 14.

56. United Nations, *The Rule of Law and Transitional Justice*, para. 6.

57. Maravall and Przeworski, *Democracy and the Rule of Law*.

58. C. Biebesheimer and J. Payne, "IDB Experience in Justice Reform: Lessons Learned and Elements for Policy Formulation," Technical Paper Series (Washington, D.C.: Inter-American Development Bank, 2001); Harry Blair and Gary Hansen, "Weighing In On the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs," Assessment Report no. 7 (Washington, D.C.: US Agency for International Development, 1994); David Pedro, "Technical Cooperation in Strengthening the Rule of Law in Latin America: Applicability of United Nations Standards and Norms in Crime Prevention and Criminal Justice to Facilitate Access to Justice," in *The Application of United Nations Standards and Norms in Crime Prevention and Criminal Justice* (Vienna: UNODC, 2003), <http://www.unodc.org/pdf/crime/publications/standards%20&%20norms.pdf>; Lynn Hammergren, "Do Judicial Councils Further Judicial Reform? Lessons from Latin America," Democracy and Rule of Law Project, Rule of Law Series no. 28 (Washington, D.C.: Carnegie Endowment for International Peace, 2002).

59. Carothers, "The Many Agendas of Rule of Law Reform in Latin America," pp. 4–5; Luis Salas, "From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America," in Domingo and Sieder, *Rule of Law in Latin America*, pp. 17, 20.

60. Salas, "From Law and Development to Rule of Law," p. 25.

61. Erik Jensen and Thomas C. Heller, Introduction to *Beyond Common Knowledge*, p. 2.

62. Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006).

63. Frank Upham, "Mythmaking in the Rule of Law Orthodoxy," Democracy and Rule of Law Project, Rule of Law Series no. 30 (Washington, D.C.: Carnegie Endowment for International Peace, 2002) <http://www.carnegieendowment.org/files/wp30.pdf>.

64. Stephen Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," in Carothers, *Promoting the Rule of Law Abroad*, p. 161.

65. Kleinfeld Belton, "Competing Definitions of the Rule of Law," p. 6.

66. See Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 vols. (Washington, D.C.: US Institute of Peace, 1995); William A. Schabas, *Introduction to the International Criminal Court* (Cambridge: Cambridge University Press, 2001); Cherif M. Bassiouni, ed., *Post-Conflict Justice* (Ardsley, N.Y.: Transnational, 2002); Priscilla Hayner, *Unspeakable Truths* (London: Routledge, 2002); William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone* (Cambridge: Cambridge University Press, 2006). For an overview of publications from the International Centre for Transitional Justice since 2002, see <http://www.ictj.org/en/news/pubs/index.html>.

67. See, for example, Lone Lindholt, Paulo de Mesquita Neto, Danny Titus, and Etannibi E. Alemika, eds., *Human Rights and the Police in Transitional Countries* (The Hague: Kluwer Law International, 2003); Robert Perito, Michael Dziedzic, and Beth C. DeGrasse, "Building Civilian Capacity for US Stability Operations: The Rule of Law Component," Special Report no. 118 (Washington, D.C.: US Institute of Peace, 2004); Laurel Miller and Robert Perito, "Establishing the Rule of Law in Afghanistan," Special Report no. 117 (Washington, D.C.: US Institute of Peace, March 2004); Robert M. Perito, "Establishing the Rule of Law in Iraq," Special Report no. 104 (Washington, D.C.: US Institute of Peace, April 2003). All of these US Institute of Peace reports are available at <http://www.usip.org>. See also Martina Huber, "Monitoring the Rule of Law: Consolidated Framework and Report," Conflict Research Unit occasional paper (The Hague: Clingendael Institute of International Relations, 2002); Anja Kaspersen, Espen Barth Eide, and Annika Hansen, *International Policing and the Rule of Law in Transition from War to Peace*, Working Paper no. 4 (Oslo: Norwegian Institute of International Affairs, October 2004); William G. O'Neill, "Rebuilding the Rule of Law in Iraq: Ten Tips from Recent Experience" (Washington, D.C.: Henri Stimson Center, 2003); Hansjörg Strohmeier, "Collapse and Reconstruction of a Judicial System: The United Nations Mission in Kosovo and East Timor," *American Journal of International Law* 95, no. 1 (2001): 46–63; Jamal Benomar, "Justice After Transitions," in Kritz, *Transitional Justice*; Jamal Benomar, "Rule of Law Technical Assistance in Haiti: Lessons Learned," in *Empowerment, Security, and Opportunity Through Law and Justice*, World Bank conference, St. Petersburg, Russia, July 8–12, 2001, http://haiticci.undg.org/uploads/lessons%20learned%20justice_2001.pdf.

68. Call, *Constructing Justice and Security After War*, p. 5.

69. Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (Cambridge: Cambridge University Press, 2006).

70. UN General Assembly Resolution 60/180 (2005).