Rule of Law in
Fragile and Conflict Affected Countries:
Working within the Interstices and Interfaces

Framing Paper
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Introduction
One of the principal objectives of this seminar is to explore the distinctive nature and characteristics of fragile and conflict affected countries and how that uniqueness influences the ways in which donors and, in particular, the World Bank can and ought to support rule of law\(^1\) programming. This framing paper, in turn, is meant to raise a number of themes, outlining some of the predominant challenges that donors may wish to take into consideration in these environments. In sketching out these issues, this paper is not meant to be an exhaustive recital of rule of law issues, debates, and lessons learned, or, as regrettably too frequently appears to be the case, not learned.

This framing paper also does not lay claim to or offer definitive answers, if for no other reason than rule of law programming depends upon grasping the complex, dynamic, and fungible balances of power within the fragile and/or conflict affected country in which donor support is to occur. If there is one lesson learned atop the pyramid, rule of law programming in these environments is not and has never been, primarily, a technical activity, in which, for instance, international lawyers, police officers, or prison wardens can impart their expertise to their partner country colleagues to strengthen the policies, operations, and behaviors of rule of law institutions, agencies, and their personnel. Knowledge can be readily conveyed, but its applicability and usability does not depend upon formal laws, administrative rules and regulations, or managerial processes, though their existence may be a prerequisite. Effective rule of law programming flows, first and foremost, from the ability and acumen of the donor and its practitioners to negotiate the shoals of power and its continual shifting dynamic balances within the partner country. In fragile and conflict affected countries, effective programming needs to weigh and manage risk, as, oft-times, it takes place in the interstices and interfaces between the differing layers of power and authority within fragile and conflict affected countries.

To begin to address the issues and the challenges rule of law in fragile and conflict affected countries, a number of discrete questions arise, but first it may be most appropriate to review the current ‘state of art,’ in terms of lessons learned and critiques of RoL programming. This review will show that there is broad agreement that the field’s track record is, at best, poor. A similar unanimity exists describing the reasons why.

The review also highlights the current consensus that there is no agreed upon understanding of rule of law. In response, this paper sketches out a method by which to demarcate the parameters of rule of law programming. It argues that the ‘experience of rule of law’\(^2\) by those living and working in fragile and conflict affected countries becomes a pivotal guidepost. The emphasis on ‘the experience of rule of law’ introduces another challenge, namely, recognizing the nature and structure of power and authority in fragile and conflict affected countries. It is important to accept that many of these

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\(^1\) Throughout this paper, the term rule of law will be used and it is assumed that security sector reform is a subset of rule of law. For a graphic illustration of how the two terms relate, see (DFID, 2007B: 12).

\(^2\) The author would like to acknowledge that the concept of the ‘experience of rule of law’ has been adopted from Bryn Hughes and Charles Hunt, The Rule of Law in Peace and Capacity Building Operations: Moving beyond a Conventional State-Centred Imagination. Journal of International Peacekeeping (forthcoming, 2009).

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countries do not resemble the western understanding of the state, in part because of their fragility and their post-colonial legacies. Consequently, rule of law programming grounded in the unitary state-centric, Westphalian model may not necessarily correspond to local needs, which helps explain why it has been and may continue to be ineffective, if its approach is not revised.

In the multi-layered fragile, post-colonial state, ‘the experience of rule of law’ approach suggests the pivotal role of the networks of the ‘second state,’ which are, at one and the same time, polities and integral parts of civil society representing the needs and interests of those to whom they provide public goods and services. It is through understanding the role and function of these networks, particularly those that provide justice and security, that donors can better appreciate the relationships and balances of power and authority in fragile and conflict affected countries. Rule of law programs that work with and support these networks, building on the linkages between these networks and state agencies, may have the greatest likelihood of successful implementation.

I. Rule of Law: State of the Art, Lessons Learned, and Critiques

In fragile and conflict affected countries, there is consensus that rule of law (RoL) programming has, at best, “a patchy record of performance” (Jensen: 2008: 120). Other critics have labeled RoL programming, alternatively, “discouraging,” having “a bad track record,” and “not especially encouraging.” Evaluations of discrete programs have reached similar conclusions, irrespective of whether the program’s emphasis had been RoL, security sector reform (SSR), police development, or judicial reform. In Papua New Guinea, for instance, “decades of Australian development assistance have had little impact on police performance with a recent review concluding that the police force ‘was close to total collapse’” (Dinnen and Braithwait, 2009: 164). In Cambodia, on the other hand, a “UN sponsored [effort] to rapidly develop a modern court and dispute settlement process [that] included a ‘Judicial Mentor Programme’ that relied on guidance by overseas judges… faltered because the poorly paid judges were prone to corruption or intimidation, and access to courts was prohibitively expensive to all but the elite” (Broadhurst and Bouhours, 2009: 187).

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3 Whether Western European and North American states truly correspond to the Westphalian model is a question outside the purview of this paper.
4 A World Bank study succinctly states the case – “the numerous rule of law assistance programs in post-conflict or fragile countries have so far resulted in few lasting consequences. Some individual programs have had a modicum of success, when evaluated according to their programmatic strategies or institutional goals, but even then most have not built institutions that might outlast the donor presence... (Samuels, 2006: 15).
5 UN, 2007: 1.
6 Sannerholm, 2007: 5
7 Call and Cousens, 2007: 8-9.
8 It is interesting, but not surprising, to note that the ineffectiveness of RoL programming closely parallels that of statebuilding, for it is claimed that “the results of... [UN peace] operations in Africa have been paltry, particularly as regards the establishment of self-sustaining state institutions” (Englebert and Tull, 2008: 106). See also Charles Call with Vanessa Wyeth (eds.) Building State to Build Peace. (Boulder: Lynne Reinner Publisher, 2008).
9 A symposium of policing experts concluded that there is “no clear cut case of any society in transition being able to build a legitimate police agency in the post-conflict phase” (Shaw, 2000: 11).
RoL programming in peacekeeping has an equally bleak track record, as has been readily acknowledged by the UN itself. Most recently, in Liberia, the UN admitted that, despite years of development during which the training of “more than 3,500 Liberian National Police officers was completed… all stakeholders provided a sobering assessment of the efforts to develop the Liberian National Police, characterizing the force as ineffecual” (UN, 2009:7). Similarly, in Timor-Leste, the UN conceded that “tremendous institutional gaps persist [within the Timorese police], including weak management and command and control, lack of core capacities…, and an almost total absence of logistics and systems maintenance capacity…” (UN/DPKO, 2008: 2). The UN’s assessment also identifies severe weaknesses within the judiciary, with “political interference in the independence of the judiciary” and “acute shortage[s] of judges, public defenders and rehabilitated court structures; the expectation of a massive increase in civil cases” (UN/DPKO, 2008: 2).

In the last decade, a cogent set of lessons learned and critiques have been assembled to explain and come to grips with RoL’s poor track record. Here too, a consensus among scholars and practitioners has coalesced. Among the influential critiques are those

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10 For a recent review of a number of UN peacekeeping operations, see Heiner Hänggi and Vincenza Scherrer (eds.), Recent Experience of UN Integrated Missions in Security Sector Reform (SSR). (Geneva: DCAF/LIT, 2008).

11 According to the UN, “despite the establishment of more than 500 community policing forums around the country, overall police relations with the communities they serve remain poor, and representatives of civil society informed the mission that many Liberians still fear the police. All of the mission’s interlocutors were of the view that the credibility of the police was negatively affected by indiscipline, corrupt practices and abuses of the population, as well as its inability to maintain law and order or respond effectively to crime” (UN, 2009: 7).

12 UN/DPKO’s judgment about Timor-Leste has been seconded by UNDP and USAID. A UNDP mid-term evaluation of its RoL programming concluded that its “programme has not made a significant impact on access to justice in Timor-Leste” (UNDP, 2007: 5). And similarly, USAID found that “the judicial system is plagued by unclear procedures in the law, unclear procedures in practice, and poor outreach and public education mechanisms. The Timor-Leste judicial system is not perceived to be responsive or independent. Some legislation in Timor-Leste has been ‘cut and pasted’ by international experts from their own domestic laws, without sensitivity to Timorese culture and context” (USAID, 2007: 5).

13 The UN’s Rule of Law Unit recently enumerated its lessons learned list, which includes (1) “assistance must acknowledge the strong link between the rule of law and politics;” (2) “rule of law assistance must avoid the “one-size-fits-all” syndrome and should build on local politics;” (3) “assistance needs to be based on a comprehensive strategy recognizing the linkage among institutions such as courts, police, prosecutors and legislative bodies;” (4) “international donors must coordinate their activities;” (5) “rule of law practitioners often fail to integrate in their assistance projects widely accepted and agreed upon international principles and standards related to the rule of law;” (6) “rule of law promotion must ensure national and local “ownership” of reform and build indigenous support for democratic reforms;” (7) “the design of transitional justice assistance should take into account the political and institutional reality of the given country; (8) “constitution-making is a key component of rule of law assistance that has too often been ignored” (UN, 2007: 1-2).

14 For one of the most recent recitals of the consensus, see Goldston, who argues that the “long list of deficiencies in rule of law assistance programs, [includes] the following:

- unwarranted emphasis on training as a tool – of judges, prosecutors, police
- and other actors – despite consistent evidence that such training is often superficial and fails to affect behavior over time;
- a default preference for top-down, supply-side programs in which governments,
elaborated by Thomas Carothers, who has argued that “rule-of-law promoters tend to translate the rule of law into an institutional checklist, with primary emphasis on the judiciary,” which results in “breathtakingly mechanistic” programs (Carothers, 2006: 8 and 9). As a result, divorced from addressing concrete, identifiable challenges, RoL programming often becomes narrowly defined as policy formulation and institution and capacity building, which translates into projects and programmes that focus on constructing and repairing court houses, supplying technical equipment, drafting of new laws or wholesale ‘importation’ of foreign model codes, training programs for lawyers, judges and prosecutors on the new laws or in gender-sensitivity, supporting human rights commissions, bar associations, and police and prosecutorial offices (Sannerholm, 2006: 3).

This policy formulation-institutional/capacity building approach also tends to conflate and obfuscate the reason(s) why RoL programs are initiated in the first place, as there is no single overarching objective that corresponds to the myriad RoL challenges.

More pointedly, Carothers asserted that RoL programs are, often, undertaken without knowledge of “what the process of change consists of and how it might be brought rather than members of civil society, are the principal partners;
– a bias against, and/or resistance to, systematic monitoring and evaluation of results, which complicates comparative analysis of what works and what does not;
– frequent changes in donor thematic preferences notwithstanding the reality that change in the justice sector, as in other areas of development, takes time;
– blind spots overlooking some areas of the justice system – for example, prisons – even though they are both problematic and essential to address;
– a general reluctance by donors to suggest candidly that governments can be often obstacles to reform.” (2009: 41-42).

15 One of the reasons for this apparently mechanistic approach may be that RoL professionals are usually those tasked with supporting a partner country’s initiatives and, while they may be highly skilled practitioners in their own countries, there is no necessary correlation between their technical expertise and their ability/acumen to be qualified RoL practitioners in fragile and conflict affected countries.

16 In Latin America, as told to this author, a UNDP justice and security advisor argued that police development ought not to reform policing practices and service delivery, but, instead, focus exclusively on policy considerations.

17 Although these lessons have been reiterated over and over, some current RoL programming seems to be repeating past errors. One of the more telling examples is Liberia. In response to its own evaluation, the UN peacekeeping operation is redoubling its efforts and “now focusing on advanced training, strategic advisory support, [and] mentoring,” although this was precisely what its personnel had or were supposed to have been doing previously (UN, 2009: 7). DFID appears to be falling into a similar situation in Sudan. Despite its acknowledgment that, after long experience of continued poor service delivery in Sierra Leone, its policy and capacity building approach needs to be redesigned so that there are “felt positive changes [in RoL] at the local level, especially for marginalised groups” (DFID, 2007: 2), DFID’s justice and police program in Sudan concentrates, first and foremost, on policy and capacity building, the relevant sections of the program being “capacity strengthening in the Justice Sector [that] will concentrate on the National Judiciary and… Ministry of Justice in the following areas: development of key departments in the Judiciary and MOJ; professional development of judges as well as legal advisers in the MOJ; strengthening core functional skills in both institutions” (DFID, 2009: 5).
about" (Carothers, 2006: 9). Given the complexity of RoL and the multitude of its moving parts, it is not surprising that there is a lack of knowledge of how change occurs. According to critics, however, this understandable lack of knowledge is compounded by “the belief that the rule of law can be developed and implemented separately from, and counter to, the political process” (Chandler, 2006: 170). The divorce of RoL programming from the complex, dynamic, and fungible balances of power and authority within the fragile and/or conflict affected country is among the most troublesome flaws.

A less pronounced, but telling, critique of RoL programming is its misplaced emphasis on strengthening accountability mechanisms, a tendency particularly evident in self-identified SSR projects. Accountability activities, typically, include “support to parliamentary defence, security and justice commissions,” Ombudsman Offices, along with “strengthening financial accountability, discipline and conduct through… supporting cross-government co-ordination, accountability and internal oversight of security sector institutions” (DFID, 2008: 2). This strategy concentrates scarce donor resources on activities for which there is little empirical substantiation that they improve RoL service delivery or are that their programs are sustainable. More to the point, “the evidence shows that reliance on legal institutions such as judges and police to enforce and strengthen accountability… is misplaced” (Jensen, 2008: 129). The reasons are relatively straightforward. Partner countries, usually, have scant political inclinations to address accountability and the lack of such political commitment cannot be overcome by repeated donor insistence that these initiatives are crucial. The nature of fragile and conflict

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18 A quick not-meant-to-be-an-inclusive-list of the components of RoL would include, among others: the courts and judiciary, including court administration; administrative courts; notaries; prosecutorial agencies; legal aid organizations; Bar Associations and lawyers; law faculties/institutes and legislative/legal digests and journals; Ministries of Justice, Interior (Police), Defense, Finance, and Human Rights (if one exists); Ombudsman Offices and other human rights organizations; prisons, detention centers, parole offices, and bail mechanisms; police services; other policing agencies (railroad, forestry, etc.); customs and border services; military services; paramilitary organizations; intelligence services; militias; Parliaments/Congresses and their various committees overseeing the operations of all of the institutions and agencies enumerated above; and the plethora of related civil society organizations; and paralegals, justice-of-the peace, lay judges, etc. Not to be left out of the list would be the range of non-state/local justice providers including customary courts, village elder councils, market/trade associations and religious courts; neighbourhood patrols and crime prevention organisations; religious police; customary police; political party security; and commercial security companies. To understand the interactions and relationships between and among these complex organizations is simply impossible; to be able to support their coordination even more inhuman.

19 The exception to this rule is financial and budgetary accountability. Although strengthening these activities may have little tangible effect on service delivery, financial management development is vital to initiate as soon as possible.

20 See DFID’s analysis of Sierra Leone, where, despite years of development assistance, “there is a lack of political will for greater accountability” (DFID, 2007, 1). Judicial independence is vital for there to be accountability across the justice and security sector, but, in Kyrgyzstan, the International Crisis Group has conceded that “there is no incentive for the political establishment to increase the independence of the courts” (ICG, 2008: i).
affected countries also suggests that partner countries, even if they had the commitment to undertake accountability reforms, they do not possess the capacity to do so.\textsuperscript{21} 

Acceptance of this critique does not to suggest that donor-supported initiatives concentrating on the long-route to accountability should be shunned. Nor does it intimate that all such programs have been ineffective and will invariably be unsustainable, though the track record speaks for itself. Without doubt, there are constituencies in fragile and conflict-affected countries that support these endeavors and there may be elements within ruling political elites that may champion them. Nevertheless, the lessons learned are, first, that accountability initiatives, focusing on institutional/capacity building projects, are hazardous undertakings, requiring a high degree of political acumen on the part of donors to shepherd them to a successful conclusion, a degree and type of involvement that most donors have, in the past, not exhibited. Second, accountability programs are long-term undertakings,\textsuperscript{22} for which the potential pay-off is, at best, a generation or two away. Third, given inherently scarce resources, RoL programming should consider alternative short- to intermediate-term approaches to address immediate challenges that have a greater likelihood of success.

Another less salient lesson learned was raised at the April 2009 UK-UN RoL conference, where policy-makers and practitioners frequently spoke about RoL as if it meant security sector reform defined as criminal justice development,\textsuperscript{23} with an emphasis on state policing.\textsuperscript{24} Because these programs are often designed by police officers, a constant refrain is the need to institute ‘community policing,’ though what ‘community policing’ may mean practically and operationally, other than a ‘partnership policing philosophy,’ in

\textsuperscript{21} Accountability as an operational challenge, the short-route, is another question entirely. Programs seeking to augment the short-route to accountability be initiated in the short-term, but they may be best addressed through the organizations and associations of the ‘second state,’ as is discussed below. 

\textsuperscript{22} This is not to assert that institutional accountability initiatives ought to be set aside for a later date, but that, pragmatically, measurable outcomes will not be forthcoming until middle management systems are operational and the personnel capable of sustaining them are in place. Sequentially, however, middle management systems with the appropriate personnel cannot be instituted until the development of senior management has progressed and has the acumen to avail itself of the benefits accountability confers. This holds true within any single RoL institution and in the checks and balances performed by the various RoL institutions, one against another, in the ideal situation.

\textsuperscript{23} See also, Bergling where it is stated that “efforts often focus on the criminal justice side of the legal system, where many initiatives deal with transitional justice issues, criminal procedure reform, reforming the police, and a variety of related issues” (2008: xi).

\textsuperscript{24} For the police development, the lessons learned list would include, such additional items as: (1) poorly designed and executed initial recruitment and selection of national police personnel; (2) overemphasis on training; (3) general neglect of police development, including planning and policy, logistics, human resource management and career development, financial management, asset management and maintenance; (4) personnel rules that compel the use of international police officers whose skill sets may not coincide with the many of the necessary tasks, which are often developmental and may be better undertaken by non-police civilians conversant with the implementation of managerial processes, procedures, and systems; (5) inconsistent and unorganized police mentoring program; (6) inability to implement a single model of policing practice upon which development can be grounded; (7) lack of coherent and cohesive development with criminal justice and other RoL reform initiatives; (8) lack of coherent and cohesive development with military reform initiatives; and (9) lack of establishing strategic architectures under which police development can take place.
such places as Afghanistan or Timor-Leste is rarely specified.\textsuperscript{25} Though it is a forgone conclusion that an Edinburgh, Chicago, or Hannover model(s) of community policing is inappropriate for Bolivia and Mali, there is insufficient evidence, outside Latin America, as to which specific elements of its policing practice -- flat, horizontal management structures; devolution of responsibility to the individual patrol officer; dissemination of timely, accurate criminal information throughout a police service; etc. -- are transferrable.\textsuperscript{26} Another hurdle with this approach has been that, although prosecutorial services and mechanisms by which legal aid can be provided are pivotal, these components are often overlooked, as appears to be the current situation in DFID’s Sudan program, was true in the early stages of DFID’s Nepal initiatives, and was the case in Kosovo.\textsuperscript{27}

Paying heightened attention to criminal justice may have a certain short-term justification, especially given that crime rates typically spike after the cessation of conflict and many fragile states are plagued by criminal violence.\textsuperscript{28} Nevertheless, a criminal justice concentration slight many of the wellssprings of conflict and pressing RoL challenges, such as land, property rights, and commercial law. In Liberia, for example, the UN concedes that “ten of the country’s 15 counties are currently affected by land conflict” (UN, 2009: 3), but, unfortunately, there is no reference to how the criminal justice approach can or will address the issue.

A criminal justice focus also overlooks and/or minimizes the importance of administrative law as a source of discrimination and conflict.\textsuperscript{29} Throughout the world, public administration agencies are the principal interfaces between the state and the individual and deal with matters of relevance for fundamental human rights, such as civil registration and health services. Problems concerning quality in these functions impact on basic rights and entitlements. In addition, post-crisis states are in a delicate situation and

\textsuperscript{25} There has been a persistent misunderstanding within much of the development community regarding contemporary criminology and the distinction between a problem-solving approach and community policing. The former is the predominant contemporary police management strategy, which may, in some countries, be labeled intelligence/information-based policing. The latter is the philosophy of contemporary policing and a tactic with which specific crime challenges can be addressed. While the philosophy is universally applicable, the use of the community policing tactic depends upon the local crime issue and the capacities of the police, local political leaders, municipal government, and the level of human and social capital within the neighborhoods in which the tactic is to be applied. It is extremely rare to see a ‘community policing’ program that touches upon all aspects of the practice.

\textsuperscript{26} There may be evidence, however, that, in and of themselves, the establishment of neighborhood safety committees is productive, as these committees may strengthen the neighborhood’s human and social capital.

\textsuperscript{27} There is no mention of prosecutors in DFID’s 2009 Sudan Safety and Access to Justice Programme and UNMIK’s long history in Kosovo virtually ignored their existence, see Scheye, “United Nations Mission in Kosovo and the Significance of Effective Programme Management: The Case of Kosovo,” in Heiner Hänggi and Vincenza Scherrer (eds.), Recent Experience of UN Integrated Missions in Security Sector Reform (SSR). (Geneva: DCAF/LIT, 2008).

\textsuperscript{28} On annual basis, criminal violence far exceeds that caused by civil strife, see, OECD, Armed Violence Reduction: Enabling Development. (Paris: OECD, 2009).

\textsuperscript{29} See Bergling, 2008.
may relapse into conflict. Dissensions increase when the administration fails to meet legitimate demands, or when it enforces discriminatory policies” (Bergling, 2008: xv).

In Bosnia and Herzegovina, for example, the implementation of a single, unified vehicular license plate was one of the first and most effective means by which reconciliation was launched. Conversely, in Côte d’Ivoire, “problems in issuing birth certificates, identification documents and citizenship were root causes of the conflict” (Bergling, 2008, 1, footnote 1), procedures and processes that are at the heart of administrative law. RoL, therefore, cannot ignore administrative law and its crucial conflict producing/alleviating issues such as access to public services; the politicization of and discrimination in of the delivery of those services; and the selection, recruitment, and career development of government employees.

This uninviting track record does not imply that RoL programs have inevitably been unsuccessful. There are countless successes, many of which revolve around paralegals, women’s groups, and rural judicial advocates, all of which have effectively increased access to justice, raised legal awareness, and protected vulnerable groups. In an early incarnation of a Nicaraguan rural RoL project, it was even reported that crime fell by 10 per cent and trust in the justice system increased (Quintanilla, 2004: 3). It should be noted that in many of these endeavors the emphasis is not on institution/capacity building. Instead, a crucial element is to engage “community members in interaction with each other and with local institutions,” which in this context would be RoL agencies (World Bank: 2006, 8-9)

Another series of effective RoL projects attribute their effective to the active involvement of the local political leadership. For instance, in Karachi, a Citizen-Police Liaison Committee productively supported police operations by the business community conducting crime analyses using databases it developed and managed. A key impetus to and support for the project, however, was the active participation of the local political leadership. In Colombia, a similar public-private partnership, initiated by local judges, strengthened court administration, as the local business association designed new processes and procedures. In addition to the backing of the judges, the political support given by the municipal government was a key ingredient for success. In Afghanistan, the provincial governor of Khost helped establish a conflict mediation commission of tribal elders that offered “an alternative dispute resolution mechanism akin to western out-of-court arbitration, and effectively serves to include the authority of tribal elders into the formal conflict resolution architecture at the provincial level” (Schmeidl, 2009: 75). The

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governor refers cases to the commission and approves its decisions and it is reported that the commission “so far resolved 23 protracted land disputes, and proactively deescalated emerging conflicts (inter-tribal as well as conflicts involving district-level government bodies)” (Schmeidl, 2009: 75). Once again, the active involvement of the local political leadership was key.

In this sense, RoL programming may have been overlooking a crucial variable -- leadership. In the successful violence reduction programming in Bogota, Colombia, there is little doubt, but that political leadership was the variable that triggered success.34 The centrality of leadership to RoL programming is an inconvenient truth, mostly because leadership is a variable that practitioners have difficulties taking into account. By definition, it adheres to an individual(s) and is, therefore, an exposed and vulnerable foundation upon which to build a RoL program. Nevertheless, the evidence may suggest that while other factors are necessary and contribute greatly to the effectiveness of a RoL program, they are insufficient in and of themselves.

What is also interesting about the two aforementioned categories of effective programming is that they are small bore, involving neither policy formulation nor traditional institution/capacity building components. Neither category depends upon international mentors or extensive training initiatives. Furthermore, neither tries to institutionalize internal or external accountability mechanisms. Instead, they seek to augment short-route accountability by increasing local participation to ensure that service delivery corresponds more closely to local needs. In short, both categories are RoL programs designed to resolve a particular and identifiable local RoL problem.35

III. ‘The Experience of Rule’: A Problem-Solving Approach

The provision of RoL is a public good and service and, like all public goods, ought to be affordable, accessible, accountable, and appropriately delivered to all.36 However, just as a consensus reigns regarding RoL’s poor track record and lessons learned, there is agreement that there is no coherent, agreed upon definition as to what public good and service RoL is. The UK-UN conference concluded that development agencies

34 The same can be said for the successful New York City crime reduction program, CompStat, but, in this case, the crucial leadership was that exercised by the Police Commissioner rather than from the municipality.

35 What frequently what appears to be small and local is not and has wide RoL ripple effects. For instance, in a West Sumatra case, “disagreement between a village and a cement factory about legitimate control over their village resources was connected with the policies of decentralisation, the privatisation of the cement factory, and local as well as national land policies, involving a wide range of actors operating in many different arenas (Benda-Beckmann and Benda-Beckmann, 2007: 82). This is one of the reasons why paralegal and other comparable initiatives seek to engage community members in with each other and with local institutions.

36 “There are three basic means by which justice and security as a public good and service can be provided, none of which are mutually exclusive and most often they exist in various complex combinations:

- the state delivers the public good and service through its institutions and agencies;
- the state ‘contracts out’ delivery to service providers; and
have labeled and presented rule of law activities differently and have therefore also inconsistently framed policies and operational approaches [, which has resulted in a] lack of policy coherence… among donors and partners in rule of law assistance [and] has hampered the effectiveness of efforts” (UK-UN Conference Summary, 2009: 1).  

Carothers has argued that “the concept is so capacious that it is open to significantly different interpretations and operational emphases” (Carothers, 2009: 52). Another critic noted that “many hairs have been split over the definition of the concept – broad or narrow, thick or thin, value-free or value-laden…. [and that there] is [an] absence of clear agreement on its scope” (Goldston: 2009: 38-39).

Depending upon the moment, RoL can refer to principles, practices, and programs. Even the most renowned definition, proffered in the 2004 Report of the UN Secretary-General, suffers from this multiplicity:

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 (italics added).

This is not to assert that multiplicity is inherently problematic, but, in the case of RoL, it leads to definitional uncertainty.

Simultaneously, the intended benefits and outcomes associated with pursuing a RoL program range across the spectrum. Depending upon the perspective, it has been claimed, for instance, that RoL:

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38 See Hughes and Hunt, Moving Beyond, p. 8.
40 “Differences over the meaning of rule-of-law development are not necessarily always ideologically based. Sometimes they simply reflect varied professional perspectives. When asked to contribute to rule-of-law reform, for example, judges will tend to emphasize the importance of judicial reform. Police will argue for the need to supplement resources for law enforcement. Lawyers will highlight the potentially valuable
promotes sustainable peace and economic development;\textsuperscript{41}
• is integral to good governance;\textsuperscript{42} and
• advances democratization.\textsuperscript{43}

All of the above may be true. Unraveling the veracity of the claims, however, may not be particularly instructive or enlightening, theoretically and pragmatically. At first blush, it may also seem that this welter of divergent, and, frequently, competing notions of RoL necessitates an effort at conceptual clarity and consistency. There may be good academic reasons to pursue such an endeavor for its own sake. There may also be reason to seek definitional coherence as a means to improve donor effectiveness, though it is improbable that definitional consistency will have much appreciable effect on programming. Even if the likelihood of achieving a modicum of conceptual coherence were high, which is eminently debatable, the quest to do so is misplaced, for a number of reasons, not the least of which is the diversion of scarce donor resources from field programs that the attempt will require.

Another reason why the attempt to achieve conceptual coherence is ill-advised lies at the heart of RoL. In one way or another, the western tradition of RoL has come to describe

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.\textsuperscript{44}

In a recent discussion with a senior UN peacekeeping official responsible for Timor-Lester, this apparently iron-clad equation between RoL and a “modern and effective” state appears to be a vehemently held belief, bordering on ideological dogma. Irrespective of the peacekeeping context, the senior official said that “there is a built-in prejudice to accountable and rule-based justice in the UN,” by which he meant that a RoL regime is, by \textit{a priori} definition, dependent upon a central state, its institutions and roles of bar associations. Mediation specialists will note the value of increased emphasis on arbitration and mediation, and so forth” (Carothers, 2009: 53).

\textsuperscript{41} According to the African Union, “…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” AU Political Affairs Department, www.africaunion.org/Structure_of_the_Commission/depPOLITICAL\%20AFFAIRS\%20DIRECTORATE.htm.

\textsuperscript{42} Asian Development Bank, 2005.

\textsuperscript{43} USAID, 2008; see also Carothers, 2009: 54.

\textsuperscript{44} Jane Stromseth, et.al., \textit{Can Might Make Right? Building the Rule of Law After Military Interventions.} (New York: Cambridge University Press, 2006), p. 78. The idea that the fragile post-colony state monopolizes or has ever monopolized the means of violence is an empirical fallacy, which will be dealt with in a later section.
agencies. A UNDP representative with years of Timor experience seconded the prejudice, confessing that his organization was and had been “overcome by our blinding ideology” in the state qua state, empirical realities notwithstanding. The fact that “government and donor legal and judicial reform programs almost always focus exclusively on the institutions of state” only underlines the strength of this ideology and its pernicious effects (World Bank, 2008: 5).

This reflexive bias equating RoL with “accountable and rule-based justice” dependent upon effective, ‘modern’ state institutions violates what lies at the core of RoL, not to mention development’s ‘local ownership’ dictum. All jurisprudence, including human rights, embodies cultural values and beliefs that reside “in the minds of the citizens of a country.” More than a set of institutions, RoL can be boiled down to the “widely shared cultural and political commitment to the values underlying… [a set of] institutions and codes.” In other words, the norms, values, cultural heritages/legacies that sit and are shared in the minds of individuals, groups, and communities are the bedrock of RoL.

Consequently, RoL is fundamentally about understandings of right and wrong, moral and immoral, fairness/equity and unfairness/inequity, with the law, the state, and other enforcement regimes as embodiments of societal choices. Contract law, for instance, is

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45 It should also be noted that this senior official, distinguishing between stabilization and reconstruction phases of peacekeeping, boldly stated that UN peacekeeping operations should not engage in justice and security development because the organization (DPKO and UNDP) does not have the capacity to do so. He asserted that development was the prerogative of bi-laterals and other international organizations. Please note that this paper does not take a position on the official’s assertion, though, it must be acknowledged that a senior UN Civilian Police representative concurred with it, praising its acumen.

46 “If local ownership is to make sense…, its meaning resides in the different perceptions, beliefs, opinions and actions of national stakeholders rather than in the minds, eyes and reports of international actors” and the chosen few members of the elite with whom the UN and international community typically consults. (Scheye, 2008: 60). The constriction of local ownership to the political elite of the ruling government ignores the other three layers of ownership: provincial/local government and elites, justice and security service providers (state, non-state, private commercial); and customers of the public and private goods and services delivered. The political difficulties experienced in Timor-Leste, where there was a legally constituted but non-legitimate government, is a prime example of what can occur when one of more sets of local owners are slighted. There is no presumption that a consensus of local owners can be attained. To the contrary, the presumption ought to be that there can and will be no consensus among the various local owners, for that is the nature of politics, sharp disagreements over how scarce resources are to be distributed and to whom.


49 See also, Jensen, 2009.

50 The lack of shared values would be telling factor for likelihood that a country will remain cohesive.

51 In this sense, RoL is unlike any other development endeavour because it is intimately bound up not only with normative assumptions, but with forms of power and authority that embody those presumptions. A coercive enforcement mechanism stands behind each and every action of a RoL regime, even if the basic principle of that regime is restorative justice. In policing, for example, that basic mechanism is the “use of force and firearms.” A person who engages in policing may graciously help an elderly person cross a muddy marketplace. That polite assistance, however, is, ultimately, an exercise of force because of the
primarily concerned with fair and equitable conduct, defining who can undertake what kind of a transaction, where, when, and how. Criminal law defines crime and the kinds of punishments appropriate for differing categories of criminal activity. RoL is concerned with issues of individual and collective responsibility; individual and collective duty; personal and group dignity, and varying levels of individual and associational autonomy. None of these concepts is value-free; none is universally comprehendible; and each may exist in tension with another cultural norm or set of values. RoL development, therefore, begins by understanding those norms and values, the tensions that arise, and the multiplicity of institutions and organizations in which they are manifested.

A prudent and reasonable method to comprehend these norms and values is to examine the ‘experience of RoL’ of those living and working in the fragile and conflict afflicted country under consideration. It is also the ‘experience of RoL’ that defines and demarcates the boundaries of RoL development for that country. When conducting assessments and evaluations, therefore, the range of interlocutors ought to be expanded beyond state officials so that the issues that confront those in need of better RoL can be plumbed. Rather than merely assessing policies and institutional capacities, RoL evaluations ought to be conducted in the marketplaces, on the streets, and in the neighborhoods where people live and among the primary questions to pose are:

- when a dispute or conflict arises, to whom do the claimants turn;
- what services are most needed, but are not adequately provided;
- what are the most prevalent types of disputes and conflicts;
- what are the most politically and socially sensitive and problematic types of disputes and conflicts;
- who and what mechanism delivers what type of service;
- to whom are services delivered or not delivered and what services are those; and
- who perpetuates insecurity and injustice and how.

There is little new in this type of evidence-based, problem-solving approach to RoL. Attempting to focus on the identified needs of those who require better RoL echoes the World Bank’s Justice for the Poor methodology, as they are problem-solving approaches which do not presuppose what the principal RoL challenge(s) may be or what the hierarchy of issues are. These problem-solving approaches seek to address the local RoL challenges as they are and however they are configured.\(^5\) The issue(s) at hand may concern administrative law, crime and insecurity, and/or property rights and gender, but

\(^5\) The underlying logic of the ‘experience of RoL’ approach is based upon the motto that politics, power, justice, and crime are, first and foremost, local issues. Even as there may be marked similarities across fragile and conflict affected countries and the design of RoL programs may, often, be comparable despite taking place in differing countries, the RoL challenge and its resolution remains local, even when its repercussions are far-flung, involving actors those influence and power are felt at a distance.
the challenge is identified by those who experience it. Given these approaches, there is also no assumption of how that challenge(s) will to be tackled. Paralleling contemporary criminology’s problem-solving strategy, there is no presumption that the donor or international actor is the ‘expert,’ from whom a solution or resolution to an identified problem(s) will be forthcoming. Rather, as in police problem-solving techniques, the answer bubbles up through a participatory process, in which those affected by the challenge contribute.

Despite its being a tried and true approach, the efficacy of a problem-solving approach to RoL in fragile and conflict affected countries cannot be underestimated. The history of justice and security development, as a statebuilding, policy, and institution/capacity building effort, in Timor-Leste is instructive. The UN and international community have spent almost a decade supporting RoL development in Timor-Leste and the results have been dispiriting. The lack of success has been attributed by a number of scholars and practitioners to a pronounced discrepancy between the values in which Timorese society believes and those embedded in the RoL regime system being imposed upon Timorese culture. A 2007 UNDP assessment of its RoL program identified the “discord and misunderstandings between local East Timorese and Western values and belief systems” (UNDP, 2007: 7) as one of the predominant causes of its program’s failure to increase access to justice. An EU report concurred, arguing that the RoL challenge in Timor-Leste encompasses more than the pragmatics of the judicial and legal system that are novel to the population. It is the core philosophical base of the formal sector that presents a formidable hurdle. The epistemological outlook of ‘modern'/Western perspectives finds answers to conflict resolution in the physical world without consulting the spiritual, a concept fundamentally at odds with the East Timorese view of the world as made of spiritual-material dimensions…. The modus operandi of legal procedures focuses on individuals and takes place in an environmental sphere that formalises active participation to a minimum. This methodology disassociates the community from both individuals and events and contradicts the integral component of Timorese identity constructed around the value of communal relationships (EU, 2007: 24).

A USAID report came to the same conclusions, stating that “police officers… did not trust the court system and believed on a personal level that community dispute mediation represented a better avenue toward resolution” (USAID, 2007: 22, italics added). It is precisely on the personal and group level that RoL development resides, which is why a problem-solving approach to RoL, which begins with the ‘experience of RoL’ needs to be

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53 See, for example, Tanja Hohe and Rod Nixon. Reconciling Justice: ‘Traditional’ Law and State Judiciary in Timor-Leste. (Washington, DC: United States Institute of Peace, 2003). For example, the Western concept of imprisonment as punishment may not correspond to the Timorese cultural heritage or normative structure. “Where the majority of the population is involved in backbreaking subsistence agricultural work, the notion of being provided with free accommodation and three meals a day with no work requirement, albeit with the loss of liberty and separation from community, is sometimes considered a privilege, not punishment” (Graydon, 2005: 33).
the starting point in fragile and conflict affected countries. This is not to suggest that policy formulation and state institutions can be ignored and their development bypassed; it is, however, to assert the need for an ‘experience of RoL’ problem-solving approach to determine the extent to which state institutions and agencies are developed.

For example, if the international community had adopted a problem-solving approach in Timor-Leste, it would have also recognized that property issues were in dire need of RoL attention. A 2008 Asia Foundation survey identified land disputes as the most prevalent source of conflict, affecting approximately “11 percent of the national public… in the past year” (Asia Foundation, 2008: 39). That is an extremely high number, but regrettably, even though property disputes cause the most conflict, the UN police have maintained a hands-off policy and do not attempt to mentor the Timorese police service in how to address its repercussions. And the experience of Timor-Leste is the rule and not the exception, as suggested by the Liberian evidence.

IV. The Fragile and Post-Colonial State

Taking ‘the experience of RoL’ seriously also means re-examining the nature and structure of the fragile post-colonial state. It is important to see the fragile post-colonial state for what it is rather than idealizing and naively wishing it to be similar to entities with which development actors are familiar. Rather, the discouraging, poor track record of RoL programming may not be primarily due to the absence of definitional precision. The principal cause for ineffective RoL may be because a “specific, historically informed assessment of the state of the state” in which RoL development is to occur has not been undertaken or, if conducted, not fully appreciated and utilized. As the Timor-Leste example suggests, too often “the importance of local context and the political character of policing” and justice development is espoused, but the “detailed analyses of the specific settings” are largely and conveniently sidestepped or ignored.

54 In a study of three Indonesian provinces, land disputes were the most frequently referred cases to legal aid offices, comprising “25% of cases… [whereas,] criminal law… [made up] 24%... followed by civil (18%) and labor law (16%)” (Zurstrassen, 2007: 1). In Nicaragua, a study of rural justice indicated that “land conflicts, road disputes, damage to property or animals and domestic conflicts were described as the most common problems subject to mediation in the communities. Other cases mentioned were disputes concerning payments, slander (injuria y calumnia) and other crimes such as thefts and threats” (Westerlund and Widenbladh, 2007: 41).

55 Of particular import is that property disputes and conflicts appear to fall disproportionally upon the most vulnerable groups, as has been the case in Cambodia, where “tenure insecurity is concentrated among vulnerable groups, particularly poorer households who occupy lands outside of core residential or farming zones such as those which are or were forests, flood plains, seasonal lakes, marshes and informal urban settlements—that is, land contested by the state (Adler, 2008: 2); see also a World Bank Justice for the Poor report, Center for Advanced Study, Justice for the Poor? An Explanatory Study of Collective Grievances over Land and Local Governance in Cambodia. (Phnom Penh: World Bank, 2006).

56 Using OECD/DAC criterion, the vast majority of fragile and conflict affected states are in post-colonial countries.

57 OECD, 2008: 23, italics in the original.

58 Andrew Goldsmith and Sinclair Dinnen. Transnational Police Building: Critical Lessons from Timor-Leste and Solomon Islands. Third World Quarterly, Vol. 28, No. 6, 2007, p. 1092. In Timor-Leste the absence of a ‘state of the state assessment’ has been profound, as “little thought has been given to the background of the local police force to be rebuilt or strengthened, to the connections between police building and broader law and justice reform and, indeed, the other components of the external engagement
A more realistic and empirically-based appraisal of the nature and structure of most fragile post-colonial states would conclude that they do not correspond to the western understanding of a Westphalian state, grounded in a separation of state and civil society, public and private goods. The Westphalian state may be the envisioned objective, however debatable, but, as one scholar has suggested, the Westphalian state “hardly exists in reality beyond the OECD world. Many of the countries in the ‘rest’ of the world are political entities that do not resemble the model western state” (Boege, et al.: 2009, p. 16). Focusing more specifically on RoL and the realities of how justice and security are delivered, the western “Westphalian assumption that monopoly over the means of legitimate coercion lies with the state and its institutions meets a veritable challenge in the face of the wide support and legitimacy enjoyed by non state security institutions” (Ebo, 2007: 10-11).

Though these scholarly assertions may be exaggerated and there may be numerous exceptions to the rule, such as Ghana, anomalies where political leadership may have played a crucial role, a ‘state of the state assessment’ reveals an amalgamation of three interlocking phenomena -- fragility, conflict/post-conflict, and post-colonialism. In each instance, the balances between and among these three variables will be different and there will be cases where one of the three may predominate, given that country’s past trajectories. In Mozambique, for example, knowable scholars and development practitioners may argue that post-colonialism is more important than its post-conflict status. In Papua New Guinea, it may be the other way around. Nevertheless, it can be expected that all three exist in most fragile environments and that the role each plays needs closer inspection.

such as economic and public sector reform, to knowledge of local political and legal systems, and to familiarity with local culture(s) and language(s) and, where applicable, non-state justice systems” (Goldsmith and Dinnen, 2007: 1096). The absence of this assessment in Timor-Leste is particularly troubling given the reams of literature that have been written on Timorese society and culture; see, for example, Tanja Hohe and Rod Nixon, Reconciling Justice: ‘Traditional’ Law and State Judiciary in Timor-Leste. (Washington, DC: United States Institute of Peace, 2003).

59 A World Bank review notes that “of the 78 assessments of legal and justice systems undertaken by the Bank since 1994, many mention the prevalence of traditional justice in the countries looked at, but none explore the systems in detail or examine links between local level systems and state regimes” (Chirayath, Sage and Woolcock, 2005: 3). It should be noted, however, that since then the Justice for the Poor initiative has significantly changed this dynamic.

60 The structure of civil society in fragile, post-colonial states fundamentally differs from its western model (Thomas Carothers. The End of the Transition Paradigm. Journal of Democracy, January 2002). “States in fragile situations are often characterized… by a lack of clear distinction between the public and the private..., and a lack of constructive relations between the two realms. As a result the public sphere… is generally weak [which]… exacerbates state fragility” Séverine Bellina , et. al. The Legitimacy of the State in Fragile Situations. (Paris: OECD, unpublished OECD/DAC draft January 2009), p. 6.


62 In countries such as Mexico, Ukraine, and Kyrgyzstan, the transition from authoritarianism may be a principal factor, though in the latter two a form of post-colonialism is present. In Kyrgyzstan, for example, Russian remains the principal language, particularly of development actors, even though only a small minority of the population is ethnic Russia.
A fragile state is burdened by the lack of capacity, willingness, and/or legitimacy and cannot deliver basic public goods and services, such as RoL, to its citizenry in an affordable, accessible, appropriate, and accountable manner. These states labor under relentless financial; human resource; administrative; capital and legal infrastructure deficiencies, which have impeded and continue to hinder the institutionalization of governing systems, managerial processes, and regulatory procedures. As a result, the capacities and structures necessary for state institutions and agencies to distribute and deliver RoL are, often, lacking. To develop the requisite capital (financial, human, legal, and infrastructural) to sustain a primarily state-delivered RoL may require a generation or two. In a growing number of fragile countries, like Kyrgyzstan and Malawi, the challenge is how to support appropriate, affordable, accountable, and accessible RoL in the interim. This is not an issue of bypassing the state, but of recognizing and accepting its severe limitations during the intervening generation or two to support sustainable RoL.

Conflict exponentially compounds these deficits. In southern Sudan, as of early 2008, the GoSS’s justice framework remained incomplete. For instance, the penal code and criminal procedure code were still in draft form. The fate of the lowest three levels of courts – Payam, Boma, and Chiefs courts, each of which may fall under the prerogative of customary law – remained legally and operationally unsettled. There was no functioning university law faculty; no law library; no judicial training centre; no official government gazette through which legislation becomes law; no Bar Association; no legal aid; little court administration; and few competent defence counsels or a public defence service…. Foreign diplomats argue that the GoSS has ‘only a few people to do everything’ – from political negotiations concerning the CPA, to formulating policies and managing embryonic ministries. A UN official claimed that… it was unlikely that state judicial functions ‘will be effective for the next 20 years’. According to justice development practitioners… there were seven lawyers in private practice and another forty employed by the Ministry of Legal Affairs and Constitutional Development (MLACD) for prosecution and litigation (Baker and Scheye, 2009: 175).

Southern Sudan epitomizes the one prevalent type post-conflict situation, one that resonates in Guinea Bissau, Central African Republic, and elsewhere. It must be

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63 It may be time to reconsider how fragility is understood and focus, more consistently, on the delivery of public goods and services and the ways in which their provision corresponds to and meets local needs and expectations.
64 In 2006 in Sierra Leone, in a country where there was a total of 100 lawyers, only 10 practiced outside the capital, Freetown (Maru, 2006: 13). In Haiti 8% of judges and 5% of their assistants were licensed attorneys, while two thirds did not have any formal legal training, their only training being ‘on the job,’ Inter-American Development Bank, Challenges of Capacity Development, Towards Sustainable Reforms of Caribbean Justice Sectors Volume I: Policy Document, (Washington, DC: IDB, 2000).
65 The lack of institutionalization is directly related to the absence of an effective separation of powers and the inability to achieve institutional accountability.
acknowledged, however, that not all post-conflict scenarios are comparable. Sri Lanka, for example, with its well-developed bureaucracy and middle class, has little in common with southern Sudan. Neither does Colombia or Mexico, even if there are pockets within these countries for which the southern Sudanese description has a modicum of validity. Nevertheless, in many post-conflict scenarios the consequences of fragility and conflict/post-conflict suggest that a RoL program that narrowly focuses on state institutions, capacity building, the long-route to accountability is misguided and will be unsustainable.

If the nature and structure of a majority of fragile and conflict affected state is defined by severe deficits and a deficiency in the provision of public goods and services, the post-colonial state, on the other hand, is multi-layered. Characterized by a jumble of networks that substitute and compensate for the dearth of state-provided public goods and services, the post-colonial state delivers much of its public goods and services -- such as health, education, electricity, economic opportunity, justice and safety -- through a system of non-state providers.66 These networks relieve “the state of part of the administrative burden of extending [its] authority and delivery benefits to a large and scattered population,” (Bratton, 1989: 429).67 By undertaking this administrative function, these networks are polities in and of themselves, though they are, simultaneously, an integral part of civil society. When, viewed holistically, these networks effectively function as a ‘second state.’68 The existence of this ‘second state,’ where multi-layered non-state structures rival those of the state in importance, means that the post-colonial state bears little resemblance to the western Westphalian model.

By delivering public goods and services, the networks of the ‘second state’ possess authority. Equally importantly, they represent the interests and needs of those to whom they provide public goods and are, therefore, imbued with political legitimacy as well.69 Their legitimacy also originates from the fact that the networks are culturally and linguistically accessible,70 in contrast to the agencies and operations of much state-provided RoL, which are often perceived “as imposed, irrelevant, and different in forms

68 In many countries of the former Soviet Union, given the absence of a divisions between public and private spheres, the ‘second state’ is composed of “informal groups and networks [that] operate, often simultaneously, in the domains of politics, economics, and law, with access to and success in one often contingent on access to and success in another. Their ability to operate in this fashion stems from the absence of independence of the various domains. One domain is used to extract or leverage benefits in another” (Wedel, 2007: 7).
70 In the Great Lakes region of Africa, as in Guatemala, Timor-Leste, Afghanistan, and many other countries, the “manner in which the laws and procedures are practiced in formal court systems as well as the languages used are incomprehensible to most poor communities and therefore, in many ways, irrelevant to their needs” (Nabudere, 2002: 1).
and procedures from the citizens‘ traditional outlooks, convictions, practices, and beliefs” (Okafo, 2007: 13). Consequently, in many post-colonial states,

customary law, traditional societal structures (extended families, clans, tribes, religious brotherhoods, village communities) and traditional authorities (such as village elders, headmen, clan chiefs, healers, bigmen, religious leaders, etc.) determine the everyday social reality of large parts of the population…, particularly in rural and remote peripheral areas. On many occasions, therefore, the only way to make state institutions work is through utilising kin-based and other traditional networks. Thus the state’s ‘outposts’ are mediated by ‘informal’ indigenous societal institutions which follow their own logic and rules within the (incomplete) state structures (Boege, et al., 2009: 20).

It is safe to conclude, then, that the post-colonial state “is even further removed from the ‘Westphalian model’” (Egnell and Haldén, 2009: 45) than are fragile and conflict affected countries. In such countries as Timor-Leste, Liberia, Nepal, when post-colonialism, fragility, and conflict are fused together, justice and security programming cannot be grounded on assumptions derived from the western Westphalian state model. The ‘state of the state,’ therefore, is multi-layered and its networks brought into the realm of donor assistance if RoL development is to be sustainable, accessible, and effective.

V. Non-State/Local Justice and Security Networks: Risks and Challenges

As the World Bank has already recognized, even if a Westphalian-derived state-provided justice and security were a desired and desirable objective, in most fragile, post-colonial, and conflict affected countries, it is a dream to be realized in a generation or two, for, is the case today in Indonesia,

the sole experience of justice for most citizens is not a courthouse, but village meeting halls, customary law councils and mediation practiced by religious leaders and village heads. It is the day-to-day disputes that arise at this level – land, labor, inheritance, marriage and divorce – that have major socio-economic impacts on the lives of most citizens (World Bank, 2008: iii). And the village meeting halls and councils, marketplace associations, and neighborhood watch groups are within the ambit of the ‘second state’ and are examples of differing types of non-state/local justice and security networks. To enhance RoL in the short- to intermediate-term, therefore, means working with and supporting these networks, one way or another.

Within the development community it is apparent that a consensus is forming -- if it has not already solidified -- that these non-state/local justice and security networks are, often, more effective, accountable, efficient, legitimate, and accessible RoL service providers than are the agencies and institutions of the fragile, post-colonial, and conflict affected
Furthermore, in country after country, from Afghanistan to Nigeria, southern Sudan to Timor-Leste to Kyrgyzstan, these non-state/local justice and security networks are also the preferred service providers vis-à-vis their state counterparts. Once again, a World Bank study of Indonesia neatly summarizes the overall argument that, on the whole, non-state justice is popular, reflecting its inherent strengths. Non-state justice functionaries have local legitimacy and authority not always afforded to judges and police. People seek assistance from non-state justice actors precisely because they possess social legitimacy in the village milieu. Furthermore, procedure and substance accords with a world view which places high importance on harmony. It is non-adversarial and restorative in aim; speedy and largely inexpensive in process (World Bank, 2008: xi).

The question for ‘the experience of RoL’ problem-solving approach, then, is how to support the networks and what are the accompanying risks of doing so.

One of the major risks is how to cope with legal pluralism. As already suggested, the norms and values and, therefore, the jurisprudence embedded in the non-state/local justice and security networks of the ‘second state’ may not coincide with those promulgated by the state and its institutions, let alone those cherished by international actors. Legal pluralism is indeed a fact of life in most fragile, post-colonial and conflict affected countries. It "is reflected through such matters as the co-existence of traditional and state courts, based upon different traditions of justice, litigation procedure, penal and reform systems, restitution and compensation processes, and so forth" (Roy, 2004: 127).

In many countries, from Bangladesh and India to Nicaragua and Peru; from Nepal and the Solomon Islands to southern Sudan, Yemen, and Malawi; from South Africa and Mozambique to Ecuador, legal pluralism is either enshrined in constitutions and legal codes or accepted ‘in practice.’ In the fragile state of Bolivia, it is reported that the new constitution will include explicit provisions respecting the activities of non-state/local justice and security networks. An association of civil society organizations, supported by USAID, has been involved in the process of drafting the constitution to ensure greater

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72 See, for Afghanistan (USIP, 2004); Nigeria (Alemika and Chukwuma, 2004); southern Sudan (UNDP, 2006); and Timor-Leste (Asia Foundation, 2004 and 2008).

73 Coinciding neatly to the discussion of the networks of the ‘second state,’ one scholar of legal pluralism, has written that multiple legal orders “provide structured and legitimate forms for social, economic, and political transactions such as marriages, inheritance, and property transfers. Moreover, they constitute positions of legitimate social and political power and regulate the ways in which such positions can be acquired. The repertoires also provide means to rationalise and justify actors’ objectives, behaviour, and choices, whether in a struggle over inheritance, in determining the property rights to a church, in understanding the nature of proper economic transactions, in engaging in the critique of state action, etc.” (Benda-Beckmann and Benda-Beckmann, 2007: 81).
protection for human rights and gender. In Kyrgyzstan, another fragile state, courts of elders were written into the constitution shortly after independence to enforce customary and statutory laws in the many rural areas where there was and is little state-delivered justice and security, with a provision of the constitution which allows for appeals from these courts into the state system.\textsuperscript{74} It has also been claimed that these courts have been successful in resolving land disputes and raising environmental issues.\textsuperscript{75} If these courts have been successful in Kyrgyzstan, perhaps comparable mechanisms would be effective in other fragile countries and even in conflict affected ones such as Liberia and Timor-Leste.\textsuperscript{76}

It would appear then that an emerging challenge for RoL programming -- and its practitioners -- is to become sensitive to working with and within the interfaces, cleavages, and contradictions between these contrasting legitimate legal orders. It is not an either/or issue -- working with state agencies or non-state networks. The challenge is to support both, with all the accompanying risks that will adhere, as working within interstices of two systems makes practitioners more vulnerable to changing balances of power. If nothing else, donor personnel will need to be well-trained, first, to calibrate dynamic shifts in balances of power. Second, they will need to be able to negotiate the intricacies of implementation to accommodate the rational self-interests of the various, oft-times competing, stakeholders as balances of power fluctuate. It should be noted that neither of these skills relates to the technical/substantive knowledge of the RoL practitioner, but to his/her politically-infused implementation acumen.

For many, the added risk concerns human rights, given that many of the networks’ activities and operations may violate international human rights conventions and principles. However, those who shun support for non-state/local justice and security networks for purely human rights reasons are naïve, as their position rests upon two assumptions, both of which are unproven. The first is that violations committed by the networks are, by definition, more egregious that those perpetuated by the state agencies of fragile, post-colonial, and conflict affected countries. There is no a priori rule. In some cases, state institutions will have the more appalling record; in others, the networks. Most likely, in the majority of instances, the breaches committed by state and non-state actors will be comparable.

The issue at hand, however, is not the depth and degree of human rights violations. Nor is it which system is most culpable. Rather, the issue is to improve the lives of those who suffer from infringement of their rights. The challenge, therefore, is to identify which service providers, state or non-state, are more susceptible and amenable to development and a progressive lessening of human rights infractions and, thereafter, provide assistance to them. Those who argue against supporting the networks usually assume, as well, that

\textsuperscript{74} According to one scholar, as “they do not benefit financially since their work is unpaid…being a court member… is about regaining ones status in the village community” (Beyer, 2007: 8). The position of a court elder may also convey other privileges and rent-seeking benefits.

\textsuperscript{75} UNECE, OSCE and ABA/CEELI. Aarhus Convention Second Regional Workshop for the Central Asia Region. Dushanbe 4-7 June 2002.

\textsuperscript{76} Such a proposal has been made in Timor-Leste, see, USAID. A Law on Land Rights and Title Restitution and a Legal Framework for Land Dispute Mediation, (Washington, DC: USAID, 2004).
they are more resistant to development than their state counterparts, even though it is widely acknowledged that the networks of the ‘second state’ are in a continual process of evolution and adaptation to changing conditions.

Conversely, the poor track record of past and current RoL programs could be considered *prima facie* evidence for the opposing argument, namely that the behavior of state elites and the institutions they have captured are highly resistant to change, even when and after development assistance has strengthened the formal laws, rules, and regulations. As with the human rights challenge, barring empirical evidence to the contrary, the most reasonable and prudent approach is to presume that the two systems are roughly equal in their susceptibility to change and development.\(^{77}\) To be able to assess which is more susceptible may require heightened abilities on the part of donor personnel to comprehend the self-interests and motivations of the various stakeholders and negotiate compromises, skills that, once again, have little directly to do with their technical RoL expertise. Of particular import may be the acumen to appreciate and recognize leadership qualities amongst stakeholders, given the paramount importance leadership may play in effective programming.

A second important risk is unabashedly political. The elites of fragile, conflict affected, and post-colonial states have an inherent inclination to centralize their power and authority, particularly as they may perceive politics to be a zero-sum game. As has already been suggested, political elites may have little interest to undertake initiatives focusing on accountability, in the form of checks and balances. Timorese,\(^{78}\) Yemeni, Guatemalan, Kyrgyz ruling classes, for example, have displayed little inclination in loosening their grip on RoL issues, even when they recognize their inability effectively to address the challenges that confront them. However, while the RoL constellation resides at the heart of power and its abuses, it may be a misplaced argument to presume that the RoL situation is altogether different than those faced, for example, in education, health, and water development. In each instance, improving service delivery may entail a de facto erosion of the elite’s authority so that local needs can be better met.

\(^{77}\) The same argument applies to the comparison of (1) elite capture of state-provided RoL versus and the elite’s ability to instrumentalize the activities and decisions of the non-state/local justice and security network and (2) provision of service, or lack thereof, to vulnerable and marginalized groups -- women, children, and demographic ethnic/religious/tribal/clan minorities -- by the two systems. It should also be noted that decentralization is not a panacea in either instance. A World Bank study has shown, decentralization can “strengthen the political power of lower tiers of government vis-à-vis the center, it has also increased the possibility of political capture within these lower tiers” (Ahmad & Devarajan, 2005:2). In Pakistan, decentralization, where the federal government retains control of RoL institutions, has resulted in a tightening of control by political elites, see M. Mezzera and S. Aftab. *Pakistan state-society analysis. Democratisation and Transitional Justice Cluster, Initiative for Peacebuilding (2009),* at http://www.initiativeforpeacebuilding.eu/pdf/Pakistan_State_Society_Analysis.pdf.

\(^{78}\) The most recent UN/DPKO assessment of Timor-Leste, 2-9 April 2009, reiterates the lack of interest of the Timorese elite to undertake RoL that may lessen their power and authority, arguing that there is still a need to articulate “a vision, strategy and priorities for SSR in Timor-Leste which is not the vision of an ‘elite’, but rather the common vision of all stakeholders… [A] comprehensive review does not appear to be a priority of, or interest to, the GoTL… [and] national initiatives on SSR tend to be top-heavy, elite based and with a rather narrow (state) ownership and participation base” (pp. 2 and 3 ).
Nevertheless, it is unquestionably the case that international assistance to the networks is riskier endeavor than RoL policy formulation and state institution and capacity building initiatives. International support to non-state/local justice and security networks is more daunting given the number, variation, and complexity of the networks in a fragile post-colonial country. It is also true that the ‘foreignness’ of the patterns, behaviors, and values of the ‘second state’ to the eyes and ears of international actors poses additional obstacles to support being provided to the networks. Finally, there is the burden of the potential breadth and intensity of unintended consequences, ramifications that may exceed those experienced with undertaking more state-centric RoL initiatives. All the same, maintaining the same ineffective RoL strategies is not an option.

As already suggested one method of lessening these risks is to design RoL programming that works in and supports activities that take place in the interstices and interfaces between the differing layers of power and authority within multi-layered fragile, post-colonial and conflict affected countries. Doing so can simultaneously support state and non-state systems, given that many networks have a pre-existing linkage to and/or relationship with a state institution and agency and it is that relationship that can be built upon. State police throughout sub-Saharan Africa have established relationships with many non-state/local justice and security networks. For example, police liaison officers may have desks in the offices of marketplace and other trade associations and building upon these relationships an appropriate ‘problem-solving/community policing’ project can be launched. In other instances, police have established relationships with tribal and village elders. Here again, that pre-existing connection can be utilized, at one and the same time, to undertake ‘problem-solving/community policing’ and various components of a community-driven development initiative. In still other cases, the police have ‘in practice’ authorized the activities of and delegated policing powers to the networks and these relationships can be supported as well.

Other linkages appear in how state ministries carry out their work, as in Yemen, for instance, where notaries are registered with the Ministry of Justice. These notaries may sit at the nexus of commercial, civil, criminal, and non-state (religious and tribal in the case of Yemen) law. Legal awareness programs may be able to work through the notaries, whether originating in the Ministry or by civil society organizations. Women’s groups can be encouraged to support the notaries better to protect the rights of vulnerable groups. In southern Sudan, on the other hand, customary chiefs may be on the payroll of Ministries of Local Administration and the fees collected in customary courts are, frequently and legally, handed over to state authorities. It may be possible to utilize a percentage of those fees to fund customary court improvements, such as better storage areas for court archives or housing community centers along the customary courts, simultaneously increasing the prestige of the chiefs and, exploiting the multiple roles of the networks in their distribution of public goods and services, providing a forum in which other community issues can be pursued.

As the case of Kyrgyzstan suggests, linkages may be enumerated in national constitutions and/or legal codes. In these cases, the networks are recognized as authorized actors and

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79 See the oeuvre of Bruce Baker.
there may be language authorizing the right of appeal into the state system of a decision of a network. Where there is no such language, it may be productive, first, to attempt to establish more firmly the jurisdictions of the networks and, thereafter, the right of appeal. Where such language already exists, it may need further development and refine so that the boundaries of the two systems promote access to justice. In the case of southern Sudan, this would mean an expansion of the jurisdiction of customary courts. Thereafter, a series of initiatives can be supported. First, it would be crucial to improve the ability of the state courts to receive appeals. In and of itself, this would be a massive undertaking and given scarce resources and limited absorption rates within fragile state, this initiative may be among the more effective institution and capacity building endeavors. Simultaneously, support can be provided to the networks to improve the ways in which their decisions are recorded. This implies enhancing the work of customary court clerks, upon whom court judges may depend for assistance. Among the projects that could be conducted is strengthening their legal reasoning, training, writing skills, and legal awareness. Undertaking these initiatives would not only strengthen the appeals process, but, equally importantly to foster greater consistency in the decisions of the networks. More readily accessible precedents and case books may be the result so that non-state law can develop, over time, as Western common law has.

V. Conclusion
An ‘experience of RoL’ problem-solving approach may enable justice and security development programming to become more effective in addressing the unique characteristics of fragile, post-colonial, and conflict affected countries. Grouped around a set of pragmatic questions, the ‘experience of RoL’ approach is an evidence-based empirical strategy, encouraging mapping and implementation strategies that seek to ameliorate identifiable challenges raised by those who are in need of better RoL. This approach takes account of the critiques of the current RoL programming and, recognizing the lessons learned, circumvents some of the prevailing ideologies and prejudices that have produced that discouragingly track record. While a problem-solving approach is not new and is not a silver bullet, it would broaden the scope of how RoL is practiced. It would draw into its ambit vital issues that have instigated and perpetuated conflict, such as property rights/land tenure and administrative law. Importantly, it can encourage policy makers and practitioners to look beyond the concept in which RoL is idealized and equated to an idea of the state that may never have existed and allow practitioners to comprehend the multi-layered nature and structure of power and authority in fragile, post-colonial, and conflict affected countries. As a result, this approach may enable RoL programming to support more effectively activities that lie within the interstices and interfaces between the differing layers of power and authority.
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