Security and Governance

PEACEBUILDING AND RULE OF LAW IN AFRICA

Just peace?

Edited by Chandra Lekha Sriram,
Olga Martin-Ortega and Johanna Herman

ROUTLEDGE

Peacebuilding and Rule of Law in Africa

Just peace?

Edited by
Chandra Lekha Sriram,
Olga Martin-Ortega and
Johanna Herman

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2011
by Routledge
2 Park Square Milton Park Abingdon Oxon OX14 4RN

Simultaneously published in the USA and Canada
by Routledge
270 Madison Avenue, New York, NY 10016

Routledge is an imprint of the Taylor & Francis Group, an informa business

Typeset in Times New Roman by Taylor & Francis Books

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book has been requested

ISBN 978-0-415-57736-6 (hbk)
ISBN 978-0-203-84849-4 (ebk)

Contributors

Stephen Brown is Associate Professor at the School of Political Studies, University of Ottawa, Canada. His main research interests are foreign aid, democratization, political violence, conflict prevention, and peacebuilding, mainly in relation to Sub-Saharan Africa.

Pall A. Davidsson is a Lecturer at Reykjavik University School of Law and the founder and director of Ethikos, the Icelandic centre for corporate responsibility. He holds an LLM from Columbia University and has over 10 years' work experience with the UN, OSCE, and the Council of Europe promoting human rights and the rule of law.

Johanna Herman is a Research Fellow at the Centre on Human Rights in Conflict at the University of East London. She received her MA in International Affairs from Columbia University. She has worked for a number of UN agencies and international NGOs. Her research interests include peacebuilding, transitional justice, and human rights.

Sarah Maguire is currently a consultant working at field and policy level with the UN, NGOs, DFID, and the UK Stabilisation Unit. Her practice as a barrister led to her involvement in international human rights, armed conflict, and development. She was previously Senior Human Rights Adviser at the UK Department for International Development.

Olga Martin-Ortega is Senior Research Fellow at the Centre on Human Rights in Conflict at the University of East London. She received her PhD in Law at the University of Jaén, Spain. She conducts research in the areas of business and human rights, post-conflict reconstruction and transitional justice. She has recently published the monograph *Empresas Multinacionales y Derechos Humanos en Derecho Internacional* (Bosch, 2008).

Muna Ndulo is Professor of Law at Cornell Law School and Director of Cornell University's Institute for African Development. He served in the Secretariat of the United Nations Commission on International Trade Law and in the United Nations Missions in South Africa, East Timor, Kosovo, and Afghanistan. His most recent book is *Security, Reconstruction, and*

Reconciliation: When the Wars End (University College London Press, 2007).

Juan Obarrio is Assistant Professor of Anthropology at Johns Hopkins University, USA He received his PhD from Columbia University in 2006. His main research interests are law, violence, and sovereignty. His book *The Spirit of the Laws in Mozambique* is forthcoming (University of Chicago Press).

Robert A. Pulver is Chief of the Criminal Law and Judicial Advisory Section within the Office for Rule of Law and Security Institutions in the United Nations Department of Peacekeeping Operations. He advises the UN on rule of law issues relating to peacekeeping operations around the globe. He has served as resident advisor assisting Albania and Kosovo to strengthen their legal systems.

Oliver P. Richmond is Professor in the School of IR, University of St Andrews, UK, and Director of the Centre for Peace and Conflict Studies. His recent publications include *Liberal Peace Transitions*, with Jason Franks (Edinburgh University Press, 2009), *Peace in International Relations* (Routledge, 2008), and *The Transformation of Peace* (Palgrave, 2005/7).

Chandra Lekha Sriram is Chair of Human Rights at the University of East London, School of Law, and Director of the Centre on Human Rights in Conflict. She has written extensively on conflict prevention, transitional justice, international criminal accountability, and peacemaking and peace-building. Her most recent book is *Peace as Governance: Power-Sharing, Armed Groups, and Contemporary Peace Negotiations* (Palgrave, 2008).

Fríða Thoroddsen holds a BA in Philosophy and a MA in International Relations from the University of Iceland. Her MA thesis '*Conflict in the Democratic Republic of Congo in a Historical Perspective: A Test for "New War" and "Human Security" Concepts*' was written at SIPRI (Stockholm International Peace Research Institute). She is currently studying Law at the University of Reykjavik.

Acknowledgements

Chandra Lekha Sriram, Olga Martin-Ortega, and Johanna Herman, at the Centre on Human Rights in Conflict at the University of East London School of Law (www.uel.ac.uk/chrc), would like to express their sincere gratitude to the ongoing institutional support from the University to the Centre. We would also like to express our particular gratitude to Fiona Fairweather, Dean of the School of Law, for her active support, which facilitates our work on a daily basis. We would also like to thank the Centre's Research Administrator, Victoria Perry, for her assistance shepherding the manuscript through its final stages. Finally, our management team within the school and our international advisory group provide us with vital guidance in our work.

A project of this size and nature is necessarily collaborative, and the editors are grateful for input from a range of individuals who contributed to the development of this project. These include all of the authors who attended our authors' meeting in February 2008, and Agnès Hurwitz for her extensive comments on the chapters there. We would also like to thank participants at a panel convened on the topic at the International Studies Association annual conference in 2009 in New York, and in particular Reyko Huang, who provided very useful comments on the papers presented there. We wish to offer a particular thanks to the series editors, Fiona Adamson, Stefan Wolff, and Roland Paris, for their interest in the project and support for the inclusion of the book in the series. We would also like to thank Kate Griffiths for her work copyediting the manuscript, and Heidi Bagtazo, Harriet Framminghamm, and the fine editorial staff at Routledge for their hard work on the manuscript.

The editors would also like to express their thanks in particular to the Royal African Society, and particularly Daniel Large of the Asia Africa Centre at SOAS, for their support in hosting a launch of the policy insights and paper emerging from this project in March 2009. We are grateful to Ademola Abass for his insightful comments on several chapters during this session.

Finally, a project of this nature involves substantial costs for fieldwork, meetings, and disseminations. The editors are very grateful to the British

Academy for its support through LRG-44998, and in particular to Adrienne Begent, who afforded us flexibility in amending the use of funds as needed to achieve maximum efficiency.

Any errors are ours alone.

Contents

1 Promoting the rule of law

From liberal to institutional peacebuilding

Chandra Lekha Sriram, Olga Martin-Ortega and Johanna Herman

Introduction

Since the end of the Cold War, numerous internal armed conflicts have been brought to a close, and following most, if not all, of these resolutions, the international community, as well as the affected state and society, have engaged in what is now generally called peacebuilding.[1] Many recent scholars have even begun to identify a liberal peacebuilding consensus, for good and ill, that specifies a key set of activities as central to post-conflict pacification.[2] These are often heavily contested in methodological terms, but the broad goal of building a liberal state with all of its expected regimes and institutions is not. This is despite the fact that the types of governance which peacebuilding activities construct in post-conflict zones reflect almost exclusively the developed world's social, political, and economic experiences. In particular, some analysts have singled out the emphasis on the reconstruction of governance, and in particular its creation as liberal democratic governance, as problematic.[3] This emphasis, even imposition, of a liberal model on a post-conflict state, it has been argued, is often a poor fit, unwelcome, and may even result in the renewal of conflict. It is argued that the competition inherent in liberalized political and economic structures can deepen existing divisions or even create new ones.

For this reason, some scholars have suggested that a strategy of 'institutionalization before liberalization' might be advisable: embedding and reforming structures of law and governance so as to manage the inevitable social conflict that attends liberalization.[4] However, there remains a danger that such emphasis upon institutionalization entails the same imposition of international preferences that the previous emphasis on liberalization did; furthermore it is likely to favour official structures and elites over civil society. Finally, there appears to be an implicit assumption that institutional reform is in some sense neutral, and thus able to contain political contestation, rather than being a political activity in itself.[5] Key among the tools of institutional reform has been the use of 'rule of law' programming, including reform of laws, constitutions, judiciaries, the use of transitional justice mechanisms, and engagement with the 'informal' or 'traditional' justice sector. Many of these

interventions are undoubtedly positive; however, there is a risk that emphasis upon the rule of law as a tool to manage conflict may simply relocate social conflict to these domains, away from the more explicitly political sector.

Rule of law and peacebuilding in Africa

This volume focuses upon the challenges of programming on the rule of law in *African* countries emerging from violent conflict, rather than *all* countries emerging from violent conflict, and this case selection requires justification. It would be a mistake to assert that challenges of rebuilding the rule of law after conflict in Africa are necessarily distinct from or more acute than those in other regions of the world; Africa is a vast continent and any such generalizations are unhelpful. However, because so many nations in Africa are in conflict or are emerging from conflict, the scale of the challenge is simply greater at the time of writing. There are seven United Nations (UN) peacekeeping missions currently operational in Africa compared to a total of ten across the rest of the world.[6] Further, because many governments in Africa have never been truly democratic, having emerged from colonialism into personalistic or one-party rule, many elements of governance and the rule of law are not being 're'-instituted but rather are being instituted for the first time, particularly where the exercise of personalized exchange, clientelism, and corruption is internalized, and have constituted what one scholar termed 'essential operating codes for politics'.[7] Indeed, in many polities, post-colonial African leaders have relied on control and patronage through capturing power over the economy, rather than through the state via a functioning administration, including an independent legal apparatus. While of course clientelism and patronage are not unique to Africa, the type of intensive neo-patrimonialism, if not 'pathological patrimonialism', that we can observe across large swathes of the continent is indeed noteworthy.[8] Competition over access to justice, disputes over relevant law, and disagreements over relevant legal authority may reinforce existing social divides, but also have historically created a situation where, according to Christopher Clapham, a leading scholar of African politics, bypassing the law is 'accepted as normal behavior, condemned only in so far as it benefits someone else rather than oneself'.[9] At the same time, there are many fragile states on the continent which may not fully control all national territories, or be capable of extending the justice sector and relevant institutions across countries. In such countries, people may choose to, or be compelled to, turn to non-state justice providers. These dynamics pose critical challenges to the promotion of rule of law on the continent. That said, much has been done to promote the rule of law since the 1990s, and more can be done to develop more refined mechanisms in this domain to support post-conflict peacebuilding, and research on the impact of rule of law promotion is needed to enable better programming by external actors. It is to this growing body of research to which this volume hopes to contribute.

Key actors: the United Nations system and beyond

Many of the chapters in this volume have a strong emphasis upon United Nations (UN) missions. This is not to suggest that other actors are not significant in the development of the rule of law in post-conflict situations. Bilateral donors, as well as international financial institutions, have a significant role to play. However, because the United Nations is a central actor in many countries in Africa emerging from conflict through its peacekeeping and peacebuilding missions, peacebuilding support offices, funds from the Peacebuilding Commission, and the ongoing development work of the United Nations Development Programme (UNDP) as well as other UN agencies, emphasis on the work of this central player is justified. This is particularly the case with the development of integrated peacekeeping missions and the ever-expanding mandates of peacekeeping missions in promoting the rule of law and human rights. However, throughout this volume the programming of other key actors is discussed in some detail where appropriate.

What is the rule of law?

While there is a long jurisprudential tradition of debate surrounding the concept of and content of the rule of law, it is primarily in the past decade that the rule of law has been included in peacebuilding discourse and scholarship.[10] We offer here, first, a set of formal, state-based definitions of the rule of law, while recognizing, as we discuss below, that in many instances states are not the only providers of services related to adjudication or conflict resolution.

The rule of law refers to the juridical conceptions and mechanisms that preside over the functioning of the state. Most of the definitions of the rule of law at a national level include a cluster of procedural requirements linked to a substantive concept of justice or fairness. The procedural requirements emphasize formal requisites for the creation, application, and enforcement of the law, and the adjudication of the rights and duties created by the law. The substantive requirements are directly related to the concept of justice, often currently understood in terms of respect and protection of fundamental human rights.

Different legal traditions have approached the definition of the rule of law from different perspectives, and it can be claimed that there is not a unique definition of the rule of law.[11] As Guillermo O'Donnell has pointed out, the rule of law, *estado de derecho*, *état de droit* or *Rechtstaat*, or equivalents in other languages of countries of civil law jurisdictions, are different terms to refer to fairly similar but not identical concepts.[12] Thus, in common law jurisdictions, the concept of the rule of law is intimately connected with the activity of the courts. A traditional definition of the modern rule of law within the common law jurisdiction is that of Dicey, who placed the emphasis on the supremacy of the law and the hierarchy of the courts.[13] Unlike *estado*

de derecho and equivalent terms, the rule of law does not refer directly to any other state agencies.[14]

The fundamental formal requirements could be identified as: the limitation of the activity of power bodies through law; the guarantee by these bodies of positive public subjective rights; and the jurisdictional control of all the activities of the state.[15] However, the notion of the rule of law would be void of content if only the technical dimension is taken into account – in which any state complies with the rule of law only by functioning through systematic legal rules and through legal channels – and it would amount to the identification of the rule *of* law with the rule *by* law. This has occurred in times in which the notion of the rule of law has been ideologically manipulated and used as a legitimating instrument of abuse of power and discrimination of certain groups.[16] The substantive element of the notion of the rule of law works then as a safeguard against such abuse, and is inherent to it. The concept of justice or fairness had traditionally been identified with equality before the law. It is agreed within the literature that the Kantian notion of rule of law links its definition to fundamental rights.[17] It is due to Kelsen that the element of democracy was viewed as central to the concept of the rule of law. The author includes, in the second edition of *Reine Rechtslehre*, the requirements of the legal order to respond to the demands of democracy and the certainty of the law in order for it to be considered the rule of law.[18] Therefore, according to this definition, a state compliant with the rule of law is one in which the legal order is relatively centralized and, according to such order, jurisdiction and administration are legally regulated, that is, they are determined by general norms which emanate from a parliament elected by the people, whose members of the government are held responsible to the people; whose courts are independent; and where certain liberties are guaranteed to the citizens, in particular those of freedom of religion, thought, and expression.[19]

Some modern definitions maintain the emphasis on democracy and/or fundamental rights, or as in the definition of the UN Secretary-General, analysed below, link rule of law to international human rights norms. Others still limit the substantive concept to the more abstract concepts of equality and fairness, for example, O'Donnell offers the following definition: 'whatever law exists is written down and publicly promulgated by an appropriate authority before the events meant to be regulated by it, and is fairly applied by relevant state institutions'.[20] By 'fairly applied', the author means the administrative or judicial adjudication of legal rules as 'consistent across equivalent cases; this is without taking into consideration the class, status, or relative amounts of power held by the parties in such cases' as well as the application of procedures which are pre-established, knowable, and allow a fair chance for the views and interests at stake in each case to be properly voiced.[21]

For the purposes of this book it is important to focus upon the concepts of the rule of law that are being translated to post-conflict situations.

The development of international peacebuilding activities and the placement of the rule of law as a core element of such international cooperation activities necessitate the development of a clearer definition of the rule of law. Thus there have been efforts by the United Nations and others to develop an agreed international definition of national rule of law.[22]

Most of the definitions of the rule of law in the context of peacebuilding have become embedded in the establishment of policy priorities and activities in the design of peacebuilding programmes, scholarly analysis and policy recommendations by the cluster of international organizations, development agencies, donors, non-governmental organizations (NGOs) and individuals involved in these processes. This makes it very difficult to identify a common definition of the rule of law that serves as a reference to those working in the field. Even distinguishing the rule of law from other policy priorities and activities in the context of peacebuilding is often quite difficult.[23] In his landmark 2004 report on strengthening the rule of law in transitional societies,[24] the UN Secretary-General offered a broad definition, which has now become the main reference point at least in the UN context:

> 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.[25]

This definition comprises the two main elements of the rule of law: (1) the procedural element, i.e. publicity of law, equal application, and independent adjudication; and (2) the substantive element, which provides content to the formal requirements of international human rights norms and standards of fairness. The abstract concept of justice is therefore identified at the international level with international human rights.[26] While the General Assembly has acknowledged since 1993 that the rule of law is an essential factor in the protection of human rights, it has only been more recently included in the work of development agencies and peacebuilding institutions. The adoption of this definition by the Secretary-General strongly reinforces this link.[27]

Defining the rule of law in terms of widely accepted international human rights standards allows the identification of a core set of values and rules which enjoy general consensus across the international community, and which may help to avoid its immediate identification as a Western concept.[28] It is more difficult to reach consensus as to which human rights are included within any definition of the rule of law.[29]

However, as Sriram has pointed out, the 2004 definition in the UN Secretary-General's report has a strongly positivist slant.[30] It focuses very prominently on the procedural elements of the rule of law. As the author observes, the emphasis is 'not on the content or conception of "justice", but rather upon the presence of appropriately constituted authorities, public creation of laws, and accountability of the state apparatus'. In this sense it is also interesting to highlight how this definition avoids the reference to democracy or democratic institutions.

The UN Secretary-General offers a definition of the rule of law but gives little by way of insights on the activities that need to be undertaken to articulate such a notion in the context of post-conflict peacebuilding, where most of the mechanisms and elements inherent to the notion of the rule of law are weakened if not destroyed, if they were ever in place. Therefore, this definition offers only a starting point in the analysis of the role of international agencies in the (re)building of the rule of law in post-conflict contexts. This is why, for the purposes of this book, we consider the UN definition to be an important baseline in the analysis, but believe it needs to be supplemented to make it more appropriate to the post-conflict peacebuilding context. Several other key components should be added: support for national justice systems, democratic institutions, human rights institutions, and, where appropriate, traditional justice mechanisms. The UN report emphasizes legislation, the judiciary, and human rights institutions, including as a subsidiary problem that of transitional justice, as concerns of rule of law. However, it is also important to recognize that the promotion of the rule of law relies upon a range of governance, economic, and security institutions.[31] This book will consider the presence of these elements in the notions of the rule of law that shape the peacebuilding programmes and how they are being implemented. These are often considered technical decisions, limited to the formal articulation of mechanisms and institutions. However, as will be highlighted in the following chapters, actions linked to the (re)building of a functioning state cannot be considered apolitical, because both decisions about, and the impact of, rule of law development and programming are political and politicized. Furthermore, as we discuss next, in many instances state-provided justice is limited in its reach, and non-state actors may provide a range of justice and security services that deviate significantly from the definitions of rule of law we have discussed here.

Beyond the formal sector: non-state or 'traditional' justice

In many of the countries discussed in this volume, the majority of the population have little or no access to the formal justice sector.[32] In such situations, rule of law programmers will inevitably work with, around, or be challenged by, non-state providers of conflict resolution and justice processes. These are often called 'traditional justice', or 'customary law'. Even the appropriate terminology and the dichotomization of practices into formal or informal are disputed, as the reality is often more complex.[33] We have chosen to call

these processes and actors non-state justice, to avoid concerns that terms such as 'traditional' and 'customary' may have both a neo-colonial ring to some, and that they run the risk of treating such processes as fixed rather than as the dynamic and changing processes which in fact they are.[34]

It is important to be clear that what we term here 'non-state justice' in fact involves conflict resolution practices as well, and that the processes are multifarious, with varying degrees of legitimacy, legality, and connection to the state. While Chapter 2, by Juan Obarrio, an anthropologist, elaborates upon the wide range of non-state justice across the continent, a couple of points are in order. First, it is only relatively recently that programmers working on the rule of law have openly acknowledged that their work affects and engages that of non-state justice providers. This is perhaps not surprising, given that most peacebuilding and development actors engage the state in the first instance, and require state consent to conduct much of their work. Open acknowledgement that the state cannot or will not provide basic services such as justice and conflict resolution, or even policing, is potentially quite controversial.

However, the 2004 UN Secretary-General's Report, *Rule of Law and Transitional Justice*, states that 'due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them continue their often vital role and to do so in conformity with both international standards and local tradition'.[35] The final clause in this quote points to a critical challenge: many non-state practices of justice do not meet international standards, whether of due process of law or protection of human rights. This may be the case because standards of evidence and the protection of the rights of the accused may be quite low, because punishments may violate international human rights standards, or because the participation in and control over processes are discriminatory, frequently against women. Nonetheless, non-state justice is often the only type accessible to a wide segment of the population, and is also increasingly acknowledged as important in peace agreements and other documents, so rule of law programmers cannot simply ignore it or condemn it; however, they also must not accept it uncritically.[36] Precisely how to engage with the range of non-state processes is a context-specific choice. Further, while some non-state processes may enjoy a significant degree of legitimacy and quasi-legality, others, such as mob action, should not be endorsed, no matter how popular they may be. Finally, programmers will be faced with challenges from some non-state authorities who see their power as being threatened by attempts to extend the reach of the state, to provide alternate justice processes to the populace, or to reform their own activities. Chapters 2, 7 and 8 by Juan Obarrio, Chandra Lekha Sriram, and Johanna Herman and Olga Martin-Ortega illustrate some of these challenges.

Evolution of peacebuilding

Over the past two decades, the practice of peacebuilding has grown rapidly. It now consumes a significant portion of UN resources, and is increasingly

undertaken by regional organizations as well.[37] Following this expansion, peacebuilding is now seen as the fourth pillar in peace and security, alongside preventive diplomacy, peacemaking, and peacekeeping.[38] Peacebuilding entails specific technical assistance and has become a sizeable industry in itself, with many activities undertaken by international NGOs, outsourced to consultants and firms, and is also the subject of monitoring and advocacy by international NGOs.

To understand the role of rule of law programming in peacebuilding, it is important to place it in the context of the evolution of peacebuilding and the debates about its aims and activities. Notwithstanding the rapid growth of the field and the seemingly broad acceptance of the term peacebuilding, there is no consensus on the definition, objectives, or even the measures of its success. Furthermore, during the relatively short time that such programming has been implemented, its very practice has altered views and expectations as to what it can or cannot achieve, or even what it should be trying to achieve. This is unsurprising for a broad activity with such ambitious ideals.

Peacebuilding as characterized today developed only since the end of the Cold War, and is significantly different to 'traditional' or 'first generation' peacekeeping,[39] which the UN has engaged in since its creation. Peace operations during the Cold War period were authorized by the Security Council under Chapter VI and were in place to provide neutral and impartial assistance during or after UN peacemaking initiatives.[40] Importantly, they had the consent of both parties to the conflict and included activities to support a secure environment such as deploying military units to monitor a ceasefire, the withdrawal of troops, or establishing a buffer zone while political settlement was negotiated. The overriding principle for UN operations during this period was that the operation mandates were neutral and impartial and that the peacekeepers were to stay out of domestic politics. This reflected the principle of non-intervention in Article 2(7) of the UN Charter and was also a product of the deadlock in the Security Council due to Cold War politics. This narrow interpretation of the responsibilities of the UN in peace and security applied to most peacekeeping operations during this period.[41]

The landscape for such peacekeeping missions changed with the end of the Cold War, as the Council authorized an unprecedented number of missions during the 1990s, and provided them with much broader mandates. Agreement within the Security Council meant that it was now empowered to take action in certain situations, and importantly, beyond this willingness to act, there seemed to be an international expectation that the UN would act. Demand for UN action arose in part because of the rise in internal armed conflicts, many based on ethnic tensions and identity, even as Cold War-promoted proxy conflicts ended.[42] Traditional peacekeeping intervention could have only a limited impact in these situations, given the complexity of implementing peace agreements that targeted the multiple sources of these conflicts. Although there were still some traditional missions,[43] there developed a broader range of peace operations also known as multilateral peace operations