Dr. Bruce D. Jones and Camino Kavanagh

Bruce Jones is Director and Senior Fellow at the NYU Center on International Cooperation, and Senior Fellow at the Brookings Institution. Camino Kavanagh is Non-Resident Senior Fellow at the NYU Center on International Cooperation; and they are co-authors of Shaky Foundations: An Assessment of the UN’s Rule of Law Support Agenda, New York: NYU/CIC, 2011.

In early 2011, citizens across the Middle East and North Africa took to the streets to demand an end to the abusive practices of the security services, calling for more representative and responsive government institutions, the protection of their rights, greater access to economic opportunity, participation in decision-making, and access to justice. They began demanding, in short, the rule of law.

The political upheavals in the Arab region are of a different nature to those that have traditionally been the focus of UN peace operations and transition engagements. The end of the Cold War, followed by a broad wave of democratic transitions, contributed to new opportunities for international cooperation and engagement in conflict management and peace support. At the same time, however, long-simmering tensions within many states erupted into mass violence. National conflicts spilled over colonial-era borders to engulf broad regions in Africa, Central America, Southeast Asia and the Balkans. Attention to these internal conflicts, which had hitherto remained on the periphery, became a central focus of the UN in the early 1990s.

Evidence has mounted that despite major challenges, international peacekeeping has had a decisive effect on helping states bring an end to many of these civil wars. However, the problem of relapse has remained. In the last decade, 90 percent of new wars were in countries that had experienced war within the previous decade. Adding to these challenges, new sources of instability are on the rise: the integration of global markets and increasing sophistication of communications technologies have facilitated the expansion of transnational organized crime and trafficking, often exacerbating existing challenges or spurring violence; while terrorism and extremism have transformed and amplified instability in a number of contexts, including pre-existing conflicts or proto-conflicts in north and eastern Africa, the greater Middle East, and south and southeast Asia.

As the international community has grappled with the relapse of civil war, the spread of organized crime, and extremism, it has increasingly focused on a strengthened rule of law as the overarching objective for the response. This conceptual shift is reflected in the diversity of actors involved: within the UN alone, peacekeepers, peacebuilders, political and development experts, security experts, organized crime experts, and counterterrorism committees of the Security Council all operate within a framework of establishing or strengthening the rule of law at the national and/or global level and implement policies or programs accordingly. This is an important conceptual shift, and one that has generated important new forms of engagement and opportunities for the UN. It has, however, also generated conceptual confusion and significant bureaucratic entanglement. These factors
have eroded confidence in the ability of the UN to fill this critical (and growing) gap in the international system.

Various actors within the UN system and across Member States are approaching these challenges with very different and equally confusing conceptions of the rule of law impacting not only the policy level, but also the manner in which these conceptions are translated into operational guidance and implemented in practice. In fact, two distinct concepts of the rule of law are embedded in UN policy and practice. One version focuses on developing judicial, human rights, and security institutions, with the intent of binding political leaders to a set of formal decision-making processes, and thus constraining the state from potential abuses. A “thicker” version denies that mere procedural formality can protect individuals or groups from oppression and insists that effective rule of law requires a deeper set of constitutional and legal norms, ranging from guarantees of full citizen equality, recognition of alternative dispute resolution mechanisms, and political participation, to the panoply of contemporary international human rights and broader range of political institutions that can facilitate the provision of human security and development.

The ‘thicker’ concept of the rule of law has increasingly been encoded in UN policy statements, while the narrower version often characterizes the UN’s operational practices in the field. Neither seems entirely suitable for the contexts where the UN has its largest operational practice, i.e. in low-income, low-institutional countries that have emerged from civil conflict (“post-conflict settings”), nor do they fit into the timeframes that characterize UN engagements whether in post-conflict or traditional development settings. Adding to the confusion, the ‘thicker’ concept of the rule of law has become almost indistinguishable from the broad concept of peacebuilding that has been adopted by the UN.

As ever, practice in the field is ahead of policy entanglements at headquarters. Indeed, there are important instances where UN actors have been creative in blending political, security, and developmental approaches to provide suitable responses to rule-of-law challenges in post-conflict and other fragile settings. But these are exceptions, rather than the norm and seldom to they trickle up to better inform policy decisions. Current practices in assessment, evaluation, or collection of good and best practices and experiences from the field seldom do justice to some of the innovative approaches that UN actors have had to conceive often in extremely difficult circumstances to respond to rule of law challenges. Neither are these practices good at identifying and phasing out bad practice.

As a consequence of these and other factors, the UN rule-of-law support agenda continues to rest on shaky foundations: unstable political settlements; a weak empirical base; and a decision-making architecture and culture that has proved unable to clarify confusion, make decisions, or present member states with a roadmap toward more streamlined arrangements.

To better understand these issues, an approach that breaks the thicker concept of the rule
of law into a set of core functions would be useful. These functions include:

i. Developing formal or semi-formal representative political institutions and participatory processes for managing/mitigating political differences and/or resolving conflict.

ii. Developing arrangements for the independent administration of justice (criminal, administrative, contractual), respect for human rights, and strengthening or supporting the emergence of alternative dispute resolution mechanisms.

iii. Developing accountability tools and mechanisms to tether different functions and fonctionnaires of the state, particularly security and financial management, to civilian oversight.

iv. Embedding the state in international law, both recognized norms of customary international law and conventional or other international regulatory regimes, including those that address serious violations of international humanitarian and human rights law, organized crime, trafficking, and terrorism.

The relationship between the first function and the other three is critical. In many conflict-affected countries, the state is still dominated by clientelist, patrimonial, and neo-patrimonial regimes – with formal and informal elite networks operating at different levels of society. In these settings neither historical developments nor economic incentives have yet produced the conditions to support the emergence of a “thick” form of rule of law, and neither the government nor formal government institutions operate in an impartial manner to enforce laws equally for all citizens, allowing elites often to escape or manipulate police, courts, and legislatures to protect their interests.

Looking ahead, the UN would do well to gear its approaches to the quite different settings in which it works.

(1) Peace operations. In most places where the UN has deployed peace operations (peacekeeping or political missions), the conditions do not exist for the “thick” approach to the rule of law. Indeed, it can be argued that the central objective of most UN peace operations is to “help countries establish order precisely in the absence of the rule of law.” Nor is a narrow approach that only considers capacity building and technical assistance to national judicial institutions adequate. While the UN evidently has a role, if not a responsibility to support member states strengthen the normative base of their institutions and practices, large investments in justice and accountability institutions will almost certainly fail in the absence of a viable and legitimate political settlement, in which support for some set of judicial or legal self-restraint is embedded.

Thus, in post-conflict settings, in cases where institutions are weak and resources are low, the UN should refrain from using the ‘thick’ version of the rule of law as an overarching planning framework for initial engagement. Rather, the focus should be on building confidence in legitimate political settlements; and on using the leverage that exists during a major UN presence to embed initial mechanisms that can, over time, foster the emergence and the deepening of rule-of-law functions.
(2) Fragile states. In settings where the UN has a limited political mandate rather than a peacekeeping one, or the Security Council’s engagement is limited, the Organization has limited leverage at its disposal. Other actors, particularly regional powers, regional organizations, large donors, and the international financial institutions (IFIs) often have important leverage. In several recent cases, the participation or resistance of the regional power has been decisive in determining the scope available to the UN to engage in key rule of law functions. For example, Brazil is perceived to have played an important role in this regard in Haiti, while India’s role in the Nepal peace process has been perceived as less constructive.

While the IFIs have not historically focused on questions such as protecting the independence of the judiciary, promoting human rights instruments, or ensuring the accountability of security services, and their policies and practices have not at times seemed coherent with UN and other efforts to promote the emergence of the rule of law, they do focus on questions of state accountability, especially on responding to corruption, and transnational challenges such as money laundering and the recovery of stolen assets, all of which have strong implications for the emergence of, or the strengthening of the rule of law; this is an important connecting point. Moreover, the World Development Report 2011 opens up an opportunity to overcome earlier challenges, suggesting a pathway of reform for the IFIs that places greater stress on questions of the orientation and accountability of judicial and security services, including addressing past systemic abuses for which they are responsible, and the involvement of public officials in activities that undermine the legitimacy of the state, and that can have significant repercussions elsewhere. In this regard, the UN should capitalize on the indirect role IFIs play in responding to transnational organized crime and extremism, not least because they can provide an important additional leverage point for the UN.

(3) Post-Authoritarian Transitions. By contrast to most post-conflict settings, the ‘thicker’ version of the rule of law can serve as a strong framework for engagement in post-authoritarian transitions, including those currently under way in the Middle East and North Africa, as well as in low and middle income countries coping with high levels of violence and fragility.

In particular, in countries transitioning from authoritarian rule, including those in the Middle East and North Africa, many of the demands articulated by popular revolts can be usefully understood within a “thick” rule of law framework. In this regard, the UN’s existing normative base bolstered by policy statements and initiatives by the current and former Secretary-Generals and UN agencies (including UNDP and OHCHR) provide important and legitimate entry points for the UN. The UN’s rule of law policy framework can help shift the divisive West/Arab discourse around democracy, and serve as a platform for sustained (and integrated) governance, security, and development support if underpinned by respect for and sound understanding and analysis of, the political, economic, social and cultural realities of the countries in the region.

This is not to deny that the UN faces challenges in fostering initiatives on the rule of law in the Middle East and North Africa. It faces legitimacy challenges in the region as a
legacy of earlier crises, and, with important exceptions, it continues to suffer from a
dearth of officials with in-depth knowledge and understanding of the region in its senior
ranks. Its policy mechanisms lack the regional expertise necessary to navigate the
transitions underway. Notwithstanding, a concerted focus by the UN leadership could
incorporate the requisite tools and capacity to enable the UN to serve, over the medium
term, as an important reference point, normative guide, and source of operational support
to the emergence of the rule of law in Middle East and North Africa. Such an approach
would be more likely to enable the UN to make a constructive contribution over the
medium term than the current search for mediation and crisis management roles.

Finally, as with many other areas of the UN’s conflict-related work, limited analysis and
weak and competing monitoring and assessment frameworks weaken each aspect of UN
engagement in the rule of law field, and prevents the organization from capturing those
experiences that have made a difference. Clarifying the underlying empirical and policy
basis for the UN’s work – alongside efforts to improve collaboration within and beyond
the UN – is an important step to continued relevance and improved performance.