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The Impact of the Rule of Law on National Security in African Countries

BY CATHERINE LENA KELLY

Research shows that a strong rule of law fosters innumerable societal benefits, including improved living conditions and citizen wellbeing, more robust law enforcement, and economic growth. Another important but perhaps overlooked benefit of the rule of law is its substantial contribution to people-centered national security.

Dr. **Catherine Lena Kelly**, Associate Dean and Associate Professor of Justice and Rule of Law at the Africa Center for Strategic Studies, an academic institution within the U.S. Department of Defense, has studied how the rule of law contributes to security sector effectiveness in Africa and spoke about the topic as part of a panel discussion on rule of law and security sector governance at the “Emerging Security Sector Leaders” seminar, a multinational [academic program](#) hosted by the Africa Center in 2022. The panel discussion aimed to discuss the place rule of law has in democratic and civilian security sector governance, consider the different ways that the rule of law shapes the drivers of security

challenges and the megatrends affecting African security futures, and examine the strategic benefits and the practical challenges that security sector leaders face when seeking to establish and enhance the rule of law in the security sector and build trusting relationships with the citizens the security sector is meant to serve.

Although the conference was designed primarily for African security sector leaders, many of the topics apply across various legal and justice systems. The following are Dr. Kelly’s remarks, edited with the author’s permission for publication. A video recording of the complete panel discussion, which includes discussion of present-day applications by Dr. and General Dan Kuwali, Chief of Legal Services and Judge Advocate General of the Malawian Defence Force, is available to watch [on YouTube](#).

To begin, what is the rule of law? Rule of law is both a principle and a process.

In terms of principles, rule of law is the idea that all people are treated equally under the law, regardless of who they are. Thus, the rule of law is meant to contrast with rule *by* law, which is a mode of governing in which those in political power use the law to constrain the behavior of others but not that of themselves.

In terms of process, it is more complex, and there are multiple facets. Rule of law is not just about security and justice officials enforcing the law; it is also about making the equality of everyone under the law a real, tangible thing. In that sense, building the rule of law is an ongoing social and political process that involves the state — including the security forces. However, it also involves citizens and hinges upon state officials forging relationships of trust and reciprocity with the citizens that they are intended to serve. Now, this could be based on relevant local, national, and international

standards about rules, rights, and ways to seek redress for problems that one is experiencing. In other words, ensuring the equality of all under the law — not only in principle but also in practice — is a core part of a government's effort to establish and maintain a “social contract” with its citizens.

To expand a bit on these ideas: The rule of law has a variety of key components that make it what it is. That is why often, when we talk about rule of law, we can talk past one another because there are multiple facets. There are multiple things that we could be talking about.

Overall, however, countries with robust rule of law have laws and policies that are clear, well-known, and internally consistent. This is sometimes referred to in legal circles as “legal certainty.” This is the idea that you can anticipate what the consequences of any given behavior might be as long as you understand what the law says. In that sense, transparency about the law and how it is applied is an important part of rule of law, too¹.

The content of the laws also matters, of course. Countries with robust rule of law have constitutions and legislation that offer the equal protection of freedoms and liberties for all citizens. Proportionality (meaning the degree of punishment being appropriate for the degree of offense, in criminal law) is also a notable aspect of the law's content here.² Some African countries have ratified international conventions that affirm some of these princi-

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ples I have mentioned. There are also continental or regional African commitments to consider. Many African countries have signed onto the African Charter on Human and People's Rights.³ The African Charter on Democracy, Elections, and Governance also promotes rule of law principles like equality in the exercise of various freedoms and liberties.⁴ This is an important point for us to highlight in particular for this audience of emerging leaders.

Another aspect of the rule of law that matters quite a bit is citizens' practical recourse to state and non-state options for accessing justice.⁵ Ideally, every citizen has a range of justice options at their disposal that they can choose to use or not to use if they encounter a particular kind of problem, and they have good knowledge about the pros and the cons of pursuing those differ-

ent options that are available.⁶

Finally, I will dwell just for a minute on the extent to which justice institutions operate fairly and independently also matters for the rule of law. Countries with robust rule of law systems have checks and balances between the executive branch, the legislature, and the judiciary.⁷ This allows the judiciary to function independently of what are often in Africa very strong executive branches of government. That helps to ensure the equitable and consistent application of the law to everyone, whether they are someone who is in the government or someone who is outside of it. And again, let me go back to some of the African Union reference points here on these principles. The [AU's Agenda 2063](#) further advances a vision based on this by calling for an Africa where people “enjoy affordable and timely access to independent courts and a judiciary that delivers justice without fear or favor.”

So to sum up: Rule of law prevails when there is a widespread sense that everyone is subject to the rules, and there are practical mechanisms in place to ensure that the rules are applied. Leaders are subject to oversight by other leaders in various branches of government. They are also subject to oversight by citizens who are not in government. People must also have sufficient access to justice to hold each other to account, and that requires a certain degree of fundamental freedoms and civil liberties that ensure that all citizens are working under the

¹ Rafael Leal-Arcas, *Essential Elements of the Rule of Law Concept in the EU* (Queen Mary Sch. of L. Legal Stud. Rsch. Paper No. 180, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483749.

² *Id.* Other manifestations of the consequences of some of these principles of the rule of law are captured in definitions by the World Justice Project, the United Nations, Afrobarometer, and the Ibrahim Index of African Governance, although particularities of their definitions or ways of measuring the rule of law differ.

³ Jamil Ddamulira Mujuzi, *Rule of Law: Approaches of the African Commission on Human and People's Rights and Selected African States*, 12 African Hum. Rts. L. J. 89, 89–111 (2012).

⁴ Berihun Adugna Gebeye, *The Janus face of legal pluralism for rule of law promotion in sub-Saharan Africa*, 53 Canadian J. of African Stud. 337, 337–353 (2019).

⁵ What is the Rule of Law?, WORLD JUSTICE PROJECT, <https://worldjusticeproject.org/about-us/overview/what-rule-law> (last visited Feb. 26, 2023).

⁶ VIVEK MARU & VARUN GAURI, *COMMUNITY PARALEGALS AND THE PURSUIT OF JUSTICE*, Cambridge University Press (2018).

⁷ CHARLES MANGA FOMBAD, *SEPARATION OF POWERS IN AFRICAN CONSTITUTIONALISM* (2016).

law on a relatively level playing field.

The Rule of Law & Security Sector Effectiveness

This now leads us to the second question of why rule of law, as I am defining it for you here, matters for security sector effectiveness. The short answer is: because justice and rule of law are vital for peace and stability, which it is the security sector's job to provide.

Part of the foundation for peace and stability is a high level of trust between security actors and citizens. Mistrust of security forces can exist for many reasons: There are historical legacies of security force abuses, perceptions of institutional corruption, and frustration with slow responses to crimes in some cases. Security forces can do their jobs better when the people that they are meant to serve trust them. Fostering popular confidence in the security sector through this kind of rule of law thus hinges upon building rights-respecting relationships with citizens, upon providing citizens human security, and upon enabling citizens to exercise their rights and express their views peacefully even if they disagree with the government. And note there that I am emphasizing “peacefully.” These are not always easy duties to fulfill, but as we will hear from others, there are major strategic benefits to the security sector operating in accordance with rule of law — both internally within defense institutions and externally in terms of their everyday interactions with ordinary citizens. Overall, more transparent, legitimate, and accountable security forces in the long run can help security services gain greater trust of the pop-

ulace and can, in turn, address threats and challenges in more lasting and sustainable ways.

Rule of law and security were frequently at odds in the early post-independence period in many African states. In these contexts, the main kind of security that concerned leaders was that of the regime itself. The focus on regime security meant structuring the security and defense services to minimize the risk of coups and wielding coercive power against citizens to keep violent and peaceful challenges to authority in check. That is part of what can sometimes lead to popular distrust in the security services or in the state justice systems. Either or both can be an issue that lingers today, and the situation differs across countries.

More recently, African national security agendas have diversified. On the AU, regional, and national levels, there is a growing emphasis on citizen security, which hinges upon state security officials forging relationships with the populace based on legitimacy, transparency, and accountability. Through this lens, rule of law matters for security in many ways, but two merit emphasis here. First, rule of law shapes the *drivers* of some of the core threats that African states face. Second, rule of law influences the *channels* through which risk factors for insecurity can play out. In other words, rule of law influences megatrends, which in turn influences security.

Now, let me spend just a few minutes on a few rule of law issues that are drivers of insecurity in several different contexts.

On violent extremism, human rights abuses by security sector actors and perceptions of unjust treatment by

government officials are key determinants of individual decisions to join violent extremist groups. We have seen this supported by research that has been done in the Sahel, the Lake Chad Basin, and the Horn of Africa.

There is one famous study published in 2017 by the United Nations Development Program (UNDP) on Cameroon, Kenya, Niger, Nigeria, Somalia, and Sudan that compared the life histories of people who had joined violent extremist organizations with the life histories of people who had chosen not to join a violent extremist group — i.e. people who had faced that choice and rejected violent extremism. By comparing those groups, the study sought to identify the tipping point that pushed particular individuals into joining a group. Seventy-one percent of the people in that study who had joined violent extremist organizations said that the tipping point was state security forces killing, arbitrarily jailing, or abusing a family member or a friend.⁸

Another study by International Alert focused on the Liptako-Gourma region concluded that the principal “push factor” leading youth in particular to join violent extremist groups was “the experience or perception of abuses perpetrated by various elements of the state.”⁹ This finding applies not just to the security forces, but to the state more generally. Perceptions that state officials act with bias and impunity can exacerbate grievances, and state actors engaged in counterterrorism risk exacerbating these grievances if they hold suspects in arbitrary detention, commit violence against suspects while they are in detention, or even profile members of particular ethnic

⁸ U.N. DEV. PROGRAM, JOURNEY TO EXTREMISM IN AFRICA: DRIVERS, INCENTIVES, AND THE TIPPING POINT FOR RECRUITMENT (2017) <https://journey-to-extremism.undp.org/content/v1/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

⁹ INT'L ALERT, IF VICTIMS BECOME PERPETRATORS: FACTORS CONTRIBUTING TO VULNERABILITY AND RESILIENCE TO VIOLENT EXTREMISM IN THE CENTRAL SAHEL 34 (2018) https://www.international-alert.org/sites/default/files/Sahel_ViolentExtremismVulnerabilityResilience_EN_2018.pdf

groups as suspects.

I will focus next on transnational organized crime, but there are certainly things one could say about rule of law drivers that contribute to, but may not actually cause, armed conflict and violence. To talk for a minute about transnational organized crime, though: Today, transnational organized crime in Africa is perpetrated by a variety of actors. Earlier, we talked about foreign entities, criminal networks, and mafia-style groups, and certain high-level officials within African states whose work can facilitate criminal networks in some cases.¹⁰

The latter is probably one of the most sensitive aspects of transnational organized crime in Africa, and it has been documented through sources like the ENACT Organized Crime Index. High-level elite facilitation of criminal network activity is a sensitive issue around the world, not just in Africa. However, there are recent examples from several African countries that are worth highlighting. In one case, security officials and diplomats from a particular country were implicated in transnational drug trafficking.¹¹ In another case, it was that government leaders who were found to be colluding with illicit trafficking networks.¹²

Why does this matter for the rule of law? It matters because organized crime is easier to perpetrate when there are fewer guardrails against corruption in government. When the law is not applied evenly, or when institutions of transparency and

accountability are relatively weak, then government officials colluding with criminal networks have little to fear. Problems can arise if states opt not to enforce laws on transnational organized crime or avoid investigating “big fish” in the government who are facilitating the perpetration of some of these acts. The practices that I am describing here subvert the principle that nobody is above the law.

A second way that rule of law is critical to security is that it shapes the ways that continental megatrends influence different countries’ risk and resilience profiles.

Let us look, for example, at urbanization and demographic growth. Over 80 percent of Africa’s population growth is expected to take place in cities in the decades to come.¹³ It has contributed to the rapid expansion of informal settlements in many of Africa’s urban areas. Along with this trend, there is a rising number of people living in slums in urban Africa whose precarious legal and economic conditions that can leave them vulnerable to heavy-handed treatment by security forces seeking to counter crime and violence. Low levels of trust in the police, low access to relevant customary or state forms of justice, and insecurity in land tenure can constrain the extent to which people living in informal settlements enjoy the economic and social rights that are fundamental parts of the rule of law.¹⁴ The legitimacy of state institutions — and people’s willingness to

respect the law the state is laying out — depend on how security personnel are relating to people living and working under conditions of informality, and whether residents of all socio-economic strata consider these state actors to be accountable.

I will discuss one more example. African security futures will also be shaped by the youth bulge, which is projected to foster a 50 percent increase in population on the continent by 2035. Youth are frequently under-represented in formal economies and in policymaking processes, and at the same time, they play key roles in mobilizing civic movements that seek to combat corruption; they play key roles in movements that work to strengthen local governance; and they play key roles in peacefully challenging presidents who try to defy term limits. The increased activism by Africa’s growing youth movement is frequently focused on matters of justice in some part. Youth are sometimes focused on mediating conflicts in their communities, challenging the actions of presidents who seek to defy term limits, and promoting civic engagement. Y’en a Marre in Senegal, Citizen’s Broom in Burkina Faso, and Lucha in the Democratic Republic of Congo have set notable examples through peaceful protest, but these movements are certainly not the only form of youth engagement in advocating for justice and rule of law.¹⁵ Rural youth are equally critical interlocutors for mediating disputes and preventing conflict in their commu-

¹⁰ ENACT, ORGANIZED CRIME INDEX, <https://enactafrica.org/organised-crime-index> (last visited Feb. 26, 2023) (explaining the typology of actors in the Organized Crime Index).

¹¹ Remadji Hoinathy, *Chad’s illegal drug trade contributes to regional insecurity*, ENACT OBSERVER (Aug. 25, 2020), <https://enactafrica.org/enact-observer/chads-illegal-drug-trade-contributes-to-regional-insecurity>.

¹² Nathalia Dukhan, *State of Prey: Proxies, Predators, and Profiteers in the Central African Republic*, THE SENTRY BRIEFING (Oct. 2020), <https://thesentry.org/wp-content/uploads/2020/10/StateofPrey-TheSentry-Oct2020.pdf>.

¹³ *These are Africa’s fastest-growing cities – and they’ll make or break the continent*, WORLD ECON. F. (May 4, 2016) <https://www.weforum.org/agenda/2016/05/africa-biggest-cities-fragility/>.

¹⁴ Jacqueline Klopp & Jeffrey Paller, *Slum Politics in Africa*, OXFORD RSCH. ENCYCLOPEDIA (May 23, 2019) <https://doi.org/10.1093/acrefore/9780190228637.013.985>.

¹⁵ Janette Yarwood, *The Struggle Over Term Limits in Africa: The Power of Protest*, 27 J. of Democracy 51, 51–60 (2016).

nities. I have seen them playing these roles in some of my own past work with the American Bar Association Rule of Law Initiative's nongovernmental organization, which does work all over Africa. I have seen youth serving as community mediators in northern Mali for disputes related to governance, and I have seen youth play key roles as community paralegals who spread knowledge about different justice options and how to access different forms of justice in countries like DRC, Central African Republic, Mali, and Mauritania.¹⁶ Youth therefore play multifaceted roles related to justice and rule of law. Including youth in policymaking is a key rule of law element for preventing exclusion and furthering the peaceful civic engagement of young people.

Using the Rule of Law to Confront Security Challenges

Finally, there are some good examples from the African continent of how rule of law can be infused into responses to security challenges. One is that of Joint Permanent Commissions that we often see in the southern African region. Joint Permanent Commissions meet bilaterally and can include security and justice ministers to discuss security issues on a high level. Including justice ministers along with those who are responsible for security helps leaders develop responses to security challenges that are based on effective security and justice sector coordination and address issues that both

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constituencies foresee.¹⁷

In Niger over the last few years, in terms of responding to violent extremism, a coordination committee was put together on terrorism and transnational organized crime. The goal was to improve respect for human rights in the criminal justice chain. A Supreme Court justice in Niger initiated this idea of enhancing communication between the chiefs of defense services and defense staff, as well those in charge of justice in the country, so that there is more communication between the point at which the military is out there fighting and they capture a suspect and when the suspect is transferred either to the *gendarmerie prévôtale* or the police. The law enforcement entities need to communicate well with prosecutors in order to make sure that rights are respected throughout this crim-

inal justice chain. This way, if there is an opportunity to prosecute a suspect, human rights and rule of law have not been violated in the process of getting to that point.¹⁸ The idea here is that the justice system should ideally serve as a deterrent mechanism for engaging in terrorism and organized crime, — but if the chain doesn't work, then the process doesn't work either.

There are quite a few promising endeavors on the community level as well. One is legal empowerment and community-based paralegal models of facilitating access to justice that we have seen used across the continent, in Liberia and Sierra Leone, as well as in Central African Republic and Democratic Republic of Congo. This is a model of training people on the local level to do work in their own communities to spread the word about the different justice and dispute resolution options available, so that people who are unfamiliar with different parts of the justice system can identify and pursue the kind of justice solution they want for whatever kind of problem they are having. Accompanying them through the justice process can be useful especially if the person seeking justice is choosing to go to a state court. This familiarizes citizens with the institution and can potentially allow for the state to link up with citizens to create some of the trust that may be missing between citizens and the state.¹⁹ There are plenty of other examples on the community level of approaches to addressing security through justice — from dialogue and

¹⁶ CATHERINE LENA KELLY, ABA RULE OF LAW INITIATIVE, RULE OF LAW FOR CONFLICT, SECURITY, AND STABILIZATION PROGRAMMING (2019) https://www.researchgate.net/publication/339298950_Rule_of_Law_for_Conflict_Security_and_Stabilization_Programming_Some_Key_Issues_for_Consideration_American_Bar_Association_Rule_of_Law_Initiative_Paper.

¹⁷ See, e.g., *South Africa hosts regional anti-poaching meeting*, XINHUA (Apr. 4, 2018, 11:48 PM), http://www.xinhuanet.com/english/2018-04/04/c_137088796.htm.

¹⁸ Junko Nozawa & Melissa Lefas, *When the Dust Settles: Judicial Responses to Terrorism in the Sahel*, GLOB. CTR. ON COOP. SEC. (Oct. 2018), <https://www.globalcenter.org/resource/when-the-dust-settles-judicial-responses-to-terrorism-in-the-sahel-quand-la-poussiere-retombe-la-justice-face-au-terrorisme-dans-le-sahel/>.

¹⁹ Maru & Gauri, *supra* note 6.

mobile courts that have been used on the local level — but for the moment I will leave things there.²⁰

CONCLUSION

To conclude, I have largely focused here on how rule of law relates to human security writ large, but there is also an important component of rule of law that applies specifically to security sector governance, that is — ensuring that the principle that nobody is above the law applies within security institutions, to all those who are interacting with citizens on behalf of the security forces, and that there are reliable mechanisms of oversight and accountability and reliable methods for building trust with the populace within the security sector so as to advance the social contract I mentioned at the start of the talk.

Justice and rule of law underpin the development and governance that is critical to realizing security for all. Justice institutions are a critical but

often overlooked element of security sector governance. While democratic and civilian forms of security sector governance hinge upon justice officials accurately understanding the challenges faced by security actors, they also equally depend upon security sector officials ensuring that their work is centered around respecting the rights of citizens while addressing the rule of law-related factors that can foster insecurity. To this end, military, law enforcement, and intelligence actors would be wise to consider how to further integrate rule of law considerations into their strategies, institutions, organizational processes, and everyday operations.

Furthermore, coordinating formal security and justice institutions is not enough. Advancing citizen security also involves security sector officials taking the informal elements of building the social contract more seriously, including by earnestly pursuing informal ways to build mutual trust and legitimacy with people on the commu-

nity level. Through the commitment of a range of formal and informal security and justice actors through these varied channels, justice and rule of law can help to shape the responses to African security challenges and African security futures.

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²⁰ See, e.g., *Justice and Security Dialogue: Saaba*, U.S. INST. OF PEACE, <https://www.usip.org/programs/justice-and-security-dialogue-saaba> (last visited Feb. 26, 2023); Dominic Naish, Security and Conflict Management in the African Borderlands, ACCORD (Apr. 24, 2017), <https://www.acCORD.org.za/conflict-trends/security-conflict-management-african-borderlands/>.