

Human Rights and Rule of Law: What's the Relationship?

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Rule of law in some form may be traced back to Aristotle, and has been championed by Roman jurists, medieval natural law thinkers, Enlightenment philosophers such as Hobbes, Locke, Rousseau, Montesquieu and the American founders, by German philosophers Kant, Hegel, and the nineteenth century advocates of the *rechtsstaat*, and in this century by such ideologically diverse figures as Hayek, Rawls, Scalia, Jiang Zemin and Lee Kuan Yew.² Until recently, however, the human rights movement paid relatively little attention to the relationship between rule of law and human rights.³ The Universal Declaration of Human Rights mentions rule of law only in passing in the preamble, suggesting in typically cryptic fashion that “human rights should be protected by the rule of law.”⁴ Neither the ICCPR nor ICESCR, the other two main pillars of the “international bill of rights,” mentions rule of law.⁵ Nor do most other early rights treaties, general assembly statements or committee reports or comments appeal to rule of law.

In contrast, references to rule of law now regularly appear in general assembly resolutions, committee reports, regional workshop platforms and other human rights instruments.⁶

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² The Western literature on rule of law is vast. See, e.g., GEOFFREY DE Q. WALKER, *THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY* (1988); *THE RULE OF LAW* (Ian Shapiro ed., 1994); FRANZ NEUMANN, *THE RULE OF LAW: POLITICAL THEORY AND THE LEGAL SYSTEM, IN MODERN SOCIETY* 77 (1986); Fred Dallmayr, *Hermeneutics and the Rule of Law*, 11 *CARDOZO L. REV.* 1449 (1990); Richard Fallon, “*The Rule of Law*” as a Concept in *Constitutional Discourse*, 97 *COLUM. L. REV.* 1 (1997). For a discussion of rule of law in Asian countries, see the essays in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.A.* (Randall Peerenboom ed., 2004) [hereinafter *ASIAN DISCOURSES OF RULE OF LAW*]. There are many different ways of understanding and conceptualizing rule of law. Given the many possible conceptions of rule of law, I avoid reference to “the rule of law”, which suggests that there is a single type or concept of rule of law, and a fortiori quasi-religious references to “The Rule of Law,” whose capitalization is presumably meant to capture Eternal Truths about The Good and Justice.

³ See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* 1488 (2d ed. 2000). The Index of Topics in Steiner and Alston’s mammoth 1361-page book (excluding the annex on documents, annex on citations, index of topics and index of authors) lists just one page on which “rule of law” is discussed.

⁴ *Universal Declaration of Human Rights*, available at <http://www.unhchr.ch/udhr/lang/eng.pdf> (last visited Aug. 12, 2004).

⁵ See International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/RES/2200(XXI) (1966), available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm; and http://www.unhchr.ch/html/menu3/b/a_icescr.htm.

⁶ See, e.g., Conclusions of the Eleventh Workshop on Regional Cooperation for the Promotion and Protection of Human Rights in the Asia-Pacific Region, Islamabad, Pakistan, Feb. 27-28, 2003, art. 61, U.N. Doc. E/CN.4/2003/109, annex I (“recogniz[ing] that good governance

Rule of law is central to the European Convention, and one of the requirements to join the E.U.⁷ The World Bank and the International Monetary Fund, limited by their charters from directly intervening in domestic political affairs, have emphasized rule of law and good governance.⁸ In 2002, the late U.N. Human Rights Commissioner Sergio Vieira de Mello made rule of law the centerpiece of his brief tenure in office.⁹

This article considers several explanations for the international rights movement's sudden heightened attention to rule of law. The human rights movement has increasingly encountered conceptual, normative and political challenges. In particular, the movement's claim to universality has been shattered by critiques that take issue with the secular, individualistic, liberal commitments of the movement.¹⁰ In contrast, rule of law appears to be widely accepted by people of different ideological persuasions. Christians, Buddhists and Muslims; Libertarians, Liberals, and Confucian Communitarians; democrats, soft authoritarians, even socialists and neo-Marxists¹¹ – all find value in rule of law. Rule of law then may provide one way to shore up the shaky foundation of the human rights movement. Perhaps, as de Mello suggested, rule of law will be a “fruitful principle to guide us toward agreement and results,” and “a touchstone for us in spreading the culture of human rights.”¹²

Whatever the human rights movement's conceptual and normative shortcomings, the movement's biggest failure has been to make good on the promise of a better life enjoyed by all

and the rule of law at the national level assist all States in the promotion and protection of rights, including the right to development.”).

⁷ See European Convention on Human Rights, preamble. The so-called Copenhagen Criteria for admission include a market economy, democracy, rule of law and the protection of human rights. See EU Enlargement – A Historic Opportunity at <http://europa.eu.int/comm/enlargement/intro/criteria.htm#Accession%20criteria> (last visited Aug. 12, 2004).

⁸ Daniel D. Bradlow, *Should the International Financial Institutions Play a Role in the Implementation and Enforcement of International Humanitarian Law?* 50 U. KAN. L. REV. 695 (2002); Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF., No. 2, Mar. 13, 1998, at 95.

⁹ Statement by the High Commissioner for Human Rights Sergio Vieira de Mello to the Fifty-ninth Session of the Commission on Human Rights, Geneva, March 21, 2003.

¹⁰ Many no longer find the international rights movement's attempts to cloak contested and contingent norms in universal garb helpful. See, e.g., Randall Peerenboom, *Beyond Universalism and Relativism: The Evolving Debates about Values in Asia*, 14 IND. INT'L & COMP. L. REV. 1 (2003); Richard A. Wilson, *Introduction to HUMAN RIGHTS, CULTURE AND CONTEXT: ANTHROPOLOGICAL PERSPECTIVES* 3 (Richard A. Wilson ed., 1997) (noting that the distinction between universalism and relativism is too totalizing in its conception); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095, 1096 (2000) (concluding that the universal versus relativism debate has already proved sterile and unproductive and may be damaging); Douglas Lee Donoho, *Autonomy, Self-governance, and the Margin of Appreciation: Developing A Jurisprudence of Diversity Within Universal Human Rights*, 15 EMORY INT'L L. REV. 391 (2001) (arguing that the political rhetoric surrounding the tired debate over cultural relativism has obscured the deeper issues that global diversity presents for the international human rights system and suggesting that more attention be paid to just how much diversity, pluralism, self-governance and autonomy should be allowed).

¹¹ For the adoption of rule of law by the ruling socialist parties in China and Vietnam, see RANDALL PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* (2002) [hereinafter *CHINA'S LONG MARCH*]; John Gillespie, *Concept of Law in Vietnam: Transforming Statist Socialism*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 2, at 146. See also E.P. Thompson, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 266 (1975) (a Marxist, Thompson describes the ideal of rule of law as an unqualified good). But see Morton J. Horowitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L. J. 561, 566 (1977) (allowing that rule of law may create a useful formal equality but claiming that it promotes substantive inequality and “enables the shrewd, the calculating and the wealthy to manipulate its forms to their own advantage”).

¹² de Mello, *supra* note 9.

in accordance with the utopian ideals contained in the ever-swelling list of human rights. Despite the movement's successes, we still live in a world where widespread human rights violations are the norm rather than the exception. Rule of law is seen as directly integral to the implementation of rights. Without rule of law, rights remain lifeless paper promises rather than the reality for many throughout the world.

Rule of law may also be indirectly related to better rights protection in that rule of law is associated with economic development, democracy and political stability, which are key determinants in rights performance. A long line of economists, legal scholars and development agencies from Max Weber to Douglas North to the World Bank have argued that rule of law is necessary for sustained economic growth. Rule of law protects property rights and provides the necessary predictability and certainty to do business. With ¼ of the world's population living below the international poverty line of \$581/year per capita, 790 million people lacking adequate nourishment, one billion without safe water to drink, two billion suffering from inadequate sanitation, and 880 million lacking access to basic health, economic growth is essential to the alleviation of some of the worst human suffering.¹³

Rule of law is integral to and necessary for democracy and good governance. Attempts to democratize without a functional legal system in place have resulted in social disorder, as in Russia, East Timor, Haiti, Kosovo, Afghanistan, Iraq, and in the collapse of democratic regimes and their replacement by more authoritarian regimes in Indonesia in 1957, the Philippines in 1972, South Korea in the 1970s, and numerous former Soviet Republics.¹⁴

Rule of law is said to facilitate geopolitical stability and global peace.¹⁵ According to some, it may help prevent wars from occurring in the first place.¹⁶ It also provides guidelines for how war is carried out, limiting some of the worst atrocities associated with military conflicts; it offers the possibility of holding accountable those who commit acts of aggression and violate humanitarian laws of war; and it is central to the establishment of a rights-respecting post-conflict regime.

Post 9-11 concerns over terrorism have also focused attention on rule of law as a means to hold terrorists accountable and to legitimize their capture and punishment, often through the promulgation of national defense and anti-terrorist laws.¹⁷ The war on terrorism has been characterized as a war on "our" way of life - on democracy, human rights and rule of law - and *ergo* on civilization itself. Kofi Anan claimed that the terrorist attacks on the U.S. "struck at everything [the United Nations] stands for; peace, freedom, tolerance, human rights, ... the very idea of a united human family[,...]all our efforts to create a true international society, based on

¹³ Thomas W. Pogge, *Priorities of Global Justice*, in GLOBAL JUSTICE 6, 7 (Thomas W. Pogge ed., 2001).

¹⁴ Ani Sarkissian, *Democratization in the Post-Communist World: Initial Conditions and Policy Choices*, available at <http://apsaproceedings.cup.org/Site/abstracts/049/049007Sarkissian.htm> (noting that many former soviet republics elected former communist parties or reverted to authoritarianism) (last visited Aug. 15, 2004); Jacek Kurczewski & Barry Sullivan, *The Bill of Rights and the Emerging Democracies*, 65 Law & Contemp. Probs. 251 (2002) (finding in a large study of post-communist states that once free, citizens did not put so much importance on free speech and association; and that when democratization led to social disorder, the emphasis shifted toward social stability, law and order, and economic growth).

¹⁵ U.S. Institute of Peace, *Building the Rule of Law and Creating Stability through Justice*, at <http://www.usip.org/ruleoflaw/about.html> (last visited Aug. 12, 2004) (quoting Conference on Security and Cooperation in Europe, 1990: "Societies based on...the rule of law are prerequisites for...the lasting order of peace, security, justice, and cooperation.").

¹⁶ Sergio Vieira de Mello, Message of the U.N. High Commissioner for Human Rights on Human Rights Day, Dec. 10, 2002.

¹⁷ See *infra* notes 378-379.

the rule of law.”¹⁸ Conversely, rule of law plays a crucial role in ensuring that civil liberties are not encroached upon in the zeal to crack down on suspected terrorists, and has been invoked to protest, for instance, the so-called Patriot Act in the U.S.¹⁹

In addition, the upsurge of U.S. unilateralism and American-style cultural relativism has challenged the universality of human rights, exposed the soft underbelly of the international order and its vulnerability to power politics, and threatened to undermine the foundation of the international legal order upon which the edifice of international human rights rests.²⁰ Rule of law provides a rhetorical basis for challenging the world’s sole reigning superpower.

Taking each of these factors in turn, I critically analyze the relationship between rule of law and human rights. The relationship is complex and defies easy summary across such a broad range of issues. Nevertheless, a provisional summary that highlights some of the key findings and conclusions may be helpful. First, on the whole, rule of law is desirable. However, it is clearly no panacea for any of these problems. There is a great danger of claiming too much for rule of law, and in the process sowing conceptual confusion and planting the seeds for a reaction against rule of law once unrealistic high hopes are dashed, as they inevitably will be when rule of law is elided with justice and all things good and wonderful.

Second, rule of law is more useful in addressing some concerns than others. Appealing to rule of law will do little to resolve the conceptual and normative difficulties at the core of the human rights agenda. We are not, never have been, and most likely never will be, one big united family. On the contrary, the failure to acknowledge that the liberal democratic conception of rule of law is but one possible variant of rule of law presents the grave danger that the international community, pushed by a liberal-leaning human rights movement, will attempt to export and impose an overly narrow, normatively contested conception of rule of law and way of life that does not fit the local circumstances. So doing is likely to cause the same sort of system failures that occur when heart transplant patients reject incompatible tissue. Liberal democratic reformers may end up undermining support for rule of law or miss opportunities to carry out meaningful legal reforms by clinging to too particularistic a conception of the good. At the same time, all legal systems must meet certain minimal requirements. This thinner conception of rule of law may provide the basis for meaningful reforms even where there is deep disagreement over democracy and rights issues.

Third, the empirical evidence to support the assertion that rule of law leads to more rights and wellbeing is limited, and subject to doubts about causality. Rule of law is closely related to economic development, which in turn is closely associated with better performance on human

¹⁸ Press Release, United Nations, Secretary-General Urges Assembly to Respond to 11 September Attacks by Reaffirming Rule of Law (Sept. 24, 2000) (U.N. Doc. SG/SM/7965), available at <http://www.un.org/News/Press/docs/2001/sgsm/7965.doc.htm>. See also Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 25-26 (2002) (“September 11 was an attack ... on the very spirit of international law.... The terrorists sought to jeopardize not just American security but the entire postwar system of free global transport, communications, markets, and self-government... At stake is the ‘positive face of globalization’...”).

¹⁹ See, e.g., Laura Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002).

²⁰ See, e.g., RULE OF POWER OR RULE OF LAW?: AN ASSESSMENT OF U.S. POLICIES AND ACTIONS REGARDING SECURITY-RELATED TREATIES (Nicole Deller et al. eds., 2003); Johan D. van der Vyver, *Universality and Relativity of Human Rights: American Relativism*, 4 BUFF. HUM. RTS. L. REV. 43, 71-72 (1998); T. Jeremy Gunn, *American Exceptionalism and Globalist Double Standards: A More Balanced Alternative*, 41 COLUM. J. TRANSNAT’L L. 137 (2002); Peter G. Danchin, *U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative*, 41 COLUM. TRANSNAT’L L. 33 (2002) (criticizing U.S. human rights policy with respect to religion for being unilateral, punitive, aggressive and failing to cooperate sufficiently with multilateral organizations, including the U.N.); UNILATERALISM & U.S. FOREIGN POLICY: INTERNATIONAL PERSPECTIVES (David M. Malone & Yuen Foong Khong, eds. 2003).

rights measures and other indicators of wellbeing. There is good reason to believe that wealth rather than rule of law is mainly responsible for better rights performance, although rule of law may also have some independent impact. Given the importance of economic development to human rights and other aspects of wellbeing, the emphasis of the human rights movement should be on promoting development. However, since rule of law is also one of the prerequisites for sustainable growth, promoting economic development entails promoting rule of law as well. Unfortunately, *how* to promote rule of law or economic development is far from straightforward, and depends on a wide variety of contingent circumstances in each country.

Moreover, while “our” way of life takes seriously violations of civil and political rights, even legitimating for some people humanitarian intervention and perhaps regime change to make democracy possible,²¹ our way of life fails to take seriously extreme poverty as a violation of human dignity, and thus we do not treat economic “rights” and the “right” to development as legally enforceable entitlements on par with civil and political rights, much less as an adequate reason for humanitarian intervention and regime change.²² The failure to attend adequately to the systemic economic causes of rights violations and human suffering deprives the human rights movement of its radically critical edge. Rather than leading to calls for a rethinking of global justice and how to achieve a more equitable distribution of resources as part of the solution to avoid humanitarian crises in the first place, episodic humanitarian interventions during times of extreme crisis are followed by a retreat into studied indifference of the ways in which the international economic order contributes to humanitarian crises, the wide disparities between rich and poor countries and the all-too-familiar toll of crushing poverty on human wellbeing. Similarly, the emphasis on a narrower political agenda of civil and political rights and the

²¹ Humanitarian intervention exists along a continuum from temporary emergency relief without any attempt to address the underlying political and economic causes (the U.S. mission as originally conceived in Somalia), including attempts to negotiate a cease fire agreement and peacekeeping operations (currently being discussed for Sudan); disaster relief plus attempts to impose political order by securing in power a leader acceptable to the international community or the intervening state (Haiti, Grenada, Panama); and nation-building and reconstruction as a liberal democratic state that implements rule of law and protects human rights (Bosnia, Kosovo, East Timor and Iraq). Of course, doing nothing is another option. See James Kurth, *Models of Humanitarian Intervention: Assessing the Past and Discerning the Future*, 9 FPRI WIRE no. 6 (Foreign Pol’y Res. Inst., Phila., PA), Aug. 2001, available at <http://www.fpri.org/fpriwire/0906.200108.kurth.humanitarianintervention.html> (noting eight humanitarian crises in the past decade that resulted in 100,000 deaths or more than one million refugees which failed to elicit a military response from the U.S. or the U.N.).

²² Even in Sudan, the focus has been on allegations of genocide and ethnic cleansing committed by the government and government-sponsored militia against non-Arab ethnic groups. Although the conflict has been ongoing for years, the violence has increased since 2003 when rebel groups, the Sudan Liberation Army and the Justice and Equality Movement, began demanding a greater share of resources and power-sharing with the Arab dominated Sudan state. See generally, Physicians for Human Rights, *PHR Calls for Intervention to Save Lives in Sudan: Field Team Compiles Indicators of Genocide*, June 23, 2004, at http://www.phrusa.org/research/sudan/pdf/sudan_genocide_report.pdf (last visited Aug. 12, 2004). See also Alex de Waal, Editorial, *Darfur’s deep grievances defy all hope for easy solution*, THE OBSERVER, July 25, 2004, available at <http://www.guardian.co.uk/sudan/story/0,14658,1268773,00.html> (noting that to characterize the conflict as between Arab and Africans obscures a more complex reality). The international community was not prepared to intervene in years past despite wars and famine that led to more than two million deaths and over four million people being displaced since 1983. See The World Factbook 2004, at <http://www.cia.gov/cia/publications/factbook/geos/su.html> (last updated May 11, 2004). Sudan is one of the poorest countries in the world. While war has had a negative impact on economic development, Sudan has also been burdened with a huge foreign debt. See World Bank Country Brief, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SUDANEXTN/0,,menuPK:375432~pagePK:141132~piPK:141107~theSitePK:375422,00.html> (last updated Sep. 2003).

technical project of implementing rule of law to facilitate democratization and economic growth within the parameters of the existing international economic regime allows the international community to take comfort in their well-intentioned efforts to do something for the less fortunate while ignoring the systemic causes of suffering that result from a grossly unbalanced distribution of global wealth. Thus, while rule of law is necessary for sustained economic growth in most countries, and economic growth is likely lead to the enjoyment of more rights and a higher level of wellbeing, efforts to implement rule of law will not be sufficient to promote growth or the enjoyment of more rights and wellbeing globally in the absence of reforms that address the structural impediments to development and result in fundamental changes in the nature of the international economic order, which continues to contribute to a wide, if not growing, gap between rich and poor countries.

Fourth, although rule of law and liberal democracy generally go hand in hand, they need not. Rule of law is possible in non-democratic states, and in democratic but non-liberal states. As rule of law is a matter of degree, rather than a dichotomous variable,²³ significant legal reforms that enhance rule of law are possible in non-democratic states. Rule of law may proceed, and is generally a precondition for, democratic consolidation. Furthermore, the transition to democracy need not result in more protection of rights and indeed frequently results in serious rights violations in the short term. Significant improvement on rights occurs only when democracy is consolidated, toward the end of the democratization process. The failure of many democratic states that have reverted to authoritarian regimes in recent years demonstrates the dangers of premature democratization. A premature transition to democracy may undermine rule of law and protection of rights, particularly but not only in states that degenerate into social chaos and civil war. Accordingly, the knee-jerk reaction to promote democracy as the best solution everywhere anytime should be resisted, especially when used as a rationale to justify military intervention and regime change.

Fifth, we should not put too much faith in the ability of rule of law to prevent war, limit atrocities during war, or rein in a superpower bent on going its own way. Nor should we expect that fragile legal systems in failed states will have the capacity to meet even the minimal requirements of a thin rule of law. Historical, economic or institutional constraints will often limit the extent to which a legal system will be able to comply with the requirements of rule of law. Regime change, civil wars, political restraints, and geopolitical power-plays will also undermine rule of law or present challenges to basic rule of law principles. Accordingly, we must adopt a more realistic and pragmatic approach, and be wary of the tendency to allow normative beliefs to get the better of common sense. Attempts to impose univocal solutions are likely to be counterproductive, for example by demanding “no impunity” for past offenders, banning amnesties or insisting that defendants in failed states with weak legal systems be afforded all the due process rights afforded defendants in politically stable states with well-established legal systems including limited detention periods, speedy trials and prison conditions that meet international standards. The expectations for rule of law and the standards for human rights in transitional states cannot be simply the same as in other states.

Finally, rule of law is only one component of a just society. In some cases, the values served by rule of law will need to give way to other values. Invoking rule of law in most cases signals the beginning of normative and political debate, not the end of it.

I. Bolstering the Shaky Foundations of the Human Rights Movement: Conceptual Issues

²³ For a discussion of different approaches to defining the minimal conditions for rule of law and measuring rule of law, see CHINA'S LONG MARCH, *supra* note 11, at 130-141.

In the past, support for the human rights movement was relatively costless for states given doctrinal limitations in the corpus of international rights law; the relatively undeveloped state of multilateral, governmental and non-governmental institutions for monitoring human rights violations; and the weakness of enforcement mechanisms. In recent years, the human rights movement has become an increasingly powerful force capable of affecting governmental policies and actions to one degree or another in many if not all countries.

Not surprisingly, the international human rights regime has become the subject of more critical scrutiny as it has become more powerful. As a result, there is now a greater awareness of a number of conceptual, normative, political and practical weaknesses in the human rights framework.²⁴ Despite the considerable efforts of philosophers, the concept of a right remains notoriously contested and incoherent.²⁵ There is no accepted understanding of what a right is;²⁶ whether collective or group rights and nonjusticiable social, economic and cultural rights are really rights;²⁷ of how rights relate to duties; or whether a discourse of rights is complementary or antithetical to, or better or worse than, a discourse of needs or capabilities.²⁸ Nor is there an accepted ranking of the different rights that make up the wish list of goodies included in the ever proliferating set of human rights instruments and customary international law.²⁹ Attempts to justify many of these allegedly universal rights have ended up demonstrating the lack of a firm foundation for them, and highlighted how different traditions may be at odds with some rights while justifying other rights in different ways.³⁰

Acknowledging the impossibility of coming up with a justification of rights persuasive to all, some rights proponents have sought comfort in a pragmatic consensus on human rights issues

²⁴ See generally, David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002).

²⁵ THEORIES OF RIGHTS (Jeremy Waldron ed., 1984); Randall Peerenboom, *Human Rights, China and Cross Cultural Inquiry: Philosophy, History and Power Politics*, 55:2 PHIL. E. & W. (forthcoming 2005) (discussing some of the philosophical difficulties that arise in even trying to determine whether one is using similar or different concepts of rights).

²⁶ See Pierre Schlag, *Rights in the Postmodern Condition*, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES 263 (Austin Sarat & Thomas R. Kearns eds., 1996) (noting that rights are treated as concepts, as argumentative trumps, as factors of production, as preconditions to bargaining, as bearer-enabling entitlements, as bearer-disabling entitlements, as totems, as sources of social solidarity, as legitimation devices and so on).

²⁷ See JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* (1989) (arguing that rights only belong to individuals and that there are no group or collective rights); see also Jeremy Waldron, *Can communal goods be rights?*, in JEREMY WALDRON, *LIBERAL RIGHTS: COLLECTED PAPERS, 1981-1991* 339 (1993) (arguing that communal goods cannot be the subject matter of rights but that it is intelligible and useful to speak of group rights). Social and economic rights continue to be either non-justiciable or only partially justiciable in most countries.

²⁸ For a useful discussion of rights and needs, see Jeremy Waldron, *Rights and Needs: The Myth of Disjunction*, in LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES, *supra* note 26 at 87-109. For capabilities, see Amartya Sen, *Capability and Well-being*, in THE QUALITY OF LIFE 30, (Martha Nussbaum and Amartya Sen eds., 1993); and Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273 (1997).

²⁹ See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (1980).

³⁰ See Abdullahi An Naim, *The Cultural Mediation of Rights*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer and Daniel A. Bell eds., 1999) (arguing that Islam is compatible with some contemporary rights but not all); Joseph Chan, *A Confucian Perspective on Human Rights for Contemporary China*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, at 212 (arguing that a Confucian justification and interpretation of free speech would place less emphasis on autonomy and allow for greater restrictions than liberal justifications).

or held out hope for the emergence of an overlapping consensus.³¹ But the pragmatic or overlapping consensus quickly breaks down once one moves beyond feel-good discussions about the desirability of the broad wish-list of abstract rights contained in human rights documents to the difficult issues of the justifications for such rights and how they are to be interpreted and implemented in practice.³²

Many human rights issues implicate deep moral commitments, including religious views, traditional gender roles, different notions of freedom and autonomy and fundamental beliefs about the relationship of the individual to the state and other members of society. Because human rights issues raise these deep commitments, and because the international human rights movement's pretense of universalism leads to particular outcomes that may be defensible on liberal principles but are at odds with the principles and commitments of other traditions and normative systems, the human rights movement has been accused of bias, arrogance and imperialism.³³ Given differences in fundamental commitments, the human rights movement is now seen by many as the new religion, the latest crusade, a modern day inquisition, while others

³¹ The frequency with which rights advocates optimistically appeal to Rawls' notion of an overlapping consensus is somewhat bewildering given that it has not even proved possible to achieve on a wide range of rights issues in its place of origin, the United States. For the concept of an overlapping consensus with respect to justice in a liberal democracy such as the U.S., see John Rawls, *The Idea of the Overlapping Consensus*, 7 Oxford J. Legal Stud. 1 (1987). For Rawls' attempt to work out an international political conception of rights and justice, see his *THE LAW OF PEOPLES* (1999).

³² Randall P. Peerenboom, *The Limits of Irony: Rorty and the China Challenge*, 50:1 Phil. E. & W. 56 (2000). See also Charles Taylor, *Conditions of an Unforced Consensus on Human Rights*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS*, *supra* note 30. Taylor suggests that it might be possible to achieve at least some agreement on certain norms of conduct such as genocide, murder, torture and slavery. However, he is less confident about reaching an overlapping consensus on the underlying values that justify such norms. MICHAËL INGATIEFF ET AL., *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (Amy Guttman ed., 2001) (discussing need for thin though more universally accepted human rights agenda rather than a thicker but more contested agenda, but ultimately still endorsing the liberal agenda with its emphasis on individual agency, civil and political rights and restrictions on religion in the public sphere).

³³ Leon Trakman, *Native Cultures in a Rights Empire: Ending the Dominion*, 45 BUFF. L. REV. 189, 191 (1997) (liberal conception of rights "affronts people who adhere to different conceptions of freedom"); Nikhil Aziz, *The Human Rights Debate in an Era of Globalization: Hegemony of Discourse*, in *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA* 32 (Peter Van Ness ed., 1999) (criticizing hegemony of liberal discourse); Makau wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (discussing liberal biases of human rights regime); BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 339 (1995); Amy Bartholomew, *Human Rights and Post-Imperialism: Arguing for a Deliberative Legitimation of Human Rights*, 9 BUFF. HUM. RTS. L. REV. 25 (2003) (attempting to overcome the imperialism in the current human rights movement by extending the principles of Habermasian deliberative democracy to the international arena to secure the legitimacy of human rights).

It should be noted that citizens and government officials in liberal democracies also often condemn human rights bodies for being arrogant and attempting to impose their views on others. In response to a report by U.N. Special Rapporteur describing capital punishment in the U.S. as arbitrary and racially discriminatory, U.S. legislators declared such monitoring constituted U.N. harassment. Betsy Pisik, *Human Rights Probes Irrk U.S.*, WASH. TIMES, June 29, 1998, at A1. I have noticed in teaching human rights law over the years that students react very differently to ICCPR Committee reports criticizing certain U.S. practices and recommending changes than they do to criticism of other countries. When it comes to the U.S., they are much quicker to raise concerns about distant, unelected rights organs telling the U.S. what to do. The different reaction cannot be attributed completely to the sense that other countries have more serious rights problems and thus the ICCPR's criticisms are more legitimate as they do not react as strongly to ICCPR criticisms of similar practices in European countries.

criticize the movement as a well-intentioned if benighted hegemony at best, or malicious strong-arm politics and cultural genocide at worst.³⁴

Several of the main fault lines may be quickly summarized.³⁵ With Marxism and leftist critiques marginalized,³⁶ Islamic fundamentalism constitutes the most radical theoretical and practical challenge to the international human rights regime.³⁷ Despite Herculean efforts to reconcile Islam with contemporary human rights through a variety of interpretive techniques, tensions remain,³⁸ including Sharia-based punishments that the international rights regime condemns as cruel and inhumane such as cutting off the hands of thieves or stoning to death adulteresses; the status and treatment of women with respect to divorce, property rights and political participation; and most fundamentally the clash between theocracy and (liberal) democracy.

Religion more generally remains a major source of contention, in part because of the inevitable tension between the freedom to practice one's religion and the freedom of others to practice their religion or to enjoy other freedoms, and in part because of the liberal bias of the human rights movement, which has resulted in the human rights movement incorporating the

³⁴ See, e.g., Makau wa Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L.J. 201, n. 6 (2001) (claiming human rights INGOs share a fundamental commitment to the proselytization of Western liberal values, and that people in economically undeveloped, non-Western societies are portrayed as ignorant savages victimized by malicious government leaders, whose duty it is for enlightened Western rights activists to save); David Smolin, *Will International Human Rights Be Used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender*, 12 J. L. & RELIGION 143 (1995/1996).

³⁵ The following list is not meant to be exhaustive. One could also note the weakness of the right of self-determination in the face of strong state support for territorial integrity. Similarly, refugee law and the rights of immigrants remain a major trouble spot. In addition, sexual orientation has been a major source of controversy and led to rifts within the international rights community and NGOs such as Amnesty International. See Rhoda E. Howard-Hassmann, *Gay Rights and the Right to a Family: Conflicts between Liberal and Illiberal Belief Systems*, 23 HUM. RTS. Q. 73 (2001) (noting that gay rights have been a tough sell for many reasons, including (i) unlike other minorities, gays are seen by some as innately dishonorable because of their sexual practices; (ii) there are heavy religious and moral overtones to the issue of gay rights; (iii) gay rights such as the right to marry and adopt present challenges to the fundamental social institution of the family; (iv) gay rights are frequently justified by appeal to secular liberal ideas of autonomy, choice, individualism and privacy; (v) and, ironically, because past efforts of the West to impose its preferred morality at the time were all too successful: Western missionaries proselytized religious beliefs that taught "primitive" societies which permitted gay sexual activity that they were wrong, while colonial governments passed laws criminalizing homosexual behavior; having now been enlightened, Western rights activists take other societies to task for being homophobic).

³⁶ Marxism may still be useful as critique even if it is no longer credible as a positive alternative to liberalism. Nancy Love, *What's left of Marx*, in THE CAMBRIDGE COMPANION TO HABERMAS 46 (Stephen K. White ed., 1995).

³⁷ See the 1990 Cairo Declaration on Human Rights in Islam, reprinted in U.N. Doc. A/CONF.157/PC/62/Add.18, and available at <http://www.mfa.gov.eg/getdoc.asp?id=134&cat=030407> (declaring that while fundamental rights and universal freedoms are an integral part of the Islamic religion, the Shariah is the only source for the explanation or clarification of any of the articles of the Declaration).

³⁸ See An-Naim, *supra* note 30; Norani Othman, *Grounding Human Rights Arguments in Non-Western Culture: Shari'a and the Citizenship Rights of Women in a Modern Islamic Nation-state*, in THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS, *supra* note 30 at 171 (arguing for a creative and historically sensitive interpretation that distinguished between the text of the Koran, which is the divine word of Allah, and the interpretations of scholars and jurists, which are distinctly human products, and that deals with negative passages in the text and commentaries by placing them in their historical context and then demonstrating that changes in the contemporary context justify a new interpretation). See also Khaled Abou el Fadl, *Islam and the Challenge of Democratic Commitment*, 27 FORDHAM INT'L L.J. 4 (2003).

conflicts and tensions over religion within liberalism.³⁹ These tensions are most evident in the Rawlsian attempt to exclude private religious views from the public sphere as the price for being able to generate an overlapping consensus.⁴⁰ The parallel at the international level occurs when rights bodies view with suspicion or dismiss attempts to justify particular practices based on religious reasons or by appeal to authoritative religious sources such as the Koran.⁴¹ More generally, critics of various religious persuasions have argued for a broader based conception of rights, not founded on secular liberalism, which builds on a more inclusive spiritual and moral worldview drawn from the world's great religions including Buddhism, Islam and Daoism.⁴²

One of the most direct threats to the movement to date came when increasingly assertive Asian governments, buoyed by years of economic growth, issued the 1993 Bangkok Declaration challenging the universalism of human rights and criticizing the international human rights movement for being Western-biased. Although not denying outright the universality of all rights, the Bangkok Declaration asserted that human rights must reflect the particular economic, social, political, legal and historical circumstances of particular countries at a particular time.⁴³ The

³⁹ Some of the more pressing issues include how to distinguish between abnormal and normal religious practices, as reflected in regulations banning or restricting cults; how to define and control religious extremism and fanaticism without unduly restricting freedom of religious belief and practice; how to ensure free speech while restricting hate speech, and how to prevent the abuse of defamation suits against those who allegedly engage in religious stereotyping or who incite religious hatred by spreading malicious untruths about a particular religious group from undermining freedom of the press while still allowing legitimate suits. Religious education is another contested area, with countries divided on whether religious education should be allowed at all, whether the government should fund religious schools, whether religious schools must meet minimal curricular requirements and when limitations are justified on the teaching of religious beliefs that may incite demands for self-determination, challenge the ruling regime or upset public order.

⁴⁰ JOHN RAWLS, *POLITICAL LIBERALISM* (1993). For a similar approach that imposes "conversational restraints" in the public sphere, Bruce Ackerman, *Why Dialogue*, 86 J. OF PHIL. 5, 16-17 (1989) (noting that he bases his argument not on some general feature of the moral life but on the distinctive way liberals conceive of the problem of the public order). For a nuanced critical response from within the liberal tradition, see KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* (1995).

⁴¹ See, e.g., Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) available at <http://www.un.org/womenwatch/daw/cedaw/>, art 5: "States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women." Others have argued in a similar vein that culture ought to be contained as much as possible in international relations.

⁴² Chandra Muzaffar, *From Human Rights to Human Dignity*, in *DEBATING HUMAN RIGHTS: CRITICAL ESSAYS FROM THE UNITED STATES AND ASIA*, *supra* note 33 at 25-31. See also Michael Perry, *Is the Idea of Human Rights Ineliminably Religious*, in *LEGAL RIGHTS: HISTORICAL AND PHILOSOPHICAL PERSPECTIVES*, *supra* note 26, at 205, 252 (arguing that there is no intelligible secular version of the idea of human rights and that the idea is necessarily religious). The historical, conceptual and normative relationships between human rights and the world's religions are by no means straightforward or unequivocally mutually supportive. *Id.* at 226. Clearly some contemporary international rights are at odds with the precepts and practices of some, perhaps most of the world's great religions. Conversely, "[T]he great religious ages were notable for their indifference to human rights in the contemporary sense. They were notorious not only for acquiescence in poverty, inequality, exploitation and oppression but for enthusiastic justifications of slavery, persecution, abandonment of small children, torture and genocide." Arthur Schlesinger Jr., *The Opening of the American Mind*, N.Y. TIMES BOOK REV., July 23, 1989, at 26.

⁴³ Report of the Regional Meeting for Asia of the World Conference on Human Rights, Bangkok Declaration, U.N. World Conference on Human Rights (1993), U.N. Doc. A/CONF.157/ASRM/8, available at <http://www.unhchr.ch/html/menu5/wcbang.htm>. [hereinafter, Bangkok Declaration]. See also Karen Engle, *Culture and Human Rights: The Asian Values Debate in Context*, 32 N.Y.U. J. INT'L L. & POL. 291 (2000) (claiming "the debate over the Bangkok Declaration seems almost outdated. The argument for context has prevailed.").

ensuing debates over “Asian values” or its more recent politically correct offspring “values in Asia” raised a wide range of issues.⁴⁴ Some of the main points of contention were the compatibility of Confucianism, Buddhism and Islam with liberal democracy and human rights; the relationship between rights, responsibilities and duties; and how to weigh rights against competing interests, including other rights claims, and balance the needs of individuals against the interests of the group and society. Demonstrating the need to avoid simplistic constructs of “the West” as well as “the East” or “Asia”, many of the communitarian criticisms of the liberal biases of the human rights movement and the privileging of personal freedom and autonomy over social solidarity and stability paralleled communitarian critiques in the West.⁴⁵

Another major area of dispute centers on economic issues. The increasing gap between the rich and poor both within countries and among states has produced a fault line that runs along the North-South, developed-developing country axis. Emphasizing the right to development, the Bangkok Declaration called for international cooperation to narrow the income gap and eliminate poverty, which it rightly declared to be major obstacles to the full enjoyment of human rights.⁴⁶ The Vienna Declaration was even more explicit: “The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.”⁴⁷ Within both developed and developing countries,⁴⁸ growing income disparities have led to a

⁴⁴ The literature on Asian values is vast. For an overview, see Peerenboom, *supra* note 10 (distinguishing between three rounds of the debates and assessing the major issues raised in each round). Supporters of universal human rights have sought to discredit the notion of Asian values by pointing to the tremendous diversity within the region. However, if such diversity precludes the possibility of common values within the Asian region, then it also precludes a fortiori the possibility of universal values. Alternatively, one could claim that there are common values within the Asian region but they are not distinctive. However, what common values do exist are so abstract and so “thin” that they lead to widely divergent outcomes on specific issues, many of which are not consistent with current human standards as interpreted by the ICCPR human rights committee and liberal rights activists. Moreover, large multiple country empirical studies have consistently identified statistically regional differences in values, in rights performance and in the impact of differences in values on rights performance. Further, both regional studies and more specific studies suggest that the liberalism that provides the thicker ideological basis for the human rights movement today is not widely accepted within Asian countries. See Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia* (forthcoming 2005) [hereinafter Peerenboom, *Show Me the Money*].

⁴⁵ See Kenneth E. Morris, *Western Defensiveness and the Defense of Rights: A Communitarian Alternative*, in *NEGOTIATING CULTURE AND HUMAN RIGHTS* (Lynda S. Bell et al. eds., 2001) (pointing out that many of the arguments of advocates of Asian values have their Western counterparts). This is not to say that there are no differences. On the whole, Western communitarians tend to accept more of the normative and institutional framework of liberalism than Asian communitarians, who tend to be more conservative.

⁴⁶ Bangkok Declaration, *supra* note 43.

⁴⁷ Vienna Declaration and Programme of Action, U.N. World Conference on Human Rights U.N. Doc. A/CONF.157/23 (1993), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

⁴⁸ Using various methodologies to measure inequality, seven of eight studies by leading economists found that global income inequality has increased. Joel R. Paul, *Do International Trade Institutions Contribute to Economic Growth and Development?*, 44 VA. J. INT'L L. 285, 310 (2003). Moreover, rapid growth in China and India account for much of the growth in developing states. *Id.*, at 312. See also *infra* notes 153-161. On the rise of intracountry inequality, see Xavier Sala-i-Martin, *The Disturbing 'Rise' of Global Income Inequality*, 2002 COLUM. U. DEP'T. ECON. DISCUSSION PAPER SERIES #01022-44, 29-30, available at <http://www.columbia.edu/~xs23/papers/GlobalIncomeInequality.htm>. In the U.S., the real income of the top one-fifth rose by 30% while the real income of the poorest one-fifth fell by 21% between 1980 and 1995. See Kevin Phillips, *Wealth and Democracy: A Political History of American Rich* 127-29, 427 (2002).

revaluation of the international rights movement's privileging of civil and political rights over economic rights and challenges to the distinction between negative and positive rights.⁴⁹ Meanwhile, the success of non-democratic and/or non-liberal Asian states highlighted the issues of whether authoritarian or democratic regimes are better able to achieve sustained economic growth, and whether certain Asian versions of capitalism are superior to the varieties of capitalism found in Western liberal democracies.⁵⁰

Still another fault line runs along gender lines. Feminists claim that international law in general and the human rights movement in particular is male-centric and discounts the needs and interests of women.⁵¹ To further complicate matters, there are also significant divisions within feminist ranks. Women rights activists in non-Western countries have accused Western rights activists of ethnocentrism, paternalism and racism.⁵² For instance, in the heavily politicized debates over female circumcision, the Association of African Women for Research and Development have complained that Western rights activists are "totally unconscious of the latent racism" in their campaign and that they have forgotten that solidarity with women of different races and difference cultures can only occur if there is mutual respect.⁵³ Women's rights have been among the most contentious of all human rights issues, as evidenced by the number of reservations to key causes to CEDAW.⁵⁴ Women's rights have encountered serious difficulties in implementation for a variety of reasons. Sociological explanations emphasize that U.N. bodies and other international rights organizations are dominated by men who presumably will be less

⁴⁹ Amnesty International and other INGOs have traditionally excluded economic rights from their mandate. See Mutua, *supra* note 33, at n. 70 (noting that while Human Rights Watch was the only major NGO to pay some attention to economic and social rights, it only devoted five pages in a book of 517 pages to such rights). Although human rights organizations have now begun to pay more attention to economic issues, much of the reporting of the major organization continues to focus on civil and political rights violations.

⁵⁰ See CHINA'S LONG MARCH, *supra* note 11 (assessing the theoretical arguments and empirical evidence concerning the relationship between regime type and economic growth). See also Daniel A. Bell, *East Asian Capitalism: Towards a Normative Framework*, 30:3 GLOBAL ECON. REV. 73 (2001); K.S. Jomo, *Rethinking the Role of Government Policy in Southeast Asia*, in RETHINKING THE EAST ASIAN MIRACLE 461 (Joseph E. Stiglitz & Shahid Yusuf eds., 2001).

⁵¹ See Hilary Charlesworth, *Feminist Critiques of International Law and their Critics*, 1994-1995 THIRD WORLD LEGAL STUD. 1, 13 (1994) (arguing that the under-representation of women in the evolution of international human rights has caused "a lop-sided canon of human rights law that rests on, and reinforces, a gendered distinction between public and private worlds"). See generally, RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW (Dorinda G. Dallmeyer ed., Studies in Transnational Legal Policy No. 25, 1993).

⁵² See Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT'L L. REV. 483 (2002). She notes that while "the feminist movement has always seen itself as an ally of third world societies and minority groups in their fight for equality and struggle against discrimination and prejudice", the movement has also emphasized the liberal values of personal choice and sought to maximize individual freedom and creativity even at the expense of the group, thus raising the dilemma of how to fight for women's rights without being complicit in the racism and prejudice that characterize Northern attitudes toward Southern countries. The compromise reached by colonial rulers was to impose their values and insist on changes in cultural practices on issues that involved violence such as Sati (widow immolation) and female infanticide, and thus challenged the colonial power's monopoly on force and life and death issues, but to allow non-violent discriminatory practices on issues of equality that involved the stability of the local order and whose reform would have undermined collaboration with local elites. *Id.* at 486-87.

⁵³ Association of African Women for Research and Development (AAWORD), *A Statement on Genital Mutilation*, in THIRD WORLD – SECOND SEX: WOMEN'S STRUGGLES AND NATIONAL LIBERATION: THIRD WORLD WOMEN SPEAK OUT 217-18 (Miranda Davies, ed., 1983).

⁵⁴ United Nations, Division for the Advancement of Women, State Parties to CEDAW, at <http://www.un.org/womenwatch/daw/cedaw/states.htm>.

sensitive to or concerned with issues such as sexual discrimination or harassment, domestic violence or wartime rape.⁵⁵ Another explanation places the blame on the liberal distinction between the public and private spheres and the emphasis on civil and political rights over economic, social and cultural rights. While these explanations all have merit, the main obstacle is that gender issues are deeply embedded in a society's traditions and lifeforms, and thus require a holistic approach involving fundamental changes in social norms and structural changes in the economic, political and legal orders.

These and other fault lines have become readily apparent as the human rights movement has gained in power and attempted to enforce increasingly specific interpretations of rights. The growing power of the international human rights movement has led to a backlash as countries have begun to feel the movement's bite. Whereas in the past, powerful Western countries raised little objection to the human rights movement as long as the movement concentrated on exporting liberal values and neo-liberal economic policies to developing countries, even powerful countries such as the U.S. now worry that the human rights movement is encroaching too far on state sovereignty.⁵⁶ In response, some member states, again including the U.S., regularly make reservations when acceding to rights treaties that undermine key provisions or prevent the treaty from having much if any domestic impact.⁵⁷ In other cases, they simply refuse to sign or ratify important treaties.⁵⁸ Some states have taken the dramatic and unprecedented step of withdrawing from rights treaties rather than conform their policies to what they consider to be the unreasonable demands of international rights bodies out to impose one-size-fits-all solutions on countries whose contingent national circumstances render compliance impossible.⁵⁹

Rule of law may seem to provide a bridge across the various fault lines. Islamic states from Egypt to Malaysia have endorsed rule of law.⁶⁰ Asian governments including the socialist regimes in China and Vietnam that regularly object to the strong-arm politics of the international human rights regime have welcomed technical assistance aimed at improving the legal system and implementing rule of law.⁶¹ Communitarians and liberals alike can find much of value in rule of law. Developing states that emphasize the right to development see rule of law as integral to development. Feminists in the U.S. and elsewhere have taken advantage of the legal system to push for enforcement of their rights, however they are interpreted. Perhaps then there is something to be gained from focusing on the common ground provided by rule of law as a way of restoring goodwill and recapturing the forward momentum lost in recent years by the increasingly contentious debates that have split the international rights community.

⁵⁵ Charlesworth, *supra* note 51. See also Patricia H. Davis, *The Politics of Prosecuting Rape as a War Crime*, 34 INT'L LAW. 1223 (2000).

⁵⁶ See, e.g., Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?*, 1 CHI. J. INT'L L. 327 (2000).

⁵⁷ See *infra* note 393.

⁵⁸ *Id.*

⁵⁹ See, e.g., Laurence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights*, 102 COLUM. L. REV. 1832 (2002).

⁶⁰ See NATHAN BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* (1997). For a discussion of rule of law in Malaysia, see H.P. Lee, *Competing Conceptions of Rule of Law in Malaysia*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 2.

⁶¹ See CHINA'S LONG MARCH, *supra* note 11. Carol V. Rose, *The New Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & Soc'y Rev. 93 (1998).

Closer scrutiny reveals both good news and bad news. A thin rule of law is universally – or nearly universally⁶² – valued, and may be useful in protecting rights. However, a thin rule of law is consistent with considerable injustice and the abuse of human rights, and allows such wide variations in institutions and outcomes that appealing to the requirements of a thin rule of law will not provide useful guidance on many important issues. On the other hand, disputes over competing thick conceptions of rule of law give rise to many of the theoretical, normative and political conflicts just discussed and thus undermine hopes that rule of law will provide a robust normative basis for bridging substantive differences on rights issues.

Rule of Law to the Rescue? The Contested Nature of Rule of Law

Despite its nearly universal appeal, rule of law, like human rights, is an essentially contested concept. It means different things to different people, and has served a wide variety of political agendas from Hayekian libertarianism⁶³ to Rawlsian social welfare liberalism⁶⁴ to Lee Kuan Yew's soft authoritarianism⁶⁵ to Jiang Zemin's statist socialism⁶⁶ to a Sharia-based Islamic state.⁶⁷ That is both its strength and its weakness. That people of vastly different political persuasions all want to take advantage of the rhetorical power of rule of law keeps it alive in public discourse,⁶⁸ but it also leads to the worry that it has become a meaningless slogan devoid of any determinative content.⁶⁹

⁶² Rule of law has its critics. Critical Legal Studies scholars (CRITS) have claimed that law is a mask for oppression and serves the interests of the ruling elite, or that the indeterminacy of law undermines the predictability and certainty promised by rule of law. Meanwhile, liberal reformers worry that in the absence of democracy and pluralistic forms of political participation, implementing rule of law will serve authoritarian ends. Other critics question whether rule of law is necessary for economic development. Some critics in Asian countries fear that implementing a liberal democratic rule of law will disrupt the existing social order and hence may be too costly. Still others see rule of law as incompatible with a modern regulatory state. There are also a number of conceptual and theoretical issues, some of which raise the fundamental issue of what is law. For a discussion of these and other critiques, see CHINA'S LONG MARCH, *supra* note 11, at 126-187; see also Randall Peerenboom, *Varieties of Rule of Law*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 2, [hereinafter Peerenboom, *Varieties of Rule of Law*] at 34-38.

⁶³ See FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944).

⁶⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

⁶⁵ Thio Li-ann, *Lex Rex or Lex Rex? Competing Conceptions of Rule of Law in Singapore*, [hereinafter Thio, *Competing Conceptions of Rule of Law*] in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 2; Kanishka Jayasuriya, *Corporatism and Judicial Independence Within Statist Legal Institutions in East Asia*, in LAW, CAPITALISM AND POWER IN ASIA: THE RULE OF LAW AND LEGAL INSTITUTIONS (Kanishka Jayasuriya ed., 1999).

⁶⁶ CHINA'S LONG MARCH, *supra* note 11.

⁶⁷ See BROWN, *supra* note 60; Abou el Fadl, *supra* note 38, at 28-34.

⁶⁸ Although rule of law is invoked everywhere nowadays, rule of law discourse is much more vibrant and hotly contested in some countries than in others. The value of even a thin rule of law is seen most clearly in countries where the fundamental principle of legality is still contested, as in Vietnam or Myanmar, or in failed states, such as Rwanda or Iraq. Thin conceptions of rule of law are most useful as a benchmark for states that are still in the process of establishing a modern, functional legal system. In such countries, much of the discussion is about which reforms are required to bring the system into compliance with the requirements of a thin theory. In more mature legal systems, the discussion is more likely to focus on thick conceptions of rule of law or, in the absence of deep conflicts about thick conceptions of rule of law, on particular issues often involving constitutional law, judicial interpretation, human rights and the separation and balance of powers. In countries where social, economic and political cleavages give rise to sharply contested political positions and in turn competing thick conceptions of rule of law such as Singapore, China, and Malaysia, much of the attention is on articulating and comparing the different conceptions, and arguing for the superiority of one over the other(s). Unfettered by the more limited conception of a thin rule of law, parties invoke rule of law in the name of widely disparate political causes.

At its most basic, rule of law refers to a system in which law is able to impose meaningful restraints on the state and individual members of the ruling elite, as captured in the rhetorically powerful if overly simplistic notions of a government of laws, the supremacy of the law and equality of all before the law. Beyond these threshold requirements, conceptions of rule of law can be divided into two general types, thin and thick. A thin conception stresses the formal or instrumental aspects of rule of law—those features that any legal system must possess to function effectively as a system of laws, regardless of whether the legal system is part of a democratic or non-democratic society, capitalist or socialist, liberal or theocratic.⁷⁰ Thus, laws must be general, public, prospective, clear, consistent, capable of being followed, stable, impartially applied and enforced.⁷¹ Moreover, laws must be reasonably acceptable to a majority of the populace or people affected (or at least the key groups affected) by the laws.⁷²

That laws be reasonably acceptable to the majority of those affected by them does not mean that the laws are necessarily “good laws” in the sense of normatively justified. The majority may very well support immoral laws. Even in countries known for rule of law, rule of law has existed side by side with great injustice, including slavery, racism, apartheid, patriarchy, colonialism, capitalist exploitation and callous disregard for the suffering of others, not to mention unspeakable cruelty to animals and environmental policies that leave future generations to clean up the mess created by today’s consumers. Because a thin rule of law is consistent with great evil, many scholars and rights activists argue that rule of law requires “good laws.” On this view, rule of law requires laws that are grounded in some normative foundation that transcends the legal system itself. In the past, divine law or natural law provided the foundation; today, the more secular ideology of democracy and human rights provides the foundation for many people. The attempt to remedy the normative shortcomings of thin theories by incorporating particular conceptions of rights and other features of political morality transforms thin conceptions of rule of law into thick ones.

Countries in the process of consolidating democracy such as the Philippines, South Korea, Taiwan, Thailand and Indonesia are all struggling with central constitutional issues involving the delineation and balancing of the powers of the various branches, as well as fundamental rights. At the same time, in most of these countries the legal system remains weak, falling short of basic thin rule of law requirements.

In politically stable democracies with well-developed legal systems, such as Japan, the U.S. or France, rule of law discourse varies. In Japan, there are many calls to radically reform the legal system, overhaul legal education, reconfigure the administrative law regime and so on. But rule of law is not often invoked. In France, rule of law discourse has centered on issues of constitutional review, and more recently the idea of a constitution for the E.U. In the U.S., parties of every political persuasion continue to invoke rule of law, notwithstanding an extensive critical literature that calls into question its meaning and value. Such extensive criticism has led to fears that the public’s faith in the legal system will be undermined. As a result, a retrenchment is taking place where rule of law is defended by making it less ambitious. See generally, Peerenboom, *Varieties of Rule of Law*, *supra* note 62.

⁶⁹ Judith Shklar, *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY?* 1 (Allan C. Hutchinson & Patrick J. Monahan eds., 1987) (rule of law “may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians”).

⁷⁰ See, e.g., Joseph Raz, *The Rule of Law and Its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (Joseph Raz ed., 1979); Robert S. Summers, *A Formal Theory of Rule of Law*, 6 *RATIO JURIS* 127 (1993).

⁷¹ This list is from LON FULLER, *THE MORALITY OF LAW* (1977). As these requirements may be partially met, legal systems may be rule of law compliant to different degrees. *Id.* at 122. Indeed, no legal system ever fully complies with the ideal. Nor would it be desirable to. For instance, some laws could not be passed without legislative compromises that deliberately paper over differences by using vague language.

⁷² For more extended discussion, including of the purposes served by thin rule of law and of the institutions required to implement it, see *CHINA’S LONG MARCH*, *supra* note 11, at 65-67.

Thick conceptions begin with the basic elements of a thin conception but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, Asian developmental state or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian, theocratic) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, "Asian values," Buddhist, Islamic, etc.).

Thus, a liberal democratic version of rule of law incorporates free market capitalism (subject to qualifications that would allow various degrees of "legitimate" government regulation of the market), multiparty democracy in which citizens may choose their representatives at all levels of government, and a liberal interpretation of human rights that generally gives priority to civil and political rights over economic, social, cultural, and collective or group rights. Liberal democratic rule of law may be further subdivided along the main political fault lines in Europe and America: a libertarian version that emphasizes liberty and property rights, a classical liberal position, a social welfare liberal version, and so on.

The wide variety of political beliefs and conceptions of a just socio-political order around the world gives rise to multiple, competing thick conceptions of rule of law. In China, for example, there is currently support for four dominant models: statist socialist, neo-authoritarian, communitarian and liberal democratic.⁷³ Statist socialists endorse a state-centered socialist rule of law defined by, *inter alia*, a non-democratic system in which the Chinese Communist Party plays a leading role; and an interpretation of rights that emphasizes stability, collective rights as well as if not over individual rights, and subsistence as the basic right rather than civil and political rights.

There is also support for various forms of rule of law that fall between the statist socialism type and the liberal democratic version. For example, there is some support for a democratic but non-liberal (New Confucian) communitarian variant built on market capitalism, perhaps with a somewhat greater degree of government intervention than in the liberal version; some genuine form of multiparty democracy in which citizens choose their representatives at all levels of government; plus an "Asian values" or communitarian interpretation of rights that attaches relatively greater weight to the interests of the majority and collective rights as opposed to the civil and political rights of individuals.⁷⁴

Another variant is a neo-authoritarian or soft authoritarian form of rule of law that, like the communitarian version, rejects a liberal interpretation of rights but, unlike its communitarian cousin, also rejects democracy. Whereas communitarians adopt a genuine multiparty democracy in which citizens choose their representatives at all levels of government, neo-authoritarians permit democracy only at lower levels of government or not at all. For instance, one prominent PRC political scientist has advocated a "consultative rule of law" that eschews democracy in favor of single party rule, albeit with a redefined role for the Party, and more extensive, but still limited, freedoms of speech, press, assembly and association.⁷⁵

⁷³ A full elaboration of these types requires a much more detailed account of the purposes or goals each type is intended to serve and institutions, practices, rules and outcomes in particular cases. *See id.* at 55-109.

⁷⁴ Supporters of communitarian versions of rule of law can also be found in Singapore, Indonesia, Malaysia, Hong Kong, Vietnam, and arguably Taiwan, Japan and South Korea as well. *See* Peerenboom, *Varieties of Rule of Law*, *supra* note 62. *See also*, VIDHU VERMA, MALAYSIA: STATE AND CIVIL SOCIETY IN TRANSITION (2002) (distinguishing between Mahathir's nationalist or statist, Asian-values perspective; a less state-oriented communitarianism that shares some of the nationalist disenchantment with Western liberalism; and an anti-liberal Islamic fundamentalism).

⁷⁵ Pan Wei, *Toward a Consultative Rule of Law Regime in China*, 12:34 J. OF CONTEMP. CHINA 3 (2003). There are also supporters of soft authoritarian variants of rule of law in Hong Kong, Singapore, Malaysia and Vietnam. *See* Peerenboom, *Varieties of Rule of Law*, *supra* note 62.

There is also support in India, Thailand, Indonesia and the Philippines for what might be called a *developmental, redistributive justice* model of rule of law. This form, with different variants in each of the countries, emerges out of a fundamental difference between these countries and economically advanced countries: the brutal reality of crushing poverty combined with severe disparities in income.⁷⁶ Observing that nearly sixty per cent of the nation's material resources are in the hands of some twenty per cent of the population in Thailand, Vitit Muntarbhorn warns that this lack of equity "has dire consequences for the Rule of Law and human rights, precisely because the inequity may breed violence, if not disrespect for the law."⁷⁷ He asks, somewhat plaintively, "How can the Rule of Law help to foster equity and social justice?"

Substantively, the developmental-redistributive model of rule of law has two main planks. The first is an international dimension that highlights the radical disparity between North and South and emphasizes the right of development, debt forgiveness and the obligation of the North/developed countries to aid the South/developing countries. The second plank is a domestic one and reflects the particular circumstances of each state, though all are united in emphasizing social and economic rights and the need to do more to protect the most vulnerable members in society.

In Thailand, concerns for redistributive social justice are found in the government's policies to achieve sustainable development, including rural development. Thus, the government has adopted a series of populist policies, including a universal health care scheme, a development fund for each village, and debt moratorium for farmers.⁷⁸ In the Philippines, one catches glimpses of the alternative redistributive conception in the way rule of law is frequently linked to social and political philosophies that promise justice, social welfare and People Power based democracy. Whereas Western countries on the whole have been reluctant to assume obligations to allocate sufficient resources to satisfy economic, social and cultural rights,⁷⁹ the 1987 Filipino constitution contained a long list of open-ended "directive principles" that reflect the tendency of the activist drafters of the Constitution to codify "new" rights to education, food, environment and health.⁸⁰

As in the Philippines, the Indian constitution codifies both civil and political rights and social and economic rights. However, whereas the former are considered fundamental and justiciable, the latter are considered progressive. Nevertheless, aggressively activist Indian courts have favored interpretations that foster social and economic rights, giving them an "indirect justiciability."⁸¹ The Indian constitution also seeks to redress historical imbalances that have led

⁷⁶ For a discussion of rule of law in Indonesia, see Tim Lindsey, *Indonesia: Devaluing Asian Values, Rewriting Rule of Law*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 2, at 386.

⁷⁷ Vitit Muntarbhorn, *Rule of Law and Aspects of Human Rights in Thailand: From Conceptualization to Implementation*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 2, at 346.

⁷⁸ *Id.*

⁷⁹ While welfare liberals in the West are also concerned about the plight of the least well off, their ability to articulate a compelling story is hampered by a strong current in liberal (and libertarian) thought from Locke to Hayek to Nozick that emphasizes property rights and the right to enjoy the fruits of one's labor, and which fosters possessive individualism and a materialistic, acquisitive capitalism. In contrast, activists in some Asian countries seeking a more egalitarian distribution of wealth may be able to draw on indigenous traditions such as the Islamic principle of *zakat* that requires one to contribute part of one's wealth to help the poor. Or they may appeal to Buddhist principles of kindness and consideration for one's neighbors to support a humane response to those in need.

⁸⁰ Raul Pangalangan, *The Philippine "People Power" Constitution, Rule of Law, and the Limits of Liberal Constitutionalism*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 2, at 371.

⁸¹ Upendra Baxi, *Rule of Law in India: Theory and Practice*, in ASIAN DISCOURSES OF RULE OF LAW, *supra* note 2, at 331.

to the subjugation of some groups, reaching beyond the state to private groups and social practices. It thus outlaws in the name of equality caste-based practices of untouchability. A system of reservations or quotas ensures some representation for disadvantaged groups including the poor. In addition, the constitution enshrines a policy of affirmative action that creates a two-track system obligating the state "to specifically reform the 'dominant'/'majoritarian' 'Hindu' religious traditions in a fast forward mode, while leaving the reform of 'minority' communitarian/religious traditions to slow motion, minuscule change."⁸² To ensure that these policies are implemented, the constitution creates a number of federal agencies to protect and promote the rights of disadvantaged minorities.

Rights activists generally prefer thick conceptions of rule of law to thin ones. In authoritarian and repressive regimes, thick theories allow reformers to discuss certain controversial political issues under the seemingly more neutral guise of a technical discussion of rule of law. For instance, in China, legal reformers have used a broad conception of rule of law as a means of discussing democracy, separation of powers and various human rights issues from free speech to arbitrary detention.⁸³ More generally, rights activists prefer thick theories because they provide rhetorical support for their particular political agenda. The unfortunate result, however, is that all too often parties appeal to rule of law, implicitly if not explicitly invoking a particular thick conception of rule of law, to criticize whatever law, practice or outcome does not coincide with their own political or normative beliefs. For example, in Singapore, where the legal system is regularly ranked as one of the world's best in terms of rule of law,⁸⁴ liberal critics of the government's communitarian policies have invoked rule of law to object to the lack of (in their view) adequate workers' rights legislation, limitations on the right of peaceful demonstration, and a regulatory framework that restricts the freedom of the local press.⁸⁵

Contrast such complaints with the following. Two government agencies issue conflicting regulations, and there is no effective legal mechanism to sort out the conflict. A suspect is entitled to a lawyer according to law, but in practice the authorities refuse to allow him to contact his lawyer. Your dispute with your insurance company regarding payment for hospital bills incurred as a result of a car accident remains pending in court after seven years due to judicial inefficiency. The rich and powerful are regularly exempted from prosecution of certain laws whereas others are prosecuted in similar circumstances.

The second set of issues invokes thin rule of law concerns. In contrast, the first set involves substantive issues that divide adherents of competing political philosophies and define different political factions. Articulating different thick conceptions makes it possible to relate political and economic problems to law, legal institutions and particular conceptions of a legal system. Moreover, by highlighting differences in viewpoints across a range of issues, thick theories bring out more clearly what is really at stake in many disputes. However, using a particular thick conception of rule of law to malign others who do not share one's political philosophy and hence thick conception of rule of law leads to the debasement of rule of law and the view that it is just a meaningless slogan devoid of content.

Proponents of thin theories protest that because thick theories are based on more comprehensive social and political philosophies, rule of law loses its distinctiveness and gets swallowed up in the larger normative merits or demerits of the particular social and political philosophy. As Joseph Raz observes, "If rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.

⁸² *Id.* at 333.

⁸³ See, CHINA'S LONG MARCH, *supra* note 11.

⁸⁴ See *infra* note 173.

⁸⁵ Thio, *Competing Conceptions of Rule of Law*, *supra* note 65.

We have no need to be converted to the rule of law just in order to believe that good should triumph. A non-democratic legal system, based on the denial of human rights, of extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."⁸⁶

Limiting the concept of rule of law to the requirements of a thin theory makes it possible to avoid getting mired in never-ending debates about the superiority of the various political theories all contending for the throne of justice. Conversely, by incorporating particular conceptions of the economy, political order or human rights into rule of law, thick conceptions decrease the likelihood that an overlapping consensus will emerge as to its meaning. Thick conceptions that require laws be good laws must specify what the good is. However, given the fact of pluralism,⁸⁷ thick conceptions must confront the issue of whose good and whose justice? Liberals, Socialists, Communitarians, Neo-authoritarians, Soft Authoritarians, New Conservatives, Old Conservatives, Buddhists, Daoists, Neo-Confucians, New Confucians and Muslims all differ in their visions of the good life and on what is considered just, and hence what rule of law requires. These categories are themselves exceedingly broad. There is considerable diversity on many issues within each one.

In short, appealing to thick conceptions of rule of law that draw on particular conceptions of the economy, political order, gender roles, social justice and human rights brings the disputes that divide the human rights community under the umbrella of rule of law. Predictably enough, nonliberals have accused proponents of a liberal democratic conception of rule of law of the same kind of ethnocentrism, arrogance and imperialism that they see in the human rights movement.⁸⁸ The tendency to equate rule of law with liberal democratic rule of law has led some commentators to portray the attempts of Western governments and international organizations such as the World Bank and IMF to promote rule of law countries as a form of economic, cultural, political and legal hegemony.⁸⁹ Critics claim that liberal democratic rule of law is excessively individualist in its orientation and privileges individual autonomy and rights over duties and obligations to others, the interests of society, social solidarity and harmony.⁹⁰ In Asia, this line of criticism tracks the heavily politicized debates about "Asian values," and whether democratic or authoritarian regimes are more likely to ensure social stability and economic growth discussed earlier. It also taps into broader post-colonial discourses and conflicts between developed and developing states, and within developing states between the haves and have-nots over issues of distributive justice.⁹¹ In Islamic countries, the debate takes the form of disputes over the role of religion, Sharia-law, the rights of women and a host of other specific rights issues.

⁸⁶ Raz, *supra* note 70, at 211.

⁸⁷ See RAWLS, *supra* note 40.

⁸⁸ See *supra* note 33-34 and *infra* notes

⁸⁹ See Rose, *supra* note 61; Barry Hager, *The Rule of Law: Defining It and Defending It in the Asian Context*, in, THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM (Mansfield Ctr. for Pac. Affairs ed., 2000), [hereinafter Mansfield Center, RULE OF LAW], available at http://www.mcpc.org/programs/rol_perspectives.htm (summarizing complaints of critics).

⁹⁰ See Takashi Oshimura, *In Defense of Asian Colors*, in, Mansfield Center, RULE OF LAW, *supra* note 89, at 141 (claiming that the individualist orientation of [liberal democratic] rule of law is at odds with Confucianism and "the communitarian philosophy in Asia"). See also, Joon-Hyung Hong, *The Rule of Law and Its Acceptance in Asia: a View From Korea*, in Mansfield Center, RULE OF LAW, *supra* note 89, at 149 (noting the need to define rule of law in a way that is acceptable to those who believe in "Asian values").

⁹¹ See Baxi, *supra* note 81, at 326-328.

The Inability of Rule of Law to Provide Effective Guidance on Specific Issues

For all of its rhetorical appeal, rule of law, whether thick or thin, cannot provide much guidance with respect to many crucial issues that affect human rights. Appeals to rule of law alone will not shed much light on such substantive issues as what is a proper time, place and manner restriction on free speech, when a particular restriction of freedom of assembly is necessary for democratic order, or whether the 9-11 attacks on the U.S. constituted a threat “to the life of the nation” under Article 4 of the ICCPR.⁹²

The minimal requirements of a thin rule of law are compatible with considerable diversity in institutions, rules and practices. For example, the way powers are distributed and balanced between the executive, legislature and judiciary varies widely in countries known for rule of law.⁹³ Constitutional review is conducted by a variety of entities that enjoy different powers.⁹⁴ The nature and degree of judicial independence, as well as the manner in which it is achieved, also vary. In some cases judges are appointed (through a variety of mechanisms) and in some cases they are elected. Nor will appeals to rule of law alone put an end to debates about what type of theory of adjudication is best - strict interpretation, purposive, or Dworkin’s make-law-the-best-it-can-be approach.⁹⁵

Institutional choices are often highly path-dependent: the initial choice of institutions and the way they operate and evolve over time is influenced to a large extent by a host of contingent, context-specific factors. Seemingly similar institutions, sometimes transplanted from one system to another, are likely to function differently from place to place. Thus, to assess the appropriateness and effectiveness of institutions requires an evaluation of their results in the particular context. For instance, all states preclude some political and administrative acts from judicial review. Such decisions often include certain decisions by police as to whom to arrest and prosecutors regarding whom to prosecute; decisions regarding national defense, war and covert operations; and some highly technical issues left to administrative agencies. Rule of law therefore cannot require that every decision be subject to judicial review or else no country’s legal system would merit the rule of law label. Nevertheless, rule of law does require some limits on discretion and arguably the ability to challenge most government decisions in some way, whether through judicial review, internal administrative mechanisms or the electoral process whereby citizens can vote governments that misuse their power out of office. But exactly what is required is far from clear.

Singapore, for instance, has a number of laws that allow for the restriction of individual liberties without judicial review. The Maintenance of Religious Harmony Act “allows the

⁹² While the U.K. declared a state of public emergency and notified the Secretary-General of the U.N. as contemplated under ICCPR article 4(3), the U.S. did not.

⁹³ TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003).

⁹⁴ *Id.*; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

⁹⁵ RONALD DWORKIN, *LAW’S EMPIRE* (1986). A more “purposive” interpretive approach is often considered to be more friendly to human rights. See also Thio Li-ann, *An ‘i’ for an ‘I’: Singapore’s Communitarian Model of Constitutional Adjudication*, 27 H.K. L.J. 152 (1997) [hereinafter Thio, *An ‘i’ for an ‘I’*] (objecting to the deferential, positivist/textualist approach of the judiciary for failing to produce a “robust constitutional jurisprudence respectful of individual rights and human dignity”). Thio’s point may be true in some countries where the laws provide for restrictions on rights or are to the disadvantage of particular groups. However, there is nothing inherent in a purposive approach that ensures outcomes consistent with the liberal preferences of rights activists. Courts could adopt a purposive approach based on conservative or religious principles that leads to outcomes not favored by liberal rights groups or the underprivileged in society.

minister to issue pre-emptive 'restraining orders' to 'gag' politicians or religionists thought to be mixing a volatile cocktail of religion and extremist politics, which could escalate racial-religious tensions."⁹⁶ The government argues that given the sensitive nature of religion in multiethnic Singapore, issues involving religious harmony are crucial for the survival of the nation, and better left to the executive than to the judiciary or the legislature. The executive's decision is subject to review by the Elected President, and advisory councils composed of bureaucrats or religious and civic leaders are sometimes consulted to further diminish the dangers of a concentration of unchecked powers in the executive's hands. Nevertheless, liberal critics contend such justifications and mechanisms are inadequate, and call for a more robust judicial review that places more emphasis on the rights of individuals to speak and practice their religion freely.⁹⁷

Cases involving the declaration of national emergency and derogation of rights raise equally difficult issues. While the danger of abuse of power is apparent, advocates of different thick conceptions are likely to disagree over when national emergencies should be declared, who has the right to declare them and what type of review, if any, there should be. In Malaysia, the King, the titular head of the executive, acts on the advice of the Cabinet in deciding whether a state of emergency exists.⁹⁸ Parliament, not the judiciary, has the power to review the decision and overturn it. In the U.S., the President has claimed broad powers for the executive in deciding how best to deal with terrorists and enemy noncombatants, much to the dismay of civil libertarians who want a greater role for the legislature and the courts in checking and reviewing executive decision-making powers.⁹⁹

Appealing to rule of law will not suffice to sort out these issues. Both sides can appeal to their own particular thick conceptions, and a thin conception does not require all important

⁹⁶ Thio, *Competing Conceptions of Rule of Law*, *supra* note 65.

⁹⁷ *Id.*; also Thio, *An 'i' for an 'I'*, *supra* note 95.

⁹⁸ H.P. Lee, *Competing conceptions of rule of law in Malaysia*, in *ASIAN DISCOURSES OF RULE OF LAW*, *supra* note 2, at 225.

⁹⁹ Laurence H. Tribe and Neal K. Katyal, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2000). *But see* Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2650 (2004) (the majority of the Court rejected "the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts ... in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."). In an interesting twist, Justice Scalia argued that absent a congressional suspension of the habeas corpus right, a U.S. citizen detained during times of war when regular courts are functioning is entitled to a criminal trial or a judicial decree for his release. Scalia however would have the Court defer to the Congress as to whether the terrorist attacks constituted or continue to constitute an "invasion", and if Congress decides a suspension is warranted, what if any due process rights a detainee might have. While a congressional suspension of the writ of habeas corpus "could, of course, lay down conditions for continued detention... there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and [the Supreme Court's] doing so." *Id.* at 2671 (Thomas, J. dissenting). Justice Thomas, who concluded that the detention was legal and that Hamdi received all the due process he was due, was equally deferential to Congress: "I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them.... The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly." *Id.* at 2674-75 (Thomas, J., dissenting). He was however even more deferential to the Executive: "the Executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the warmaking function." *Id.* at 2682.

decisions to be left ultimately to the courts or that the court adopt a particular interpretive practice. In any event, concluding that a practice or decision is consistent or inconsistent with a thin rule of law or a particular thick conception of rule of law is not the end of normative debate. Rule of law is only one of many social values, and only part of a comprehensive political philosophy. Thus, in some cases the values served by compliance with rule of law may be overridden by other important social values. This is most notable in recent discussions that the rule of law does not pertain to emergency situations.¹⁰⁰ However, it arises in many other contexts involving resistance to narrowly legal but massively unjust laws and regimes. As the heroic struggles of Muhammad Ali, Martin Luther King, Mahatma Gandhi, Nelson Mandela and countless less famous individuals show, the rule of law virtues of predictability and certainty may at times need to give way to higher moral principles and considerations of equity, justified civil disobedience or even mass illegalities and populist movements that seek to overthrow the political system.

Ritualistic invocation of rule of law then will not put an end to the conceptual and normative debates that have undermined the universality of the human rights movement. Notwithstanding debates over these deep issues, perhaps rule of law may still be useful in practice. We must therefore still consider the extent to which the renewed attention to rule of law will help address the current serious shortcomings with respect to implementation of human rights.

II. The Implementation of Human Rights and the Practical Limitations of Rule of Law: Empirical Issues

Quantitative studies have shown that the protection of rights is influenced by, among other things, and in roughly descending order of importance: economic development, with a higher level of development associated with better protection of rights; international or civil wars, with war leading to more violations of rights; political regime type, with democracies protecting rights better than authoritarian or military regimes; regional effects, with Northern Europe and North America outperforming other regions, and with “region” often serving as a proxy for religion and culture and correlated with economic development and regime type; population size, with larger populations leading to higher rates of violation; and colonial history, with British colonialism linked to better rights protection.¹⁰¹ Interestingly, ratification of treaties does not translate into better protection for human rights, and may even have a negative effect, at least in the short term.¹⁰²

¹⁰⁰ Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always Be Constitutional*, 112 YALE L.J. 1011 (2003).

¹⁰¹ See generally, Steven Poe et al., *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993*, 43 INT’L STUD. Q. 291 (1999); Linda Camp Keith, *Constitutional Provisions for Individual Human Rights (1977-1996): Are They More than Mere ‘Window Dressing?’*, 55 POL. RES. Q. 111 (2002) [hereinafter Keith, *Constitutional Provisions*]. The relative importance of the factors varies depending on the right in question. In particular, wealth is less important with respect to personal integrity rights than other rights.

¹⁰² Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941, 1978 (2002). Nevertheless, a country’s ratification of a human rights treaty generally strengthens the hand of domestic and international rights advocates and may therefore contribute to norm change over time. Thus in the long term, the human rights situation may improve.

Only recently have empirical studies begun to test the relationship between “rule of law” or other legal system features and the protection of different types of rights.¹⁰³ The neglect of law may reflect the skeptical view that human rights law in particular and international law more generally is mere window dressing. However, as the human rights movement has become more powerful, scholars have become more interested in testing the impact of law. The few studies available provide some limited general support for the thesis that rule of law and judicial independence help protect human rights.¹⁰⁴

However, the studies raise a number of concerns regarding the definition and measurement of rule of law, the range of rights tested, the ability to control for other factors and sort out direct and indirect effects, and the usefulness in identifying specific features of the legal system that are most important for rights protection. What appears to be the only study to date to test directly the relationship between “rule of law” and rights relied on a rule of law index that drew on subjective perceptions of the legal system.¹⁰⁵ The index is constructed from sixteen different sources that measure a variety of factors: trust in, and the legitimacy of, the legal system; crime, including violent crime, kidnapping of foreigners, organized crime, financial crime, money laundering, and insider trading; property rights, including the enforceability of government contracts and private contracts, the enforceability of judgments, and the protection of intellectual property rights; institutional factors such as the independence of the judiciary (influence of government, citizens and firms on the courts), an effective administrative law regime whereby parties can challenge government decisions; and the quality of the legal system, including the fairness, speediness, affordability of the judicial process, the honesty of judges and the quality of the police.

Relying on subjective responses to questionnaires by different people in different countries gives rise to concerns about consistency and ideological bias.¹⁰⁶ A more fundamental issue is whether the criteria that form the subject matter of the various surveys adequately capture rule of law. On the whole, the indicators in the World Bank index reflect many of the procedural

¹⁰³ Frank B. Cross, *The Relevance of Law in Human Rights Protection*, 19 INT'L REV. L. & ECON. 87, 93 (1999) (noting that researchers have focused on such factors as national wealth and civil unrest as keys to human rights but have largely ignored the role of law and legal institutions).

¹⁰⁴ *Id.* Linda Camp Keith, *Judicial Independence and Human Rights Protection Around the World*, 85 JUDICATURE 195, 199-200 (2002) [hereinafter Keith, *Judicial Independence*] (finding that constitutional provisions to provide judicial independence were associated with civil rights, but noting the need for further research to control for other factors known to affect rights, and to move beyond measures of formal provisions of judicial independence in constitutions to measures of actual judicial independence); Clair Apodaca, *The Rule of Law and Human Rights*, 87 JUDICATURE 292 (2004) (finding that rule of law and judicial independence were instrumental in securing both economic and physical integrity rights, although rule of law frequently gives way even in rich countries with well-developed legal systems during times of international or domestic conflict).

¹⁰⁵ Apodaca, *supra* note 104. The index is part of the World Bank's Good Governance Indicators. Daniel Kaufmann et al., *Governance Matters III: Governance Indicators for 1996-2002*, (June 2003), at <http://www.worldbank.org/wbi/governance/pdf/govmatters3.pdf>. According to the authors, the rule of law index measures the extent to which people have confidence in and abide by the rules of society, how fair and predictable the rules are, and how well property rights are protected. The indicators include perceptions of incidence of crime, the effectiveness and predictability of the judiciary, and the enforceability of contracts. Interestingly, the authors “cautiously conclude” that there is no evidence of “any significant improvement in governance worldwide, and if anything the evidence is suggestive of a deterioration, at the very least in key dimensions such as rule of law, control of corruption, political stability and government effectiveness.” *Id.* at 32.

¹⁰⁶ Kaufman et al. discuss the advantages and disadvantages of relying on subjective responses, provide an analysis of the affects of ideological bias, and test their results for consistency with various objective measures. *See id.*

and institutional aspects of a thin rule of law. To be sure, perceptions about property rights, including intellectual property rights, or the independence of the courts may be influenced by one's ideological beliefs and may be tied to political and economic beliefs that form the basis for thick conceptions of rule of law. However, the index for the most part avoids the circularity problems that would arise if one incorporated into the index democracy and particular interpretations of contested economic, political or rights issues that define thick conceptions of rule of law.

One major disadvantage with such a broad index however is that it obscures which legal system features are related to better human rights performance. The utility of such aggregate rule of law studies for policymakers is therefore limited because the studies do not shed light on the particular institutional arrangements, laws or legal practices that are necessary or beneficial for the protection of human rights.

Some studies have tried to focus on more specific issues such as particular constitutional provisions or institutions, with mixed results.¹⁰⁷ One study relying on data from just 39 countries from 1948-1982 found that the constitutional guarantee of freedom of the press and provisions regarding a state of emergency were associated with less censorship and restrictions on civil and political rights, while a constitutional restriction on free press produced the opposite result.¹⁰⁸ However, a larger study found that constitutional guarantees of speech, assembly, association, religion and the press as well as of the right to strike were not associated with better protection of personal integrity rights, although a constitutional protection of freedom of the press was associated with fewer violations during times of civil war. Surprisingly, a ban on torture and the provision of a habeas corpus right were statistically significant *but associated with more violations*. In contrast, provisions for public and fair trials were statistically significant and associated with fewer violations.¹⁰⁹ However, public and fair trials were not nearly as important as the impact of a large population, domestic and international war or democracy.

A third study sheds some light on these apparent inconsistencies by distinguishing between levels of threat. The study found that at low political threat levels, constitutional provisions regulating the declaration of a state of emergency and derogation of civil and political rights had no effect. However, at mid to high levels, such provisions may actually be harmful because they provide the regime with a legitimate basis for declaring an emergency and derogating from rights. On the other hand, such prohibitions are likely to lead to fewer violations during extreme cases of civil war.¹¹⁰

Still another study adopted a more institutional approach, testing the affects of codification of a right in the constitution, judicial independence, federalism, separation of powers and the relative number of lawyers on the protection of political rights and the right against search and seizure.¹¹¹ The study found that judicial independence is significant with respect to the

¹⁰⁷ Early studies either found little correlation between constitutional provisions or reached the counter-intuitive result that more constitutional protections were associated with more rights violations. Keith, *Constitutional Provisions*, *supra* note 101, at 115-116 (summarizing results of previous studies).

¹⁰⁸ Christian A. Davenport, 'Constitutional Promises' and Repressive Reality: A Cross-National Time-Series Investigation of Why Political and Civil Liberties Are Suppressed, 58 J. Pol. 627 (1996).

¹⁰⁹ Keith, *Constitutional Provisions*, *supra* note 101.

¹¹⁰ Linda Camp Keith & Steven Poe, Personal Integrity Abuse during Domestic Crises, paper presented at Annual Meeting of the American Political Science Association, Boston, August 29-September 1, 2002, at <http://apsaproceedings.cup.org/Site/papers/046/046004PoeSteven0.pdf>.

¹¹¹ Cross, *supra* note 103. Cross' study is limited to a small number of countries and relies on subjective measures of judicial independence and search and seizure from Humana. See Keith, *Constitutional Provisions*, *supra* note 101, at 116.

protection of political rights and search and seizure even after controlling for wealth and other factors. The number of lawyers was significantly associated with greater protection of political rights, though not significant with respect to protection against search and seizure. However, federalism, separation of powers and constitutional provisions on search and seizure were not significant.

While the attempt to disaggregate rule of law to test which elements are most important in what circumstances to the protection of which rights is a worthwhile endeavor, the approach is likely to produce weak and inconsistent results because of the wide variation among countries on key legal institutions and practices such as separation of powers, constitutional review, judicial review of executive power, judicial independence, the way judges are appointed, the tenure and qualifications of judges, and so on.¹¹² A cursory glance around the globe is sufficient to demonstrate that countries known for rule of law differ dramatically in each of these areas, and that what works in one place may not work in another.

Another problem with most of the legal system studies so far is that they have focused on physical integrity rights or relatively easy to monitor rights such as search and seizure. However, the relationship between rule of law and other "rights" is likely to be more difficult to measure and to explain. Cultural rights such as the right of minority groups to use their own language or affirmative action policies for members of particular groups are difficult to quantify. The theoretical link between rule of law and such rights is also murky. For example, whether a country should set aside a quota of commercial contracts or seats in parliament for a particular minority group is heavily dependent on the particular circumstances of the country.¹¹³ Appeal to thin rule of law principles will rarely if ever be determinative.

Economic and social rights are generally not justiciable or are only partially justiciable in most countries. To be sure, governments might provide a variety of welfare benefits, including food and shelter, medical care and access to education. But citizens generally do not have the right to sue the government for such benefits in court.¹¹⁴ It is possible that an equity-minded judiciary might help alleviate extreme poverty and promote social justice by overturning unjust laws that favor the rich or that impose undue hardships on the poor. Thin rule of law principles however would require in most cases that judges apply the laws passed by the legislature and set out in the constitution, even if the judges themselves believe the laws are inequitable. Arguments about how activist the judiciary should be and the proper method and principles of constitutional

¹¹² See, e.g., Keith, *Judicial Independence*, *supra* note 104, at 199-200. Keith found that provisions for guaranteed terms for judges, "separation of powers," bans on military courts and other exceptional courts, and fiscal autonomy were associated with better protection of civil rights, although a provision for exclusive authority of the courts to determine their own competence, a provision enabling courts to issue final decisions not subject to review other than by appeal in accordance with law, and a provision enumerating qualifications to be a judge were not significant. The various factors were coded on a scale of 0-2. However, many of the variables are vague or subject to wide variation in different systems. Consider the wide range of differences with respect to the key issue of separation of powers. Similarly, guaranteed terms of office encompass systems that provide life tenure and systems where judges are employed for a period of years, with the number of years varying from country to country.

¹¹³ See Peerenboom, *Show Me the Money*, *supra* note 44.

¹¹⁴ But see Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEXAS INT'L. L.J. 763 (discussing a limited range of cases in which South Africa courts have given effect to constitutional provisions regarding social and economic rights). For a discussion of the social and economic rights in Asia, see THE RIGHTS OF ASIANS TODAY: A COMPARATIVE LEGAL STUDY OF HUMAN RIGHTS IN TWELVE ASIAN COUNTRIES, THE U.S. AND FRANCE (Randall Peerenboom et al. eds., forthcoming 2005).

interpretation cannot be settled by appealing to the requirements of a thin rule of law alone, and will turn in part on one's belief about judicial competence.¹¹⁵

Quantitative studies have yet to make much headway in the complicated task of sorting out the direct and indirect effects of rule of law on law. Rule of law and economic development are closely related,¹¹⁶ as are economic development and human rights performance.¹¹⁷ Indeed, as the following chart graphically depicts, wealth is highly correlated with social and economic rights ($r=.92$),¹¹⁸ women's rights as measured by the Gender Developmental Index ($r=.93$),¹¹⁹ good governance indicators such as government effectiveness ($r=.77$),¹²⁰ rule of law ($r=.82$), and control of corruption ($r=.76$),¹²¹ civil and political rights ($r=.62$),¹²² and even physical integrity rights though to a lower degree ($r=-.40$). As countries become wealthier, they generally protect all rights better. Thus, to compare the performance of a high income country such as the U.S. to a lower middle income country such as China or a low income country such as Sudan makes about as much sense as comparing a piano to a duck.

¹¹⁵ Attempts by activist judiciaries to address social inequities by interpreting economic rights provisions broadly have led to complaints that rule of law is being undermined in India and the Philippines. While such disputes also occur in the context of interpreting broad clauses regarding civil and political rights, they often give rise to additional concerns about judicial competence in that they involve resource allocation decisions arguably best left to the legislature and executive branches. See Pangalangan, *supra* note 80; Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 498 (1989).

¹¹⁶ See *infra* Table 2. Apodaca, *supra* note 104 (even after excluding Western nations and limiting the study to 154 developing and transitional countries, Apodaca found that GDP and rule of law were so closely correlated ($r=.81$) that that she was forced to drop GDP per capita from the model).

¹¹⁷ William H. Meyer, *Human Rights and MNCs: Theory Versus Quantitative Analysis*, 18 Hum. Rts. Q. 368 (1996) (GNP biggest contributor to civil, political, social and economic rights); GEERT HOFSTEDE, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* 248, 251 (2nd ed. 2001) (wealth was the main factor affecting rights compliance, although individualism mattered in rich countries); Neil J. Mitchell and James M. McCormick, *Economic and Political Explanations of Human Rights Violations*, 40 WORLD POL. 476, 497 (1988) (higher levels of economic wellbeing associated with better physical integrity rights records); Steven C. Poe et al., *The Abuse of Personal Integrity in the Eighties: Regional Perspectives*, (presented to the Annual Meeting of the Midwest Political Science Association, Chicago, April 14, 1994) (same); Steven Poe et al., *Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976-1993*, 43 INT'L STUD. Q. 291, 310 (1999) (same); Clair Apodaca, *Measuring Women's Economic and Social Rights Achievement*, 20 HUM. RTS. Q. 139 (1998) (higher GDP associated with better performance on women's rights); Peerenboom, *Show Me the Money*, *supra* note 44.

¹¹⁸ The table is based on UNDP rankings for social and economic rights in 2002 as measured by the Human Development Index. The HDI measures the average achievement in a country in three basic dimensions: a long and healthy life based on life expectancy at birth; education and knowledge measured by adult literacy and combined primary, second and tertiary enrollments; and a decent standard of living as measured by GDP per capita (\$PPP).

¹¹⁹ The UNDP's Gender Development Index (GDI) index is also highly correlated with the HDI index ($r=.999$), suggesting that they capture largely the same phenomena. Accordingly, I have not produced a separate scatterplot for GDI as the graph is virtually identical to the HDI graph.

¹²⁰ "Government effectiveness" measures the provision of public services, the quality of the bureaucracy, the competence and independence of civil servants and the credibility of the government's policy commitments. Kaufmann et al., *supra* note 105.

¹²¹ "Control of corruption" measures perceptions of corruption, the effects of corruption on business, and "grand corruption" in the political arena. Kaufmann et al., *supra* note 105.

¹²² Voice and accountability incorporates a number of indicators measuring various aspects of the political process, civil liberties and political rights, including the right to participate in the selection of government and the independence of the media. See Kaufmann et al., *supra* note 105.

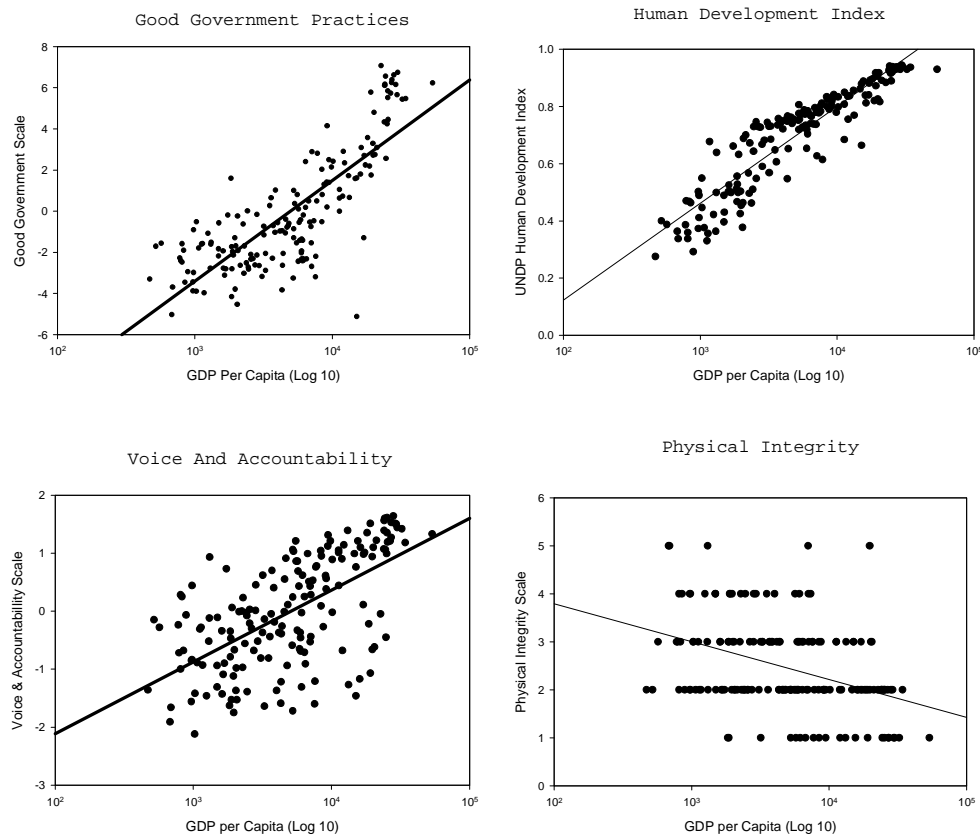
Table 1. Wealth Effect (GDP) on Rights Performance

Table 2. Correlation of Wealth and Measures of Development¹²³

Measure	Region								
	All	Africa	Asia	Australia and Pacific	Caribbean	Former Soviet Influence	Latin America	Middle East	Western Europe
Human development index (HDI) 2001	0.92**	0.88**	0.93**	0.97**	0.86**	0.97**	0.88**	0.93**	0.94**
Gender-related development index (GDI) 2001	0.93**	0.87**	0.92**	0.98*	0.89*	0.97**	0.90**	0.92**	0.83**
Rule of Law	0.82**	0.58**	0.91**	0.95**	0.90**	0.81**	0.64**	0.89**	0.92**
Government Effectiveness	0.77**	0.49**	0.90**	0.98**	0.92**	0.85**	0.69**	0.78**	0.91**
Control of Corruption	0.76**	0.55**	0.88**	0.96**	0.81**	0.83**	0.67**	0.77**	0.86**
Voice and Accountability	0.62**	0.29	0.50*	0.94**	0.75*	0.73**	0.34	0.18	0.85**
PTS 2002 (AI & State)	-	0.40**	-0.22	-0.42	-0.71*	-0.21	0.10	-0.25	-0.48*
N	174	41	19	6	10	20	20	15	23

Cell entries are Pearson's R coefficients. Dependent variable is natural log of GDP per capita
 *p < .05, **p < .01

The high correlation between wealth and rule of law, and between wealth and virtually every type of right and indicator of wellbeing, suggests that wealth rather than rule of law is the more important factor in rights performance. While this has yet to be demonstrated statistically, it makes intuitive sense in that it is much easier to come up with plausible explanations of how wealth leads to better rights performance than it is to explain how rule of law leads to better rights protection, particularly for non-justiciable social and economic rights. Wealthier countries can afford better medical care, better education, and better sanitation systems. Affluence reduces the intensity of distributional conflicts by increasing the resources available for redistribution and decreasing the number of people at or below the poverty line. Development increases the ranks

¹²³ Table 10.1 illustrates the relationship between per capita GDP and various measures of development, across all countries and within regions. Across all countries the relationship is highly significant ($p < .01$), but the strength of the correlation varies. The UNDP Human Development Index (HDI) is correlated strongly with per capita GDP ($r = .92$), but physical integrity (PTS) bears a relatively weak correlation ($r = -.40$). If we square these coefficients to compute r-square (as in regression), we can say that per capita GDP explains 85% of the variance in HDI across countries, but only 16% of the variance in physical integrity. The same calculation can be made for the other measures of development, which are ranked in declining order for all countries. Analysis of these variables within regions indicates variation in the relationship between wealth and development, but the same pattern is still largely evident. Where no relationship exists (e.g., Voice and Accountability in the Middle East) it is due to the lack of variance within the region.

of middle class who seek to protect their growing property rights through political channels, including the electoral process, thus leading to stronger civil and political rights. Citizens of rich states are less likely to take to the streets to protest government policies, thus decreasing the threat to governments that result in physical integrity violations or curtailments of civil and political liberties.

However, even assuming wealth is the more important factor in explaining rights performance, rule of law may have some independent direct positive affect as well.¹²⁴ Moreover, because rule of law appears necessary though not sufficient for sustainable growth, efforts should also be made to promote rule of law as an indirect way of improving rights protection.

To be sure, wealth is not the only factor that affects rights performance or even the most determinative factor for all rights in all cases. The relationship between personal integrity rights and GDP is weaker than for other rights because of continued police violence and other acts classified as torture even in rich countries, and because rich countries also react to war, terrorism and political stability by limiting civil and political rights and detaining and interrogating suspects in ways that are considered arbitrary detention or torture under international human rights standards (or at least may be so perceived by survey respondents). Moreover, some countries exceed expectations relative to their income level while others fall far short.¹²⁵ Distribution of wealth also matters: some countries are more egalitarian than others, with serious consequences especially for the most vulnerable in society.¹²⁶ There is also some regional variation, particularly on voice and accountability, reflecting different political regimes and value structures, and in physical integrity rights, reflecting more wars and political instability in some regions.¹²⁷ The rights performance of reasonably wealthy countries may deteriorate rapidly because of war, economic stagnation, natural disasters or problems like HIV/AIDS.

Despite such qualifications, while money may not be able to buy happiness, it does seem to buy a longer life, better education, more health care, better governance, more gender equality and even more civil and political rights.

III. Rule of Law, Economic Growth and Human Rights: The Limits of Altruism and Other Obstacles

¹²⁴ Apodaca, *supra* note 104 (finding that rule of law has a direct statistically significant effect on infant mortality rates). *See also*, Kaufmann et al., *supra* note 105 (suggesting a causal link between the rule of law and infant mortality rates).

¹²⁵ United Nations Development Programme, HUMAN DEVELOPMENT REPORT 2000: HUMAN RIGHTS AND HUMAN DEVELOPMENT, available at http://hdr.undp.org/reports/global/2000/en/pdf/hdr_2000_back1.pdf (of 174 countries in the UNDP study, 97 scored higher on the Human Development Index than their GDP ranking, while 69 scored lower).

¹²⁶ Inequality has led to violent uprisings and undermined rule of law and democratic regimes in Latin America. *See* Juan Forero, *Latin America Graft and Poverty Trying Patience With Democracy*, N.Y. Times, June 24, 2004, at A1, available at <http://www.nytimes.com/2004/06/24/international/americas/24PERU.html?ex=1089065297&ei=1&en=7f452d7bbb6ecb14>.

¹²⁷ *See* Table 1.1. David Reilly, Diffusing Human Rights, paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, August 28-31, 2003, at <http://archive.allacademic.com/publication/browse.php?PHPSESSID=9d439a2eca932ca51d8ac1576440c90c>. All references to APSA papers for 2003 are available at this cite, hereinafter APSA 2003. *See also* Apodaca, *supra* note 117 (finding that regional coefficients play a larger role than GNP in the achievement of women's economic and social rights, although the regional identification of Asian and African explains less variation than the Middle East regional designation; and noting that various literatures suggest that the explanation lies in "culturally specific attitudes towards women's status, developed under differing historical and economic conditions.")

One of the main motivating forces behind the turn toward rule of law has been the belief that legal reforms are necessary for economic development. A 1997 World Bank report, for instance, claimed that "countries with stable government, predictable methods of changing laws, secure property rights, and a strong judiciary saw higher investment and growth than countries lacking these institutions."¹²⁸

Notwithstanding theoretical arguments for and against the claim that rule of law contributes to economic development,¹²⁹ the empirical evidence is surprisingly consistent and supportive of the claim that implementation of rule of law is necessary though by no means sufficient for sustained economic development. A number of long-term, multiple-country empirical studies have shown rule of law to be positively correlated with growth. Robert Barro analyzed data from 85 countries for the periods 1965-75, 1975-85 and 1985-90.¹³⁰ He tested the impact of a number of independent variables, including rule of law.¹³¹ His rule of law index was based on International Country Risk Guide (ICRG) survey data compiled from the subjective responses of businesspersons regarding law and order. The law subcomponent assesses the strength and impartiality of the legality system and the order subcomponent assesses the popular observance of law. Higher scores indicate sound political institutions, a strong court system, and provisions for an orderly succession of power. Lower scores indicate a tradition of dependence on physical force or illegal means to settle claims. Barro's regression analysis found that an improvement in one rank in the 0 to 6 rule of law index raised growth rates by 0.5%.¹³²

Other studies have found that clear and enforceable property rights are positively correlated with growth.¹³³ Knack and Keefer relied on both the ICRG and the Business Environmental Risk Intelligence (BERI) surveys. The BERI survey does not directly ask about rule of law but includes questions about contract enforceability, the likelihood of nationalization, infrastructure and bureaucratic delays. Knack and Keefer conclude that institutions that protect property rights are crucial to economic growth and investment and the effect of such institutions continues to exist even after controlling for investment.

In a somewhat broader study, Clague, Knack, Keefer and Olson tested growth rates against the BERI standards; the contract-intensive money ratio (CIM), which is the ratio of non-currency money to total money supply;¹³⁴ and the aggregate ICRG index, which is a composite of the indexes for the quality of the bureaucracy, corruption in government, rule of law,

¹²⁸ THE WORLD BANK, ENTERING THE 21ST CENTURY: WORLD DEVELOPMENT REPORT 1999/200023 (1999), (citing THE WORLD BANK, THE STATE IN A CHANGING WORLD: WORLD DEVELOPMENT REPORT 1997 (1997)).

¹²⁹ I summarize the main theoretical arguments for the relationship between rule of law and economic development as well as the critiques elsewhere and will not repeat them here. See CHINA'S LONG MARCH, *supra* note 11, at 451-458.

¹³⁰ Robert Barro, *Democracy: A Recipe for Growth?*, in CURRENT ISSUES IN ECONOMIC DEVELOPMENT: AN ASIAN PERSPECTIVE (M.G. Quibria & J. Malcolm Dowling eds., 1996).

¹³¹ Other variables included were GDP, the rate of male higher and secondary schooling, life expectancy, the fertility rate, the government consumption ratio, a democracy index, the inflation rate and the growth rate in the ratio of export to import prices. The rule of law index was for data from the early 1980s.

¹³² ROBERT BARRO, DETERMINANTS OF ECONOMIC GROWTH: A CROSS-COUNTRY EMPIRICAL STUDY 28 (1997).

¹³³ Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995).

¹³⁴ The idea is that in societies where property rights are secure and contracts can be reliably enforced, parties have little reason to use cash for large transactions or to maintain large cash holdings. C.P. Clague et al. *Institutions and Economic Performance: Property Rights and Contract Enforcement*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS-DEVELOPED AND POST-SOCIALIST COUNTRIES 70, 76 (C. P. Clague ed., 1997).

expropriation risk, and the risk of government repudiation of contracts. Higher ICRG, CIM and BERI scores were associated with higher annual per capita growth rates, even in less developed countries.¹³⁵

Another study based on the ICRG showed that rule of law is an important factor in determining the size of capital markets (both debt and equity) and that improvements in rule of law are associated with more domestically listed firms and initial public offerings per capita, a greater ratio of private sector debt to GNP, and a higher amount of outsider participation in a country's capital markets.¹³⁶ In a similar vein, Ross Levine found that countries that give a high priority to creditors receiving the full present value of their claims in bankruptcy or corporate reorganizations and in which the legal system effectively enforces contracts generally have more developed financial intermediaries and higher growth rates.¹³⁷ Moving a country from the lowest quartile of countries with respect to the legal protection of creditors to the next quartile translates into a 29% rise in financial development, which increases growth by almost one percentage point a year.

Still another study of seventy countries found that the "efficiency and integrity of the legal environment as it affects business, particularly foreign firms" was positively and significantly correlated with economic growth, even controlling for GDP per capita. It also found that, contrary to the speculations of some theoreticians that corruption might increase economic growth, corruption lowers private investment, thereby reducing growth rates.¹³⁸

Country and regional studies add further support. In Russia, privatization in the absence of rule of law led to widespread looting and diversion of state assets into private hands.¹³⁹ In retrospect it is clear that Russian institutions were insufficiently developed to carry out massive privatization and ensure the smooth operation of capital markets. Economic reforms were undermined not only by weak courts but by weak supporting institutions. Russia's credit rating services, securities regulators, accountants and legal profession were simply not up to the demands of a modern economy.¹⁴⁰

Asia is often considered to be an exception to the general rule requiring rule of law for sustained economic growth. However, the role of law in economic development in Asia is often

¹³⁵ Id. at 80 (arguing that secure property rights and effective contract enforcement mechanisms are not in themselves inequalitarian institutions but rather have powerful equality-promoting effects).

¹³⁶ RAFAEL LA PORTA ET AL., LEGAL DETERMINANTS OF EXTERNAL FINANCE (Nat'l Bureau of Econ. Research, Working Paper No. 5879, 1997); Asli Demirguc-Kunt & Vojislav Maksimovic, *Law, Finance and Firm Growth*, 53 J. OF FIN. 2107 (1998). (companies are more likely to fund growth through external financing in countries that score high on the ICRG index for Law and Order). See also, Robert Ahdieh, *Making Markets: Network Effects and the Role of Law in the Creation of Strong Securities Markets*, 76 S. CAL. L. REV. 277 (2003).

¹³⁷ Ross Levine, *Law, Finance and Economic Growth*, 8 J. OF F. INTERMEDIATION 8, 36 (1999).

¹³⁸ Paulo Mauro, *Corruption and Growth*, 110 Q. J. OF ECON. 681 (1995). A World Bank Study of 4000 businesspersons in 69 countries supports the Mauro study's conclusion that corruption inhibits investment and thus leads to lower growth rates. Corruption was cited as one of the three most important obstacles to growth in less developed countries though not in Asian countries and one other region dominated by transition economies. See Brunetti, AYO, GREGORY KISUNKO, & BÉATRICE WEDER, *HOW BUSINESSES SEE GOVERNMENT* (IFC, Discussion Paper No. 33, 1998).

¹³⁹ Jeffrey Sachs & Katharina Pistor, *Introduction: Progress, Pitfalls, Scenarios and Lost Opportunities* to THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA (Jeffrey Sachs & Katharina Pistor eds., West View Press 1997).

¹⁴⁰ Cheryl Gray & Kathryn Hendley, *Developing Commercial Law in Transition Economies: Examples from Hungary and Russia* in THE RULE OF LAW AND ECONOMIC REFORM IN RUSSIA (Jeffrey Sachs & Katharina Pistor eds., 1997).

underestimated because of the tendency to elide rule of law with democracy and a liberal version of rights that emphasizes civil and political rights.¹⁴¹ Although the political regimes may not have been democratic and the legal systems may not have provided much protection for civil and political rights in some cases, the Asian countries that experienced economic growth generally scored high with respect to the legal protection of economic interests. A survey of economic freedoms in 102 countries between 1993 and 1995 found that seven of the top twenty countries were in Asia.¹⁴² Economic freedoms include protection of the value of money, free exchange of property, a fair judiciary, few trade restrictions, labor market freedoms and freedom from economic coercion by political opponents. Six states — Japan, South Korea, Taiwan, Hong Kong, Singapore and China— experienced sustained growth over 5% for the period from 1965 until 1995.¹⁴³ The legal systems of these countries measure up favorably in terms of economic freedoms and rule of law, with the possible exception of China. However, even in China, the legal system has improved significantly in the last twenty-five years, particularly in the commercial area, to where it now ranks in the 51st percentile of law legal systems.¹⁴⁴ In contrast, the legal systems of most of the low growth countries are among the weakest in the region. The following table presents a percentile ranking of Asia legal system based on the World Bank's rule of law index discussed above for the years 1996 and 2002.¹⁴⁵ Countries with better legal systems tend to have higher growth. As noted in Table 2, the relationship between GDP and rule of law is strong in the Asian region ($r=.91$), compared to $r=.81$ for all countries.

Table 3. World Bank Rule of Law Rankings

County	2002	1996
Singapore	93.9	99.4
Japan	88.7	88.0
Hong Kong	86.6	90.4
Taiwan	80.9	84.3
South Korea	77.8	81.9
Malaysia	69.6	82.5
Mongolia	64.9	70.5
Thailand	62.9	71.1
China	51.5	37.3
Vietnam	44.8	34.9
Philippines	38.1	54.8
Indonesia	23.1	39.8
Cambodia	20.1	16.9
North Korea	14.7	13.9

¹⁴¹ For the argument that law played a greater role than normally suggested, see KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-1995* (1999).

¹⁴² Henry Rowen, *The Political and Social Foundations of the Rise of East Asia*, in *BEHIND EAST ASIAN GROWTH: THE POLITICAL AND SOCIAL FOUNDATIONS OF PROSPERITY* (Henry Rowen ed., 1998).

¹⁴³ *Id.* Thailand, Malaysia and Indonesia grew more slowly, at around 3.5% per year. Seven countries, including North Korea, Mongolia, Vietnam, Cambodia, Laos, Philippines and Myanmar, averaged less than 2% growth.

¹⁴⁴ For a more thorough discussion of the role of the legal system in China's economic development, see China's Long March, *supra* note 11, at 462-498. As the chart indicates, in 2002 China's legal system ranked in the 51st percentile on the World Bank's rule of law index, having risen from the 37th percentile in 1996.

¹⁴⁵ See Daniel Kaufman et al., *supra* note 105.

Laos	12.9	4.8
Myanmar	2.1	5.4

Despite such consistent and seemingly overwhelming evidence, there are still good reasons to be cautious in reaching broad conclusions about the relationship between rule of law and economic growth,¹⁴⁶ and between economic growth and better protection of human rights. As discussed above, defining and measuring rule of law remains an issue. Several of the empirical studies relied on subjective measures from two sources, the ICRG and BERI surveys. Significantly, most studies to date do not purport to show that rule of law *causes* development, only that rule of law is positively correlated with economic development.¹⁴⁷

Although in general a legal system that complies with the requirements of a thin rule of law appears to be necessary to sustain long-term economic growth, rule of law may not be necessary or as significant where a country is very poor and the economy is largely rural-based. A formal legal system that meets the standards of rule of law is costly to establish and operate. In some cases, norms of generalized morality, social trust, self-enforcing market mechanisms and informal substitutes for formal law may provide the necessary predictability and certainty required by economic actors for a fraction of the cost.

Formal and informal law, public ordering and private ordering are complementary in many ways. Family businesses, networks of personal relationships, private orderings exist in all legal systems, although the cultural, economic, political and economic context may vary from one country to the next, leading to differences in the degree of importance or variations in particular practices.¹⁴⁸ Since they are not perfect substitutes, each can support and help overcome the weaknesses of the other. In general however, relationships and social networks, clientelism, corporatism and informal mechanisms for resolving disputes, raising capital and securing contracts are at best imperfect substitutes that themselves often depend on formal legal institutions that meet the standards of a thin rule of law. Moreover, although these mechanisms are to some extent compatible with rule of law, some are also incompatible in certain ways with rule of law. In addition, once a country reaches a certain level of economic development, the

¹⁴⁶ Notwithstanding the clear correlation between wealth and good governance, at least one study has found that cultural values are more predictive of rule of law, accountability and controls on corruption than GDP. Amir Licht, Chanan Goldschmidt, and Shalom Schwartz, *Culture Rules: The Foundations of Rule of Law and Other Norms of Governance* (draft on file with author June 9, 2002). The study found that countries that emphasized autonomy and egalitarianism had higher levels of rule of law, accountability and less corruption, whereas countries that emphasized embeddedness and hierarchy had a lower level of rule of law, accountability, and worse corruption. In short, English-speaking and Western Europe scored significantly higher than other regions. The authors suggest that cultural orientation in East Asia may make it more difficult to implement rule of law, restrict corruption and increase accountability or that "good governance" in Asia may differ in some respects from "good governance" in Western liberal democracies. Good governance in Asian countries no doubt differs in significant respects from good governance in rich, liberal democratic Western countries once one examines in more detail the broad variables of rule of law, accountability and corruption. Nevertheless, Asian states have outperformed other regions in terms of rule of law on the same World Bank good governance scales used by the Licht et al., suggesting that culture may not be as important at least in Asia as the authors suggest. More generally, the study suffers from a relatively small number of countries (N=45 to 53), the dubious reliance on urban school teachers and IBM employees as the source of cultural values for the nation, and dated data, with some of the data from 1968 to 1972 and the rest from 1993 to 1998.

¹⁴⁷ But see Ross Levine, *supra* note 137.

¹⁴⁸ See Randall Peerenboom, *Social Networks, Rule of Law and Economic Growth in China: The Elusive Pursuit of the Right Combination of Public and Private Ordering*, 31:2 Global Econ. Rev. 1, 1-20 (2002).

costs of a formal legal system are easier to bear. Indeed, as we have seen, the rule of law is closely correlated with GDP.

Rule of law is therefore to some extent a function of demand. Economic reforms and development enhance the demand for rule of law, while legal reforms and rule of law contribute to economic development. There is both a push and a pull aspect to the process.

Demand, however, will vary in a society. Most segments of society will benefit directly or indirectly from rule of law, both in economic and non-economic issues. However, some groups, companies or individuals—particularly those that rely on government connections—will be worse off if rule of law is implemented, and may oppose reforms.

One reason citizens who are not involved in complex economic transactions will benefit from efforts to establish rule of law for commercial purposes is that development of commercial law is likely to have important spillover effects into non-commercial areas. Improving commercial law requires institution-building. A more independent and competent judiciary, a more highly trained legal profession, and a more disciplined administration are of benefit to all. Further, institutional development is self-reinforcing. The successful resolution of cases, whether commercial or not, demonstrates the improvements in the legal system, resulting in increased trust in the judiciary and greater demand for the courts to resolve all manner of disputes.

Of course, implementing rule of law and achieving economic growth are complicated tasks. Even those at the center of the so-called new law and development movement acknowledge the persistent difficulty in operationalizing the relation between law and development, and the inability to specify with any reasonable degree of certainty precisely what is required for economic development.¹⁴⁹ Chastened by fifty years of failed predictions by leading development pundits and international organizations, the World Bank unveiled a Comprehensive Development Framework that declares that everything matters: economic policies; political and legal institutions, including rule of law, property rights regimes and security market regulatory mechanisms; human resources; physical resources; geography; and culture. The Bank is also careful to point out that this holistic approach is difficult to operationalize and meant as a pragmatic guideline rather than a detailed blueprint. Hedging its bets still further, the Bank takes pains to add that the "mixed record of development programs in the past suggests the need for both caution in application and realism about expected results."¹⁵⁰

Nevertheless, these difficulties should not blind us to some important lessons that can be drawn from the experiments in stimulating economic growth during the last several decades. Not surprisingly, economic growth requires good economic policies, including sound macroeconomic policies that keep inflation down and avoid recessions, as well as policies that encourage high savings, provide strong returns to investment, reduce corruption, increase competition, and promote education.¹⁵¹ The free flow of information, capital and technology are also important. Political processes that are open, participatory and inclusive are beneficial, as demonstrated by the Asian financial crisis, the looting of state-owned assets in Russia, the problems with crony capitalism in Indonesia, and the difficulties in achieving equitable growth in South American countries. Efficient markets depend on a variety of institutions and professions to disseminate information and reduce the costs of doing business and the likelihood of ending up in disputes. A professional corps of accountants, appraisers, credit rating services, securities companies and regulatory systems are all needed. As the empirical studies show, a legal system capable of enforcing contracts, maintaining competition, upholding property rights and protecting investors

¹⁴⁹ On the old and new law and development movements, see China's Long March, *supra* note 11, at 148-153.

¹⁵⁰ The World Bank, *supra* note at 21.

¹⁵¹ *Id.* at 17.

against excessively predatory governments is also useful. Social capital is also important, including informal mechanisms for resolving disputes as well as cultural norms that allow cooperation and encourage trust, and thus reduce transactions costs. As with rule of law, however, economic reforms are path-dependent and interdependent. Even well-intentioned government leaders will not always be able to translate these broad principles into a coherent reform plan that is feasible given the local conditions and circumstances.¹⁵²

While international efforts to stimulate growth through the export of neoliberal policies have been successful in some cases, we must face the unpleasant reality that there remains a wide gap between rich and poor countries, with devastating consequences for the rights and wellbeing of billions of people in poor countries. Every year, more than 10 million children die of preventable diseases, some 30,000 a day.¹⁵³ In some countries, one-third of children will not live to the age of five.¹⁵⁴ Fifty-four countries were poorer in 2000 than in 1990; in twenty-one countries, human development levels decreased, in thirty-four, life expectancy declined, and in twelve, primary school enrollment dropped in the last decade.¹⁵⁵ Excluding China, the number of poor people actually increased by 28 million in the 1990s.¹⁵⁶ Although measures of global income equality raise a number of contentious issues, there is a general consensus that the difference between rich and poor countries is so grotesque as to shock the conscience: global income inequality is greater than the gap between rich and poor even in the most inegalitarian countries.¹⁵⁷ The income of the richest 1% of the people is greater than the income of 57% of the rest of the people in the world, while the income of the 25 million richest Americans exceeds that of two billion people.¹⁵⁸ Despite such gross inequality, aid from developed countries actually fell in the 1990s. Even with pledges to increase aid by \$16 billion by 1990, aid from the 22 members of the OECD will account for only 0.26% of their gross national income.¹⁵⁹ Yet agricultural subsidies in rich countries amount to more than \$300 billion, some six times the total amount of official developmental assistance.¹⁶⁰

Many failed states, racked by poverty, war and oftentimes poor governance, are simply incapable of implementing rule of law or following sound economic policies. But even functional developing states continue to be frustrated by the lack of concrete efforts to breathe life into the right to development, and the structural impediments to growth in the current international economic order. Economic growth, rule of law and better protection of rights across the board will be difficult to achieve without greater redistribution of assets, a reduction in agricultural

¹⁵² See DANI RODRIK, GROWTH STRATEGIES (Nat'l Bureau of Econ. Research, Working Paper No. 10050, 2003) (noting that although the general principles are relatively clear - market reforms, sound monetary policies, fiscal solvency, enforceable property rights - the wide institutional variation in achieving them limits policy guidance because policymakers cannot be sure what specifically to do in any given context).

¹⁵³ UNDP HUMAN DEVELOPMENT REPORT 2003, MILLENNIUM GOALS: A COMPACT AMONG NATIONS TO END HUMAN POVERTY 8, available at http://www.undp.org/hdr2003/pdf/hdr03_overview.pdf.

¹⁵⁴ *Id.* at 44.

¹⁵⁵ *Id.* at 1.

¹⁵⁶ *Id.* at 5. Overall, however, the number of people living on less than \$1 per day dropped by at least 200 million to 1.2 billion in 1998, mainly because China was successful at lifting 150 million people out of poverty between 1990 and 1999, *id.* at 2.

¹⁵⁷ *Id.* at 39 (citing Gini coefficients of 0.66 globally compared to 0.61 for Brazil).

¹⁵⁸ *Id.* The average income in the twenty richest countries is thirty-seven times that of the poorest twenty countries. The gap doubled in the last forty years, *id.* at 2.

¹⁵⁹ *Id.* at 11.

¹⁶⁰ *Id.* at 12.

subsidies, debt relief, and changes in the international trade regime, including the intellectual property regime, that provide less developed countries a better chance to compete with wealthier states and afford human rights and legal systems that are rule of law compliant.¹⁶¹

To be sure, providing more aid or redistributing global resources alone will not ensure economic growth, bring about an end to war and human suffering, or necessarily lead to the realization of rule of law. In some cases states, resources are likely to be squandered by government leaders, misappropriated for personal use or used to wage war on government enemies. Setting right persistently failed states would seem to require regime change, which gives rise to complicated legal, political and practical issues about humanitarian intervention,¹⁶² as well as concerns about a global state.¹⁶³

¹⁶¹ *Id.* See also Joel Paul, *supra* note 48 (discussing negative affects on global equality from subsidies, safeguard provisions, preferential tariff concessions for countries within same customs union or free-trade zone, overly protective intellectual property rights and antidumping rules).

¹⁶² NICHOLAS WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* (2000). See also *HUMAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS* (J.L. Holzgrefe & Robert Koehane eds., 2003) [hereinafter *HUMANITARIAN INTERVENTION*].

For a critical reading of humanitarian intervention that raises the specter of Western powers recapitulating 19th century imperialist patterns of military invasion to impose a particular lifeform on other states, this time thinly cloaked in the garb of allegedly universal values of liberal democracy bolstered by neoliberal economic policies, see ANNE ORFORD, *READING HUMANITARIAN INTERVENTION* (2003). Orford joins cause with Mutua in arguing that the metaphors of savages, victims and saviors continue to underwrite the narrative of the human rights movement. *Id.*, chapter 5. See also Mutua, *supra* note 34. To be sure, the particular recipe for salvation differs from the classical narrative of 19th century colonialism where enlightened members of civilized societies felt compelled to save the savages without much concern for rights of democratic participation or other liberal entitlements enjoyed back home, in exchange of course for the lion's share of the country's natural resources. The growth of the human rights movement, the successful struggles to oust colonial powers, and evolving economic policies within Western developed states have produced a contemporary narrative of self-determination, liberal democracy, small governments and free trade. However, as these plot elements reflect the latest thinking of the enlightened intellectual elite in Western powers, we are still exporting the results of our palace wars. See Bryant G. Garth, *Building Strong and Independent Judiciaries Through the New Law and Development: Behind the Paradox of Consensus Programs and Perpetually Disappointing Results*, 52 *DEPAUL L. REV.* 383, 395-96 (2002). Nor is there any doubt that foreign countries and investors benefit from the free trade principles, intellectual property laws and other reforms that are part of the international relief package for post-crisis nation-building.

The key issue, however, and what remains to be seen, is whether the results will be any different this time around. Orford provides a useful cautionary tale that foregrounds the extent to which neoliberal economic policies and the international trade regime are responsible for creating and legitimating the disparities in global wealth that often contribute to the dramatic telegenic humanitarian crises that attract the attention of the international media and the foreign community, while at the same time the slower but equally deadly insults to dignity caused by grinding poverty recede into the shadowy background of collective indifference. She also notes that reliance on foreign advisors and international institutions such as the IMF and World Bank produces its own kind of dependency, with a corresponding reduction in sovereignty. Ironically, the language of rights, which promises the moral authority to resist power, may be undermining local agency and legitimating a new imperialism backed by coercive humanitarian interventions from powerful states that determine the rules for the international community. Nevertheless, in the end, she allows that there may be specific instances of justified humanitarian intervention to rescue citizens of failed states from the Hobbesian brutality of ethnic violence or to protect citizens in tyrannical states from the appalling suffering caused by widespread and systemic violations of basic rights. It may still be possible, as in the case of intervention in East Timor, to stand in solidarity with East Timorese as comrades rather than imperial saviors.

While there are no doubt some cases in which intervention is morally justified, only time will tell whether the current prescription for post-crisis recovery and nation-building will prove beneficial to people in developing and failed states, or turn out to be more snake oil. There is good reason to be concerned that attempts to force-feed others an unvarying diet rich in liberal democracy, liberal rights and liberal democratic rule of law may in some cases

The well-off citizens of rich and powerful countries do not appear to have the stomach for such radical interventions, or even to support significant redistribution of global resources. Despite globalization and the ready availability of 24-hour news programs that feed us images of massive human rights violations around the clock, we define ourselves not in universal terms as featherless bipeds but in terms of more particular identities that distinguish between us and them. Notwithstanding all of the self-congratulatory talk of moral progress and the universality of human rights, most of us still stand idly by while much of the world's population lives in abject poverty, all too willing to work in unsafe conditions for a fraction of the wages made by their counterparts in developed countries – and yet even then workers in developed countries begrudge them the jobs.¹⁶⁴ Our altruism has limits.¹⁶⁵ We still want our lattes from Starbucks and our nice

produce indigestion and heartburn. See *infra* notes 289-96. The imperialism lies therefore not in the morally justified intervention to prevent mass starvation or genocidal slaughters, but in the failure to envision and tolerate alternative paths to nation-building. At minimum, the general template of democracy, rule of law, rights and neoliberal economic policies must be adapted to local circumstances to be feasible, and to gain the support of the local communities, even allowing the general desirability of the constituent elements of the template. The contrast between the havoc wreaked by “shock therapy” in Eastern Europe and the success of more incremental economic reforms in China, the ways in which IMF policies contributed to the Asian Financial Crisis, and the manner in which neoliberal economic policies contributed to the crises in Rwanda and Yugoslavia all demonstrate that blindly following a model that works in one place may lead to disastrous results in other places. See generally, JOSEPH STIGLITZ, *GLOBALIZATION AND ITS CRITICS* (2002); ORFORD, at 110-123 (describing role of neoliberal economic policies in Rwandan and Yugoslavian crisis).

¹⁶³ Edward Foley, *The Elusive Quest for Global Justice*, 66 *FORDHAM L. REV.* 249, 249-271 (1997). Several of the essays in *HUMANITARIAN INTERVENTION*, *supra* note 162, contemplate a more expanded scope of humanitarian intervention that includes nation-building, in some cases in contexts where sovereignty is compromised under forms of protectorate or trusteeships. The authors however have reservations about when such trusteeships are justified, the willingness and the capacity of the international community to establish effective trusteeships, and the likelihood of their success given deeply embedded ethnic hostilities, interfering neighbors with their own agendas and interests, and the sometimes ambiguous affects and unintended consequences of aiding failed states. Farer suggests that the silver lining to the terrorist attacks of Sept. 11 might be that developed countries will come to appreciate the many ways in which centers of disorder can undermine centers of order in the world. Global order may require the establishment of trusteeships to ensure good governance, the production of essential public goods and rule of law. This much broader intervention will require political and technical advisers with financial and coercive resources at their call. Whereas humanitarian intervention prior to 9/11 was “a band-aid on a few suppurating wounds in a radically diseased body,” treating the disease requires a new scheme of international cooperation. However, Farer suggests that there is little in the biographies of “the parochial, narrowly compassionate figures who predominate in the councils of leading states” that provides grounds for hoping that “they will face the 9/11 challenge with imagination and generosity no less than fire and sword.” Tom Farer, *Humanitarian intervention before and after 9/11: legality and legitimacy*, in *id.* at 53, 88-89. See also Robert Keohane, *Political authority after intervention: gradations in sovereignty*, in *id.*, at 275 (arguing that effective post-intervention measures requires limitations on sovereignty, and that states in “bad neighborhoods” might have to go through a process of nominal sovereignty where authority over domestic affairs rests with UN or some outside authority, limited sovereignty where the UN or outside authority has veto power over key decisions by local actors, and then integrated sovereignty where nationals make their own decisions subject to a supranational court); Michael Ingatjeff, *State failure and nation-building*, in *id.*, at 299 (discussing whether states that have failed because of ethnic conflict should be maintained intact, and whether the international community should intervene at all in places like Somalia or just walk away given that periodic aid may exacerbate conflicts as factions fight over the bounty, and the international community often lacks the political will and resources for the kind of sustained occupation that ultimately is required to turn the state around).

¹⁶⁴ The recent uproar in the U.S. over “outsourcing” to China, India and other poor countries appears to be based on the faulty normative premise that Americans are entitled to high paying jobs while Chinese, Indians and others are forced to live in squalid conditions, without potable water, adequate food and access to basic medical care. Some 46% of people live in China live on less than \$2/day. It seems that people in poor countries should be able to choose whether they want jobs or higher labor standards, better environmental protection and

houses with plasma televisions while others are starving and living impoverished lives, not only in other countries but right in our own communities.¹⁶⁶

On the rare occasion the international community does respond to a humanitarian crisis, the public's attention fades once the immediate emergency is over. In the need for an immediate response, there is little time to reflect on the structural issues that produce failed states and the extent to which the international economic order is a contributing factor to the crisis. After the crisis passes, life in the developed world returns to normal, while those in the failed state continue to struggle along often only to experience another crisis several years later. People in developed countries are able to seek solace in their efforts to address the crisis, while blaming further problems in failed states on ethnic conflict, tribal warfare, rapacious tyrants, ruthless dictators, religious fanatics, rogue states or the lack of requisite cultural resources to support democracy, rule of law and liberalism. Placing the blame on others provides the psychological distance needed to justify washing one's hands of the problems, and diverts attention from one's complicity in the international economic order, while at the same time reaffirming one's own identity, the difference between oneself and the other, and the superiority of one's own way of life.

IV. Rule of Law, Democracy and Human Rights: All Good Things Need Not Go Together

so on. Of course, efforts should be made to provide workers in poor countries as much protection as possible consistent with remaining competitive in a global market.

¹⁶⁵ See Pogge, *supra* note 13, at 14. A number of normative arguments have been advanced to justify limits on transfer of wealth. One argument is that while we are obligated to look after our family members and members of our community or country to some extent, we simply do not owe strangers, especially in far off lands, much if anything, absent conditions that would create some more particular relationship. Some ethical systems, such as Confucianism, explicitly acknowledge gradients of obligations that become more attenuated as one moves from family to friends to members of the same community or nation to foreigners. There is still some degree of concern owed others, although it may not be enough to justify transfer of wealth from one country to another. In any event, some people would go further and simply deny any obligation to transfer wealth to others, especially given poverty and resource-related problems in one's own society. For the argument that a special relationship exists based on historical events that have contributed to global inequality, our shared dependence on a single natural resource base, and the existence of a single global economy which has tended to serve the interests of wealthy states at the expense of the poor.

A second argument is the Lockean/Nozickian one that we are entitled to the fruits of our labor. This line of argument has been criticized for failing to account for inequality in initial conditions and moral luck, such as being born smart or gifted or, given the importance of wealth, an American or Western European.

A third argument is based on fairness. Differences in levels of wealth are often the result of choices: some people work hard and save while others opt for leisure and immediate gratification; some countries adopt austerity policies while others opt for more consumption, less saving, less emphasis on education, larger populations and so on. Redistribution would penalize those who did not indulge in immediate gratification, and turn the U.S. and Germany into slave colonies for those who lack the same level of industriousness or who prefer larger populations. See JOHN RAWLS, *THE LAW OF THE PEOPLES* 108-114 (1999).

A fourth argument is that the lack of a practical or effective means to alleviate poverty or the adverse consequences of establishing an international order that would be necessary to eliminate poverty either prevents an obligation from arising on some version of the "ought implies can" argument or provides an excuse for non-performance. Such adverse consequences might include the need for a global government or at least significantly greater intervention in the affairs of sovereign states. If wealthy countries are to provide financial support to developing states, they may demand a greater say in policy-making or require a change in the nature of the regime or in state leaders.

¹⁶⁶ Ole Hosti, *Public Opinion on Human Rights in American Foreign Policy*, in *THE UNITED STATES AND HUMAN RIGHTS* 131-174 (David Forsythe ed., 2000) (Despite a moral streak in American political culture, there is little public support for a moral crusade abroad in the name of human rights. The protection of human rights trails protecting U.S. jobs, protecting interests of U.S. businesses abroad, securing adequate supplies of energy, and defending allies' security. Most Americans do not consider spreading of democracy very important.).

The relationship between rule of law, democracy and human rights is difficult to sort out conceptually because of the contested meanings and interpretations of each and to test empirically because of problems in operationalizing and measuring them. The following may serve as a provisional working definition of democracy.¹⁶⁷ A genuine democracy requires at minimum open, competitive elections, under universal franchise, of those in posts where actual policy decisions are made (*the electoral dimension*). It also requires sufficient freedom of association, assembly, speech and press to ensure that candidates are able to make their views known and compete effectively in the elections, and so that citizens are able to participate with reasonable effectiveness in the electoral process (*the participatory process dimension*). In addition, it requires the legal institutions to ensure that these freedoms are in fact realized and the election is carried out fairly (*the rule of law dimension*).¹⁶⁸ Elections are a necessary but not sufficient condition for democracy. Moreover, democratization is a process, which can occur even within a single party state, even though full realization of genuine democracy is not possible in such a state. Further, and most important for present purposes, while democracy implies a thin rule of law, the opposite is not necessarily the case.

Many commentators who adopt thick conceptions of rule of law incorporate democracy into the concept of rule of law. Still others would accept that democracy is conceptually distinct from rule of law, but maintain that rule of law is not (fully) realizable except in democracies. The existence of nondemocratic states that enjoy a thin rule of law would disprove the second claim or at least require qualifications. Yet some non-democratic states seem to have had or to now have legal systems that meet the requirements of a thin rule of law (at least as well as other democratic countries known for rule of law).¹⁶⁹

Singapore for example has been described as a semi-democracy, pseudo-democracy, illiberal democracy, limited democracy, mandatory democracy, a "decent, non-democratic regime," a soft authoritarian state, and a despotic state controlled by Lee Kuan Yew.¹⁷⁰ Critics

¹⁶⁷ JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY (1943). Schumpeter emphasized the first two dimensions in his influential conception of democracy. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights do not expressly require democracy in their operative clauses regarding political participation (though both restrict limitations on certain rights to those necessary in a democratic society). Rather ICCPR, art. 25, provides: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." These provisions are vague in several respects. They do not explicitly require contested elections at all levels of government between multiple parties. Nor do they define what is required by way of political participation beyond elections, if anything. For attempts to operationalize democracy, see Gerardo Munck & Jay Verkuilen, *Conceptualizing and Measuring Democracy: Evaluating Alternative Indices*, 35 COMP. POL. STUD. 5, 5-34 (2002); James Raymond Vreeland, *A Continuous Schumpeterian Conception of Democracy*, APSA 2003, *supra* note 127.

¹⁶⁸ This conception of democracy obviously will not be useful for empirical studies that attempt to test the relation between democracy as the dependent variable and as the independent rule of law. For such studies, the dependent variable democracy would have to exclude the rule of law dimension.

¹⁶⁹ See Minxin Pei, *Political Institutions, Democracy and Development*, in DEMOCRACY, MARKET ECONOMICS AND DEVELOPMENT 31 (Farrukh Iqbal & Jong-Il You eds., 2001) (citing as examples on non-democratic rule of law states Kaiser Germany, pre-1945 Japan, Pinochet's Chile, Franco's Spain and "nearly all Western European countries before they became democratic in the mid-1800s."). Robert Barro, *supra* note 132 (noting that there is little empirical evidence that rule of law promotes political freedom).

¹⁷⁰ Eugene KB Tan, "WE' v 'T': Communitarian Legalism in Singapore, 4 AUSTL. J. OF ASIAN L. 1 (2002).

note that elections are dominated by the People's Action Party (PAP) and opposition is tamed through the use of defamation suits against political opponents, manipulation of voting procedures, gerrymandering, and short campaign times. Given the dominance of the PAP, accountability in Singapore is achieved not so much through elections as through other means such as allocating limited participation rights to the opposition, inviting members of the public to comment on legislation, and the use of shadow cabinets where PAP members are asked to play an opposition role.

The primary role of law in Singapore is to strengthen the state, ensure stability and facilitate economic growth.¹⁷¹ Many decisions are left to the state and political actors, primarily the Cabinet headed by the Prime Minister. Civil society is limited, and characterized by corporatist relationships between the state, businesses, labor unions and society. Administrative law tends to emphasize government efficiency rather than protection of individual rights. While individual rights are constitutionally guaranteed, they are not interpreted along liberal lines. Lee Kuan Yew and other government officials have invoked Asian values to emphasize group interests over individual interests, and to justify limitations on civil and political rights, including limits on free speech such that citizens are not allowed to attack the integrity of key institutions like the judiciary or the character of elected officials without attracting sanction in the form of contempt of court or libel proceedings. Labor rights are also limited in the name of social stability and economic growth. Rejecting liberal neutrality, the government favors a more paternalistic approach where the state promotes a substantive normative agenda and actively regulates private morality and conduct. The government has appealed to Confucianism to support its paternalist approach and to promote social harmony and consensus rather than adversarial litigation. On the whole, the judiciary tends to follow the government's lead. Although the reason for that seems to be a genuine congruence of views on the part of most judges rather than overt political pressure on the courts, in some cases judges who have challenged the PAP have been reassigned.¹⁷²

Despite the limitations on democracy, the use of the legal system to suppress opposition, and a nonliberal interpretation on many rights issues, Singapore's legal system is regularly ranked as one of the best in the world. The World Comprehensiveness Yearbook consistently ranks Singapore first.¹⁷³ It was ranked in the top 99th percentile on the World Bank Rule of Law Index in 1996, and in the 93rd percentile in 2002. By way of broad comparison, the U.S. and the average OECD rankings were in the 91st to 92nd percentiles for 1996 and 2002.

Like Singapore, Hong Kong has a well-developed legal system that is largely the product of British colonialism. Until the handover to the PRC in 1997, the system was widely considered to be an exemplar of rule of law, notwithstanding the lack of democracy and a restricted scope of individual rights under British rule. After the handover, the legal system continues to score high on the World Bank's Rule of Law Index, with only a slight drop from 90.4 in 1996 to 86.6 in 2002.

With the change of government, however, has come a different value orientation. Tung Chee-hwa has on occasion invoked Asian values, suggesting to some that Hong Kong might be evolving toward a more Singaporean model. Signs of a possible shift include pressure on the media to toe the government's line; limitations on free speech and assembly and in particular the requirement that demonstrators obtain prior approval from the authorities; consideration of a bill on religious sects, urged by Beijing, to control Falungong, along with the recent conviction of Falungong demonstrators; and the recent brouhaha over regulations required under Article 23 of

¹⁷¹ Thio, *Competing Conceptions of Rule of Law*, *supra* note 65. Peerenboom, *supra* note 2.

¹⁷² Thio, *Competing Conceptions of Rule of Law*, *supra* note 65

¹⁷³ *Id.*

the Basic Law dealing with a variety of potential threats to national security from sedition to disclosure of state secrets, which resulted in some 500,000 people taking to the streets.¹⁷⁴ The protesters, some of whom demanded faster democratization including election of the chief executive in 2007, were also upset by a downturn in the economy and the ineffective governance of Tung.

Singapore and even more clearly Hong Kong show that rule of law need not necessarily march in lock step with democracy. Nor does democracy necessarily entail better protection of human rights. To be sure, many studies using a variety of methods and definitions find that democracy reduces human rights violations.¹⁷⁵ However, the studies tend to assume a linear relationship: marginal improvement in democratization leads to a similar improvement in protection of human rights. Yet many qualitative studies have found that democratization has not led to better protection of human rights in the countries studied.¹⁷⁶

A number of quantitative studies support the disconcerting results of the qualitative studies by showing that the third wave has not led to a decrease in political repression, with some studies showing that political terror and violations of personal integrity rights actually increased in the 1980s.¹⁷⁷ Other studies have found that there are non-linear effects to democratization: transitional or illiberal democracies increase repressive action. Fein described this phenomenon as “more murder in the middle” – as political space opens, the ruling regime is subject to greater threats to its power and so resorts to violence.¹⁷⁸ More recent studies have also concluded that the level of democracy matters: below a certain level democratic regimes oppress as much as non-democratic regimes.¹⁷⁹

¹⁷⁴ Albert Chen, Hong Kong's *Legal System in the New Constitutional Order*, in Implementation OF LAW IN THE PEOPLE'S REPUBLIC OF CHINA (Chen Jianfu, et al., eds., 2002); Report of the Joseph R. Crowley Program, *One Country, Two Legal Systems: The Rule of Law, Democracy, and Rights in Post-Handover Hong Kong*, 23 FORDHAM INT'L L.J., 1 (1999); U.S. Department of State, *United States Report on Hong Kong*, available at <http://www.usconsulate.org.hk/ushk/pi/20010731.htm>.

¹⁷⁵ See generally Christian Davenport and David Armstrong, *Democracy and the Violation of Human Rights: A Statistical Analysis of the Third Wave* (2002), at <http://apsaproceedings.cup.org/Site/abstracts/011/011002ArmstrongD.htm>; Todd Landman, *Norms and Rights: A Non-Recursive Model of Human Rights Protection*, APSA 2003, *supra* note 127.

¹⁷⁶ Davenport & Armstrong, *supra* note 175; Jacek Kurczewski & Barry Sullivan, *supra* note 14. For the experience of newly democratized states in Asia, see Peerenboom, *supra* note 4. For Africa and a discussion on widespread human rights abuses even in democratic African states see GEORGE WILLIAM MUGWANYA, HUMAN RIGHTS IN AFRICA 53-106 (2003). See also, Angelina Snodgrass Godoy, *Lynchings and the Democratization of Terror in Postwar Guatemala: Implications for Human Rights*, 24 Hum. Rts. Q. 640-661 (2002) (political democracy co-exists with widespread tolerance for violation of individual rights, particularly of criminally accused; people may also vote back in former dictators, as in Guatemala).

¹⁷⁷ J. James A. McCann & Mark Gibney, *An Overview of Political Terror in the Developing World, 1980-1991*, in POLICY STUDIES AND DEVELOPING COUNTRIES, 15, 23-24 (Stuart Nagel and David Louis Cingrandelli, eds., 1996) (noting that political terror increased in the developing world in the 1980s and finding that democracy does not by itself ensure low levels of terror). See also David Reilly, *supra* note 127 (over the period from 1976-1996, the number of countries with the best score actually decreased, countries with the worst score increased, while the mean remained about the same). See also Todd Landman, *supra* note 175 (noting increase in violations of personal integrity and torture between 1985 and 1993).

¹⁷⁸ Helen Fein, *More Murder in the Middle: Life-Integrity Violations and Democracy in the World, 1987*, 17 HUM. RTS Q. 170 (1995).

¹⁷⁹ Bruce Bueno de Mesquita et al, *Thinking Inside the Box: A Closer Look at Democracy and Human Rights*, APSA 2003, *supra* note 127. See also Davenport & Armstrong, *supra* note ?. See also Keith & Poe, *supra* note 110 (democracy has only a minor impact on personal integrity rights although transition from lowest level to highest level produces a more substantial impact). But see S.C. Zanger, *A Global Analysis of the Effect of Regime Changes*

Democracy consists of different elements or dimensions, and thus most studies use a composite index. The Polity IV measure increasingly favored by researchers is a 21-point scale made up of five components: competitiveness of executive recruitment, competitiveness of participation, executive constraints, openness of executive recruitment and regulation of participation. Other composite measures of democracy include civil liberties, freedom of press, minority protection and so on. Which elements matter the most for the protection of human rights?¹⁸⁰ Is there a sequencing effect that would recommend increasing political participation before increasing constraints on executive, or vice versa? de Mesquita et al. found that political participation and limits on executive authority are more significant than other aspects, but that there is no human rights benefit at all until the very highest levels of political participation and executive constraints are achieved. However, these levels require moderate progress on each of the other subdimensions. In short, “there is no significant increase in human rights with an incremental increase in the level of democracy until we reach the point where executive constraints are greatest and where multiple parties compete regularly in elections and there has been at least one peaceful exchange of power between the parties... Put more starkly, human rights progress only reliably appears toward the end of the democratization process.”¹⁸¹ This finding is worrisome for human rights in that despite the much vaunted third wave of democratization in the 1980s and 1990s, regimes that combined meaningful democratic elections with authoritarian features outnumbered liberal democracies in developing countries during the 1990s.¹⁸²

Moreover, even full democratization does not necessarily entail a *liberal* interpretation of human rights. As discussed previously, many critics object to the liberal interpretation of human rights that emphasizes individual autonomy and choice at the expense of other values.¹⁸³ Conflicting views over how the oftentimes abstract principles set forth in rights documents are to be interpreted arise across a wide range of issues, including the rights of the criminally accused versus the need to protect members of society from crime,¹⁸⁴ the rights of women versus

on Life Integrity Violations, 1977-1993, J. OF PEACE 33 (2000) (finding that democracy leads to improvement in human rights performance within the first year of holding elections).

¹⁸⁰ See de Mesquita et al., *supra* note 179 (noting one of the disadvantages of using composite measures of democracy is that it is not clear how democracy promotes human rights. The factors measured by studies of democracy are only loosely tied to theories about why democracy protects human rights).

¹⁸¹ de Mesquita et al., *supra* note 179.

¹⁸² Steven Levitsky and Lucan Way, *Autocracy by Democratic Rules: The Dynamics of Competitive Authoritarianism in the Post-Cold War Era* (2002), at <http://apsaproceedings.cup.org/Site/papers/045/045008WayLucan.pdf>.

¹⁸³ See Tan, *supra* note 170.

¹⁸⁴ Although Japan has the lowest crime rate of any industrialized democracy, critics of the criminal justice system question whether the pretrial procedures afford adequate protections to suspects and charge that the system lacks transparency, police and prosecutors are unaccountable, and defense lawyers are impotent. There is an ongoing active debate as to whether Japan is and should be moving away from its traditional criminal law system based on “paternalistic benevolence,” prosecutorial discretion, particularized justice, and rehabilitation, toward a more “American” model that combines greater protection for individual rights with a punitive emphasis on incarceration. See, e.g., Susan Maslen, *Japan and The Rule of Law*, 16 UCLA PAC. BASIN L. J. 281 (1998). See also Randall Peerenboom, *Out of the Pan and into the Fire: Well-intentioned but Misguided Recommendations to Eliminate Administrative Detention in China*, 98 NW. U. L. REV. 1 (2004) (citing widespread support for China’s tough anti-crime campaigns, including 99% support for capital punishment, with some 22% of the population calling for more death sentences even though China executed more people in one three month period in 2001 than the rest of the world executed in three years).

traditional norms,¹⁸⁵ and the scope of legitimate limitations on free speech in the name of national security or social stability.¹⁸⁶ Regional variations even after controlling for wealth and regime type demonstrate that there are differences in values among the majorities in different countries,¹⁸⁷ and that such values play a significant role in how rights are interpreted and implemented.¹⁸⁸

¹⁸⁵ Apodaca, *supra* note 117 (attributing regional variations in women's rights in part to cultural differences).

¹⁸⁶ Even when Asians prefer democracy, they may prefer majoritarian or nonliberal variants to liberal democracy. Nearly two-thirds of Koreans agreed with the statement that "If we have political leaders who are morally upright, we can let them decide everything", 40% believed that "the government should decide whether certain ideas should be allowed to be discussed in society," while 47% believe that "if people have too many different ways of thinking, society will be chaotic." See Chong-min Park and Doh Chull Shin, *Do Asian Values Deter Popular Support for Democracy? The Case of South Korea*, paper prepared by AAS Meetings 2004. In contrast to South Koreans and Taiwanese, there is overwhelming support for democracy among Thais, with an astounding 90% satisfied with the way democracy works in Thailand and 85% maintaining that democracy is always preferable to authoritarianism. Nevertheless, half of Thais still rank economic development as more important than democracy. Moreover, Thais remain distrustful of political parties, while 75% view diversity of political and social views as threatening, and 45% are unwilling to tolerate minority viewpoints. Nor is there a very deep commitment to rule of law and separation of powers. A majority would accept government control over the judiciary or even parliament to promote the wellbeing of the nation. Robert Albritton & Thawilwadée Bureekul, *Impacts of Asian Values on Support for Democracy in Thailand*, paper presented at AAS (2004). A survey of academics, think tank experts, officials, businesspeople, journalists and religious and cultural leaders found significant differences between Asians and Americans. The former chose an orderly society, harmony and accountability of public values, in descending order, as the three most important societal values. In contrast, the Americans chose freedom of expression, personal freedom and the rights of the individual. See Susan Sim, *Human Rights: Bridging the Gulf*, STRAITS TIMES, Oct. 21, 1995. See also Bridget Welsh, *Attitudes Toward Democracy in Malaysia: Challenges to the Regime?*, 36:9 ASIAN SURVEY 882 (1996) (reporting that a survey of Malaysians in 1994 found that the majority were willing to limit democracy, particularly when social order was threatened, and that fears of instability and Asian values led to limited support for democracy; also noting that respondents were willing to sacrifice freedom of speech in the face of threats to social order).

¹⁸⁷ See generally, Peter B. Smith et al., *Cultural Values, Sources of Guidance, and Their Relevance to Managerial Behavior - A 47-nation Study*, 33(2) J. OF CROSS-CULTURAL PSYCHOL. 188 (2002) (summarizing various multiple country studies that find similarities on various dimensions of values within different regions). See also Geert Hofstede, *supra* note 117. See also Peerenboom, *Show Me the Money*, *supra* note 44 (East Asian countries generally outperform the average country in their income category on social and economic rights, governance indicators, law and order measures, but score below the average on civil and political rights, with differences most notable with respect to free speech and freedom of the press).

¹⁸⁸ See GEERT HOFSTEDÉ, *CULTURE'S CONSEQUENCES: COMPARING VALUES, BEHAVIORS, INSTITUTIONS AND ORGANIZATIONS ACROSS NATIONS* 248, 251 (2nd ed. 2001). (Hofstede examined the affects of cultural values identified by his study for on human rights in 52 countries as measured by Humana's 1992 world human rights ratings. The ratings were derived from responses to 40 questions based on the Universal Declaration of Human Rights. He found that GDP explained most of the variance ($r = .71$), and that cultural values were not significant. However, when he considered only wealthy countries, he found that individualism (as opposed to collectivism) was strongly correlated with higher human rights ratings ($r = .73$), more spending on health and education and less on military. None of the other cultural values identified were significant. Interestingly, while individualism has been shown to be strongly correlated with wealth in many studies ($r = .84$ for Hofstede), rich East Asian countries score lower on individualism and higher on collectivism relative to other countries at their income category). Relying on more specific rights rather than an aggregate score, David Cross, *supra* note 103, found cultural values were a significant determining factor even controlling for wealth and other factors. See also Layna Mosley and S. Uno, *Racing to the Bottom or Climbing to the Top? Foreign Direct Investment and Human Rights* (2002) at <http://apsaproceedings.cup.org/index.htm> (finding strong regional relationship between regions and labor rights, and that the Asian and Pacific regions were not as protective of labor rights as Western Europe, Central and Eastern Europe, although they were more protective than the Middle East, North Africa and Latin America and on par with Sub-

V. Rule of Law and War: After 2000 Years Not Quite *Inter Armes, Silent Leges*,¹⁸⁹ But Not Much Better

Former UN Human Rights Commissioner de Mello eloquently captured the evils of war:

We are living in a profoundly challenging time for human rights. On this day, I would like us to think in particular of the countless number of civilians who are living in the midst of war and conflict and who continue to endure atrocities which should outrage the conscience of humanity. Their basic rights, those enshrined in human rights and humanitarian law are denied.... [F]or millions of victims of armed conflict, war represents the daily reality. Men and women are killed, maimed, raped, displaced, detained, tortured, and denied basic humanitarian assistance, and their property [is] destroyed because of war. Children are abducted, forcibly recruited into arms, separated from their families, sexually-exploited, suffer hunger, disease and malnutrition, and are unable to go to school. They are denied not only their present, but their future.... *The best chance for preventing, limiting, solving and recovering from conflict and violence lies in the restoration and defence of the rule of law.* Armed conflict stands as a bloody monument to the failure of the rule of law. We must break the cycle of violence. Where armed repression strips people of their rights and dignity, let those responsible answer under the rule of law.¹⁹⁰

War is undeniably a serious threat to individual freedom and rights. However, is rule of law an antidote to war? To what extent can rule of law prevent war, limit abuses during war and contribute to transitional justice while laying the foundation for a rights-respecting future polity?

Prevention of War

The shortcomings of relying on rule of law to prevent war are painfully obvious in light of recent history. International and domestic wars are driven by ethnic hatred, greed, economic considerations, geopolitical concerns for stability and the struggle for power. Law is for the most part powerless in the face of these concerns.¹⁹¹ The U.N. regime was largely an attempt to bring war and the use of force within an international legal framework.¹⁹² But it has proven incapable of preventing wars: the twentieth century was one of the bloodiest, and the twenty-first is not shaping up to be much better.¹⁹³ The Cold War undermined whatever hope there might have been

Saharan Africa); *see also* Apodaca, *supra* note 117 (finding that regional coefficients play a larger role than GNP in the achievement of women's economic and social rights, although the regional identification of Asian and African explains less variation than the Middle East regional designation).

¹⁸⁹ "In times of war, the laws are silent." Attributed to Cicero, circa 50 B.C.

¹⁹⁰ de Mello, *supra* note 16 (with emphasis added).

¹⁹¹ James Morrow, *The Laws of War, Common Conjectures and Legal Systems in International Politics*, 31 J. OF LEGAL STUD. 41 (2002).

¹⁹² The U.N. Charter prohibits the use or the threat of the use of force against the territorial integrity or political independence of a state in way inconsistent with the Charter. Member States are supposed to resolve disputes peacefully. If they are unable to do so, they are to refer the matter to Security Council. However, states are allowed to use force in self-defense without Security Council approval.

¹⁹³ Since 1945, there have been 250 conflicts, resulting in 70 million to 170 million deaths. M. CHERIF BASSIOUNI, *POST-CONFLICT JUSTICE* XV (M. Cherif Bassiouni ed., 2002) [hereinafter *POST-CONFLICT JUSTICE*]. After the Cold War, between 1989 and 1993, there have been 90

that the Security Council would be able to play a moderating role during the early decades of the U.N. The NATO bombings in Kosovo and the U.S. invasion of Iraq without Security Council approval have demonstrated further the limits of international law to prevent war in the post Cold War era.¹⁹⁴ In the eyes of the vast majority of international law scholars, the NATO bombings and the U.S. invasion of Iraq were illegal and demonstrate just how far away we are from an international rule of law.¹⁹⁵

To be sure, some have attempted to the actions of NATO and the U.S. were legal, albeit based on changing conception of laws of war,¹⁹⁶ or as morally justified even if illegal based on humanitarian intervention to protect human rights or to promote democracy.¹⁹⁷ The hand-wringing among international law scholars over the conflict between the illegality of NATO's intervention in Kosovo and their personal conviction in the morally compelling case for humanitarian intervention highlights the normative limitations of a thin rule of law and the need to weigh the values served by rule of law against other important social values, including the protection of human rights. Former President and Judge of the International Criminal Tribunal for the Former Yugoslavia Antonio Cassese succinctly stated the choices:

Faced with such an enormous human-made tragedy and given the inaction of the Security Council...should one sit idly by and watch thousands of human beings...slaughtered or brutally persecuted? Should one remain silent and inactive only because the existing

armed conflicts involving 60 different governments and one-third of all UN Members. Most are now internal conflicts. MICHAEL GLENNON, *LIMITS OF LAW, PEROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 68 (2001).

¹⁹⁴ See, e.g., Simon Chesterman and Michael Byers, *Has US Power Destroyed the UN?*, LONDON REVIEW OF BOOKS, April 29, 1999, at 30 ("The global situation has begun to resemble that of previous centuries, where military force was the preferred tool of the powerful, and the less powerful sought protection in alliances of convenience rather than international institutions or international law."). See also David Whippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L. J. 129 (2001) (arguing that NATO's intervention in Kosovo is part of, and contributes to, a broader phenomenon that involves the loosening of the legal and political constraints on the use of force and thus is likely to lead states to interpret the UN Charter's restrictions on the use of force less narrowly in the future).

¹⁹⁵ Mary Ellen O'Connell, *The UN, NATO and International Law After Kosovo*, 22.1 HUM. RTS. Q. 57, 57-89 (2000) (challenging the legality of NATO intervention); MARK DRUMBL, SELF-DEFENSE, PREEMPTION, FEAR: IRAQ AND BEYOND ([Washington & Lee Public Law Research Paper No. 03-04](#), 2003) (according to the President of the American Society of International Law 80% of international lawyers think the U.S invasion of Iraq was illegal).

¹⁹⁶ See generally *id.* (noting that international law evolves as state practices change, and that there seems to be widespread support for the U.S. attack on Al Qaeda, substantial but somewhat less support for the attack on Afghanistan, and substantial opposition to the attack on Iraq); see also Thomas Franck, *Interpretation and change in the law of humanitarian intervention*, in HUMANITARIAN INTERVENTION, *supra* note 162, at 204, 226 (claiming NATO's use of force in Kosovo was both lawful and unlawful: unlawful in that prohibition against the use of force without Security Council approval or in self-defense was not repealed by an evolving consensus over the practice of humanitarian intervention; lawful in that while technically illegal no undesirable consequences resulted from the intervention, and thus the illegality of the act was mitigated to the point of exoneration).

¹⁹⁷ See Klinton Alexander, *NATO's Intervention in Kosovo: The Legal Case for Violating Yugoslavia's National Sovereignty in the Absence of Security Council Approval*, 22 HOUS. J. INT'L L. 403-449 (2000). See also, Hilary Charlesworth, *International Law: A Discipline in Crisis*, 65 MOD. L. REV. 377, 380 (2002) (noting that a number of international law scholars consider the NATO campaign to be illegal but morally justified); cf. Allen Buchanan, *Reforming the international law of humanitarian intervention*, in HUMANITARIAN INTERVENTION, *supra* note 162, at 130, 160-163 (arguing that in a system in which rule of law is imperfectly realized, humanitarian intervention or other acts may be justified even if they are illegal provided, *inter alia*, the intervention or acts promote reforms that bring the system more into line with the ideal rule of law).

body of international law rules proves incapable of remedying such a situation? Or, rather, should respect for the Rule of Law be sacrificed on the altar of compassion?¹⁹⁸

The conflict could be resolved by “legalizing” humanitarian intervention. One approach would be to recognize a customary international law right for a country or group of countries to intervene when certain standards are met.¹⁹⁹ However, any such standards will be broad and subject to vastly different interpretations based on contested and complex facts.²⁰⁰ Ex ante and ex

¹⁹⁸ Antonio Cassese, *Ex Iniuria ius oritur: Are We Moving Toward International Legitimation of Forcible Countermeasures in the World Community?* 10 EUR. J. OF INT’L L. 25, 25 (1999).

¹⁹⁹ See *id.* Cassese suggests that intervention is justified when there are gross breaches amounting to crimes against humanity involving the death of hundreds or thousands and the government has collapsed or is involved in the crimes. If the government is alleged to have collapsed then it must be shown the government is not capable of stopping the violations. If the government is alleged to be involved then it must be shown that government has refused to cooperate with UN. In addition, the Security Council must be blocked by the veto power from taking coercive action. All peaceful avenues must be exhausted. A group of states, not just a superpower or its allies, must intervene, and with the consent of the majority of other states. Armed forces must only be used for the purpose of stopping atrocities and restoring respect for human rights. See also TOM FARER, A PARADIGM OF LEGITIMATE INTERVENTION, in ENFORCING RESTRAINT 316, 327 (Lori Fisler Damrosch ed., 1993) (intervention is justified only when (i) there is no plausible alternative for averting mass violations of fundamental rights; (ii) the violations will cause irreparable injury; (iii) the intervening party uses minimal necessary force to address violations and then withdraws immediately; (iv) intervention is calculated to cause less damage to the target society than inaction). Others would add that the use of force be proportional and consistent with international humanitarian law, that the intervention be welcomed by the population in the target country, that there be a reasonable prospect of success and that intervention be motivated to a substantial degree by humanitarian concerns. See Jane Stromseth, *Rethinking humanitarian intervention: the case for incremental change*, in HUMANITARIAN INTERVENTION, *supra* note 162, at 232, 233, 248-251 (arguing however against codifying the criteria for intervention in order to allow for the gradual emergence of normative consensus over time in light of practice and case-by-case decision-making). Whatever the normative merits of these various lists of criteria, there is little chance that they will generate the consensus needed to be written into the UN Charter or some other generally applicable treaty or to give rise to the consistent practice among states with the requisite *opinio juris* to become customary international law. The U.S. objects to stipulating the criteria for intervention in advance, preferring instead a more case-by-case approach, while Russia, China and India have opposed humanitarian intervention on more traditional sovereignty grounds. *Id.* at 263-264; WHEELER, *supra* note 162, at 280-281.

²⁰⁰ The criteria suggested by Cassese, Farer and Stromseth would seem to prevent the U.S.-led coalition from relying on humanitarian intervention to justify the invasion of Iraq. However, application to Iraq also demonstrates that the standards are vague on key points and will give rise to disputes in future cases. First, all peaceful means do not appear to have been exhausted, although there is some room for debate on that score. Critics of the war argue that weapons inspectors should have been given more time to complete their investigation, and that Sadaam Hussein was showing signs of flexibility. Tony Blair has countered by arguing that Hussein has shown flexibility in the past as a matter of strategy, but that there was no realistic hope for significant progress without a U.N. resolution that gave Hussein an ultimatum, and France opposed such a resolution. However, critics argue that the danger was the U.S. would take the U.N. resolution as authorizing immediate use of force without a further resolution from the U.N. should Hussein not be in full compliance with the resolution, as interpreted by the U.S. Moreover, while the fear of an attack by weapons of mass destruction might have provided a degree of urgency had the allegations of WMD turned out to be grounded in fact rather than fantasy, there was no immediate need to intervene on humanitarian grounds. Although the Hussein regime was guilty of gross rights violations in the past and arguably was likely to commit more violations in the future, there was no immediate humanitarian crisis at the time of intervention. The U.S. and its allies had lived with Hussein for twenty years, and were prepared to continue to let him remain in power had he acquiesced on inspections.

Third, the use of force was not for the limited purpose of addressing the humanitarian crisis but for regime change. Supporters of the war would argue however that regime change was the only effective way to address the violations and provide Iraqi citizens the chance for a democratic future. While in some cases, such as the crisis in the Sudan, it might be possible to intervene and put an end to a humanitarian crisis without regime change, in other situations regime change may be the only way to put an end to the violations, particularly when they are

post assessments are also likely to differ widely given the impossibility of answering the counterfactual question what would have happened if intervention had not occurred, assuming that some entity someday would be in a position to assess whether the intervention was legitimate humanitarian intervention or an illegal act of aggression.²⁰¹ For now and the foreseeable future the lack of an authoritative entity to review and pass judgment on the decisions undermines the predictability and certainty that is central to rule of law and the requirement that laws be impartially applied. Allowing states to determine for themselves when intervention is merited, subject only to the threat of possible censure and sanctions by the world community, suggests the possibility of anarchy rather than rule of law. However, given the high costs of intervention, the risk to one's own citizens, the possibility of getting bogged down in a major reconstruction effort with little chance of success and political pressure from the international community, a much more likely result is that only the strongest states will intervene. Nevertheless, that result is also problematic from a rule of law perspective in that given limited resources and political will, strong states will intervene in an inconsistent and unprincipled way based on some mix of humanitarian concerns and self-interest.

the result of systematic and enduring state practices. See Mark Drumbl, *supra* note 195 (distinguishing between humanitarian intervention and democratic intervention).

Fourth, while the U.S. was not without allies, even its allies presumably based their support primarily on the threat of mass destruction. At minimum, it is safe to say that the majority of countries did not support invasion, much less regime change, on humanitarian grounds or to support democracy. However, Bush and Blair argue that they were right and that Iraq is better off without Hussein, regardless of what others (including Iraqis) thought or think. More fundamentally, moral realists among others would argue that what is right cannot be determined by majority vote, while the most forward leaning rights activists might go so far as to argue that there is a deontic moral duty to rescue people subject to serious rights violations or to ensure that people are able to exercise their right to democracy and self-determination. Cf. Fernando R. Teson, *The liberal case for humanitarian intervention*, in HUMANITARIAN INTERVENTION, *supra* note 162, at 93, 94, 95, n. 5 (arguing that there is a duty to rescue victims of tyranny or anarchy if we can do so at a reasonable cost to ourselves, and claiming that intervention to restore democracy may be justified on the existence of regional norms). Further, over time, opinions may change. Thus, supporters would argue that it is too early even for consequentialists to draw any final judgments about whether the intervention was successful or merited, particularly given that views are likely to be heavily influenced in the short term by the inevitably messy process of rebuilding Iraq.

Finally, critics of the war will note that the invasion was clearly not only out of concern for the rights of Iraqis. However, supporters will counter that the fact that states intervene partially out of self-interest does not undermine the morality or legitimacy of intervention on humanitarian grounds. To be sure, third parties assessing the situation may discount the humanitarian concerns when there are significant economic or geopolitical issues at stake depending on their political views. Many critics of the war find the increasing emphasis on humanitarian justifications in light of the failure to find WMD disingenuous at best given that Hussein's regime was tolerated and even supported by Western powers for years and other dictators and tyrants of lesser geopolitical and economic importance continue to be tolerated.

²⁰¹ A 1999 poll in Greece found that 99.5% opposed the way, 85% believed NATO's motivations were strategic rather than humanitarian, while 69% favored charging Clinton with war crimes. Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to be Learned from It*, 25 FORDHAM INT'L L. J. 95, 101 (2001). Whether intervention in Kosovo should be considered a success remains contested in light of the large outflows of refugees, the acceleration of ethnic cleansing and the deaths of Kosovar Albanians after bombing commenced, the deaths of civilians caused by NATO bombing, questions about the compatibility of the aerial campaign with the laws of war, reprisals against Serbs in the wake of the bombing, ongoing ethnic conflicts even today, the continued occupational presence of 20,000 foreign troops, daily assaults and murders and other problems in establishing law and order, rule of law, democracy and good governance. See Department of Human Rights and Rule of Law at www.osce.org/Kosovo/reports/justice/criminal_justice4_eng.pdf. For a highly critical appraisal, see Marjorie Cohn, *The Myth of Humanitarian Intervention in Kosovo*, in LESSONS OF KOSOVO: THE DANGERS OF HUMANITARIAN INTERVENTION 121, 124 (2003). For a more ambivalent appraisal, see WHEELER, *supra* note 162, at 275-284 (arguing that "the jury is still out on the long-term humanitarian consequences of the Kosovo intervention").

An alternative would be to require U.N. approval, perhaps amending the U.N. Charter to require less than unanimity on the part of the Security Council permanent members or a supermajority of the entire Security Council or some combination thereof. However, there would still be a significant danger that U.N. decisions to intervene would be heavily politicized and that the standards for intervention would be stretched as necessary to reach what appear to some to be morally compelling cases.²⁰² Moreover, there would still be moral and political pressure on states to act outside the U.N. framework and intervene on humanitarian grounds when the U.N. fails to act, which is likely to be often given the large number of compelling cases for humanitarian intervention based on purely on moral concerns about horrific human suffering, the limited resources of the U.N. and political barriers even with a lower approval threshold for intervention. Accordingly, decisions to intervene on humanitarian grounds are likely to remain largely outside the framework of rule of law.²⁰³

The refusal to include crimes of aggression within the jurisdiction of the International Criminal Tribunal for the Former Yugoslavia and, at least for the time being, the International Criminal Court, further demonstrates the extent to which war falls outside the parameters of rule of law. In establishing the ICTY, the powers that be did not want to undermine the possibility of reaching a settlement with Milosevic, with whom they were negotiating at the time, by allowing or forcing the ICTY to decide who the aggressor was and which parties were responsible for the conflict.²⁰⁴ Nor do the U.S. and many other countries want the ICC determining who the aggressor is and which parties are responsible to what extent for future conflicts.²⁰⁵

Prevention or Mitigation of Abuses During War

²⁰² Martti Koskeniemi, *The Lady Doth Protest Too Much*, 65 MOD. L. REV. 159-75 (2002) (noting a general turn to ethics among international lawyers since the end of the Cold War that often involves "a shallow and dangerous moralisation, which, if generalized, transforms international law into an uncritical instrument for the foreign policy choices of those whom power and privilege has put into decision-making positions."). Humanitarian intervention raises the issue of whose moral compass should be determinative. One year after the invasion, less than one-third of Iraqis felt there was any moral justification for the war, while 39% felt there was no moral justification and an additional 13% felt the moral justification was less than adequate. Almost half of Iraqis felt the invasion did more harm than good for the country as a whole, while only one-felt the opposite. More people reported suffering from lack of electricity, clean water, medicine, food and safety after the invasion than under Hussein, although they enjoyed greater freedom of speech and religious practice and more than half felt that personally their family was better off now than before. Accordingly, despite the hardships and lack of moral justification, some 60% of Iraqis believed the invasion was worth it personally. See *Key findings: Nationwide survey of 3,500 Iraqis*, USA TODAY, April 30, 2004, available at <http://www.usatoday.com/news/world/iraq/2004-04-28-gallup-iraq-findings.htm>.

²⁰³ See Glennon, *supra* note 193 at 2 ("There is today, no coherent international law concerning intervention by states... The received rules of international law neither describe accurately what nations do, nor predict reliably what they will do, nor prescribe intelligently what they should do concerning intervention. With respect to interventionism by individual states, legal restraint is illusory; it is... a piece of sublime mysticism and nonsense.").

²⁰⁴ Paul R. Williams, *The Role of Justice in Peace Negotiations*, in POST-CONFLICT JUSTICE, *supra* note 193, at 115-133.

²⁰⁵ The drafters of the ICC could not decide on definition of crime of aggression. The U.S. wanted decisions about aggression left to the Security Council. The U.S. also opposed including a definition of aggression in the U.N. Charter. See Majorie M. Whiteman, DIG. OF INT'L L. §22, at 740. Michael Glennon, *The Fog of Law: Self-defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 540, 556-557 (2002) ("Under many of the definitions proposed over the years, wholly reasonable and justifiable actions undertaken by states in their own defense, such as the use of force by the United States in Afghanistan, could qualify as aggression.").

While determinations of crimes of aggression (*jus ad bellum*) remain largely outside an international rule of law framework, issues of how war is to be conducted (*jus in bello*) have increasingly become subject to international law. The Geneva and Hague Conventions have been supplemented by a number of other conventions and an expanding body of customary international law that set limits on how war may be waged.

Such rules are not wholly without affect, although their effectiveness should not be overstated. Some rules limiting certain weapons such as chemical weapons have generally been followed, rules regarding treatment of POWs have had a more mixed record of compliance, while rules protecting civilians have been more frequently ignored.²⁰⁶ There is some evidence that rule of law does reduce physical integrity violations, some of which would fall within the realm covered by international humanitarian law.²⁰⁷ Nevertheless, many of the countries with the worst human rights records are failed states, torn by ethnic conflict, and wholly lacking in the political will or institutional capacity to implement rule of law. Moreover, historically even countries known for rule of law have reacted to international war and domestic instability by cutting back on civil and political liberties and violating the laws of war.²⁰⁸

There are, from both thin and thick rule of law perspectives, a number of problems with this body of law and its implementation. There is something fundamentally odd if not

²⁰⁶ There are many different explanations as to why the rules are followed or not followed. For a useful discussion of the strengths and limits of leading theories in explaining compliance and noncompliance with the laws of war, see William Bradford, *In the Minds of Men: A Theory of Compliance with the Laws of War*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=555894 (discussing realism, enforcement theory, liberalism, rational choice, institutionalism (managerialism, reputational theory, transnational legal process), and normativism (legitimacy theory, constructivism, organizational culture theory). See also Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 Harv. Int'l L.J. 49, 50 (1994) (arguing that laws are generally followed because they in fact impose no real restraints on military necessity; far from serving a humanitarian purpose by imposing meaningful limits on war, the laws have served to legitimate increasingly destructive methods of combat and facilitated rather than restrained wartime violence).

²⁰⁷ Clair Apodaca, *supra* note 104 (finding that rule of law can reduce the devastating effects of international or civil conflicts on human rights to a limited extent). Apodaca states: "For each unit increase in Kaufmann, Kraay and Mastruzzi's rule of law index, the PTS decreases by nearly 4/10 of a point (on a 5 point scale). The rule of law does decrease a government's use of non-judicial execution, torture, forced disappearance, and arbitrary imprisonment. Where the rule of law and accountability prevail, citizens have the ability to oust potential abusive leaders or to seek judicial remedy for abuses. Furthermore, with a high level in the rule of law, nongovernmental and international human rights organizations can flourish, thereby deterring leaders from undertaking repressive actions. Finally, the rule of law promotes peaceful resolution of conflicts through bargaining, compromise and elections."

²⁰⁸ See Keith, *supra* note 102; Keith & Poe, *supra* note 110; Diane Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 460 (2003) (noting that Lincoln suspended habeas corpus during Civil War, and Congress approved the suspension; 2200 people were prosecuted under Espionage and Sedition Acts, with more than 1000 convicted during WWI; the right of habeas corpus was suspended and martial law imposed in Hawaii after Pearl Harbor; during the McCarthy era, the Supreme Court in *Am. Communications Ass'n. v. Douds*, 339 U.S. 3832, 288-89 (1950) permitted regulations requiring labor unions to sign an oath swearing they were not members of Communist Party and did not believe in the overthrow of the United States, and in *Dennis v. U.S.*, 341 U.S. 494, 501 (1951) rejected "any principle of government helplessness in the face of preparation for revolution, which principle, carried to its logical conclusion, must lead to anarchy"). See also Tom Bingham, *Personal Freedom and the Dilemma of Democracies*, 52 INT'L & COMP. L.Q. 841 (2003) (England suspended habeas corpus fifteen times between 1688 and 1848, including for those charged with treason; in 1914, the U.K. detained 30,000 enemy aliens based on prerogative power requiring no legislation, and again detained some 30,000 during WWII; the legislation was also used against Irish and was not contested in parliament or by the public; in British India the emergency power of detention was a regular part of the legal system; in 1954 the U.K. used emergency powers to derogate civil and political rights in Malaya, Singapore, Kenya, and British Guiana).

oxymoronic about humanitarian laws of war. One goes to war to defend one's way of life and all that one holds most dear, and to do so by killing others.²⁰⁹ However, one is only supposed to kill others in a civil way. But why is it more humane, for example, to drop cluster bombs from 15,000 feet than to use chemical weapons? And even allowing that there is something terribly wrong about relying on civilians as human shields, what is particularly noble or humane about sacrificing one's own life by fighting an invading force with advanced weaponry in the open or in conventional ways? Why should the weaker side agree to fight by rules made by the stronger side, especially when the stronger side routinely violates the rules when doing so is to its advantage, and then claims that the rules have changed based on acceptance of its behavior by its allies? The U.S. treatment of prisoners in Iraq is only the most recent in a long list of violations of the law of war by Western states. The Allied fire-bombing of German cities, the refusal of British and U.S. navies to rescue Germans left stranded in the water after their ships were hit, and French executions of German soldiers in reprisal for killings of French insurgents all violated the existing laws of war.²¹⁰ In Vietnam, apart from using Agent Orange and napalm-bombing, the U.S. systematically tortured and abused POWs and civilians.²¹¹ Meanwhile, defenders of the U.S. war on terror now argue that the laws of war have changed both with respect to *jus ad bellum* and *jus in bello* based on the "new" threat from terrorism and international approval or tolerance of U.S. actions.²¹²

An evolution in the political rationale behind the laws of war has also led to inconsistencies in the nature of humanitarian law. The earlier Hague rules sought to establish some ground rules between roughly equal states involving battles between lawful combatants. As such, they only applied to "civilized" (Christian) peoples: the British did not apply the laws of war to conflicts with Zulus.²¹³ In contrast, the additional protocols of the Geneva Conventions

²⁰⁹ Walzer offers a number of arguments against the theory of total war and the realist view that law and morality are silent or powerless when it comes to war. As he notes, not all wars involve a battle for one's way of life. Not all ways of lives are worth dying for, and even if they are, not all struggles to maintain one's way of life need to be resolved through war. Moreover, most if not all people talk about war in moral terms and recognize some limits to war. However, he also acknowledges the possibility that even innocents might have to be killed to save the world or one's way of life in some circumstances. See MICHAEL WALZER, *JUST AND UNJUST WARS* 253, 323 (2000). As for the fact that most people at least in times of peace advocate moral limits to war, hardened realists point out that many of the same people change their views when confronted with actual threats. More importantly from the perspective of rule of law, there is a large gap between moral views about war as codified in existing laws and actual practice. This has always been the case, and remains so today. See Jochnick & Normand, *supra* note 206, at 55 ("The history of war, however, reveals that the development of a more elaborate legal regime has proceeded apace with the increasing savagery and destructiveness of modern war.").

²¹⁰ See generally, *id.* See also A.J. COATES, *THE ETHICS OF WAR* (1997). Despite morally righteous denunciations of bombardments of civilians and pre-war promises to avoid such atrocities, Britain, France, Germany and the U.S. all eventually engaged in terror bombing of civilian populations in cities for the purpose of undermining morale. Jochnick & Normand, *supra* note 206, at 85-89. Nevertheless, no one was prosecuted for such bombing at Nuremburg because according to the Chief Prosecutor for the U.S., the aerial bombardment of cities and factors had become a recognized part of modern warfare and justified by military necessity. Indeed, the Nuremburg Tribunal only ruled out wanton killing for the sheer enjoyment of killing or for revenge. *Id.* at 92-93.

²¹¹ TELFORD TAYLOR, *NUREMBURG AND VIETNAM: AN AMERICAN TRAGEDY* 123-153 (1970). See also Edward Herman, *Genocide As Collateral Damage, But With Sincere Regrets*, Nov. 9, 2001, available at <http://www.zmag.org/Sustainers/Content/2001-11/09herman.cfm> (last visited Aug. 18, 2004); Edward Herman, *Lessons of the Vietnam War: Parts 1 and 2*, available at <http://www.nnn.se/levande/lessons1.htm> (last visited Aug. 18, 2004).

²¹² See *infra* section VI.

²¹³ Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169, 175 (2003).

sought to address asymmetrical power by extending protection to “people’s fighting against colonial domination and alien occupation and against racist regimes.”²¹⁴ The change has resulted in considerable confusion, and highly politicized interpretations, of who is entitled to what protections under humanitarian laws of war. At one extreme, the Bush administration has tried to deny virtually all rights to unlawful combatants, while human rights groups and most international law scholars argue that even unlawful combatants who violate the laws of war are entitled to certain protections.²¹⁵

To be sure, many people find it hard to accept that unlawful combatants who engage in war crimes or who kill American occupational forces sent to liberate Iraq *should* benefit from the protections of the humanitarian laws of war. One might think that the torture of Iraqis detainees in Abu Ghraib and elsewhere would have demonstrated once and for all the need to ensure that even unlawful combatants and insurgents battling occupational forces be afforded certain protections. On the other hand, despite all of the moral indignation over the horrific images, the fact remains that torture remains a common weapon of governments faced with extreme security challenges.²¹⁶ Moreover, government officials, citizens and academics are increasingly arguing that torture and other physical integrity violations are justified. For instance, Amnesty International has claimed massive human rights violations in Nepal by both the military and Maoist guerrillas, including the killing and kidnapping of civilians, torture of prisoners, and destruction of property.²¹⁷ In defense of the government’s suspension of constitutional freedoms and harsh actions, Nepal’s Prime Minister declared: “You can’t make an omelette without breaking eggs. We don’t want human rights abuses but we are fighting terrorists and we have to be tough.”²¹⁸ Ultimately, how much protection is provided depends on the severity of the threat.²¹⁹

Deep conflicts over the nature, purpose and justifiability of humanitarian laws of war give rise to different thick conceptions of a humanitarian rule of law. Should unlawful combatants be entitled to protections and if so which ones? Should torture be allowed in some circumstances, and if so, under what circumstances?²²⁰ Should the executive be able to derogate from civil and

²¹⁴ Protocol I, art. 1.

²¹⁵ Laura Dickinson, *supra* note 19; Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1 (2001); Jordan J. Paust, *Antiterrorism Military Commissions: Postscript Concerning The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677 (2002).

²¹⁶ See Todd Landman, *supra* note 175 (noting that according to Amnesty International the majority of countries continue to engage in torture, with 57% of states committing acts of torture against citizens in 2002 as compared to 58% in 1990). See also David Reilly, *supra* note 127.

²¹⁷ Daniel Lak, *Kingdom on the Brink of Catastrophe*, S. CHINA MORNING POST, May 12, 2002, at 7.

²¹⁸ See *id.*

²¹⁹ As Alexander Hamilton noted, “Safety from external danger is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free.” THE FEDERALIST No. 8 (Alexander Hamilton).

²²⁰ ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE (2002). See also OREN GROSS, THE PROHIBITION ON TORTURE AND THE LIMITS OF LAW, IN TORTURE (Stanford Levinson ed., 2004) (arguing against passing laws that carve out exceptions for torture in times of crisis. Rather, in truly exceptional circumstances government officials might have to engage in civil disobedience: they might have to step outside the legal framework, authorize torture, and then accept the legal ramifications of their actions. Such ramifications might be expulsion from office or criminal

political rights in times of emergency, and if so should the decision be subject to legislative or judicial review? As discussed above, these issues cannot be resolved by appealing to the requirements of a thin rule of law. Rather they will turn on differences in normative and political beliefs that underlie different thick conceptions of rule of law.

The laws of war are equally problematic from a thin rule of law perspective. A thin rule of law requires that rules be reasonably clear. However, international humanitarian law is *remarkably unclear* in many crucial areas. Frequently, it consists of nothing more than general principles, often with an idealistic and - considering the context - surreal quality. Consider for instance the principles of proportionality and military necessity. Even the most basic issue of proportional to *what* remains unclear. Are U.S. actions in the war on terror supposed to be proportional to past terrorist acts or possible future threats? Is proportionality to be justified based on the ability to deter future terrorist acts? If so, then a use of force wholly disproportionate to the original attacks might be justified as necessary to strike sufficient fear into would be terrorists.

A group of renowned scholars found that NATO had committed “relatively minor” breaches of international humanitarian law that were reasonable interpretations of the concept of “military necessity” in Kosovo.²²¹ But was it really necessary or justifiable to take out basic civilian structures including bridges, telecommunications facilities and power stations?²²² Even if necessary, NATO’s decision to bomb from higher than 15,000 feet up hardly seems to meet the proportionality requirement given that there were no casualties among NATO forces but more than 500 Serbian and Kosovar civilians were killed and an additional 6000 wounded.²²³ The Independent International Commission admitted that some of NATO’s decisions to attack dual use targets were “questionable under the Geneva Conventions and Protocol I,” but then let NATO off the hook by pointing out in effect that breaches were the norm in practice and thus apparently

sanctions, but could also be that prosecutors exercise discretion and decide not to prosecute, “runaway juries” acquit or the authorities issue a pardon. Gross claims that “[g]oing completely outside the rule of law in appropriate cases preserves, rather than undermines, the rule of law in a way that bending the law for catastrophes does not.” In contrast, allowing torture as a matter of law in certain circumstances may lead to abuse in times of crisis because the provisions may be stretched to reach circumstances not originally intended).

Overextending narrow exceptions for torture would constitute a violation of thin rule of law criteria. However, civil disobedience, runaway juries and the possibility of politically motivated decisions not to prosecute or to issue pardons are also problematic from a thin rule of law perspective. In the end, the values of a thin rule of law may be less important than substantive concerns about which approach is likely to result in the right amount of torture and security. Prohibiting laws that carve out exceptions may be preferable because they lead to a more justifiable amount of torture even though the prohibition may do more violence to rule of law principles. A thin rule of law does not guarantee just outcomes, and the values served by a thin rule of law may at times need to give way to other socially important values such as avoiding excessive torture.

²²¹ Independent International Commission on Kosovo, *The Kosovo Report* 288-89, 183-84 (2000). Both the Kosovo Report and a report by the House of Commons Foreign Affairs Select Committee concluded that the intervention by NATO itself breached international law but was morally justified.

²²² See Henry Shue and David Whippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civil Functions*, 35 CORNELL INT’L L. J. 559 (2002).

²²³ See *Final Report to the Prosecutor by the Committee established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia*, para 1, at <http://www.un.org/icty/pressreal/nato061300.htm>. (rejecting the duress defense in the Erdemovic case, the majority reasoned that soldiers in essence assumed the risk and should be held to a higher standard than civilians. Thus poor Erdemovic, about to be killed unless he killed others, was required to sacrifice his life rather than kill civilians. However, whereas the ICTY Appeals Chamber expected Erdemovic to be a superhero, U.S. soldiers are allowed to avert any risk to themselves by bombing from 15,000 feet, in the process killing many more innocent civilians than did Erdemovic).

justified or at least excusable: "State practice in wartime since World War II has consistently selected targets on the basis of an open-ended approach to 'military necessity,' rather than by observing the customary and conventional norm that disallows deliberate attacks on non-military targets."²²⁴ The Commission noted the "NATO campaign was more careful, in relation to targeting, than was any previous occasion of major warfare conducted from the air."²²⁵ Apparently violations of law that are less flagrant than the normal exceedingly egregious type are to be considered "minor breaches," regardless of the number of lives lost. The curious result from a rule of law perspective is that rather than the simple determination of legality or illegality, there is a gray area of semi-illegal, at least for the victors.²²⁶

In the end, broad principles such as proportionality and military necessity provide precious little guidance in deciding the legality of dropping atomic bombs on Hiroshima and Nagasaki, napalming Vietnam or carpet-bombing Cambodia, and are easily manipulated to justify whatever conclusion happens to satisfy one's political position.

It is true that laws are often unclear. But the vagueness of humanitarian law is particularly problematic given the decentralized nature of international law. A wide variety of bodies are charged with interpreting these laws and their domestic counterparts, including the I.C.J., U.N. bodies, international criminal tribunals, the International Criminal Court, and domestic courts claiming universal jurisdiction over serious crimes such as crimes against humanity and war crimes. These bodies do not share a common method or culture of legal interpretation. Some of them are heavily politicized. They may issue final judgments that the states and individuals affected have no further legal channels to challenge.²²⁷ Given the highly political and emotionally charged nature of the issues involved, these exceedingly vague concepts are likely to result in outcomes determined more by power politics and contested normative views than legal considerations in many cases.

The dangers are most evident in trials in domestic courts under principles of universal jurisdiction.²²⁸ Rights organizations initially praised Belgium for adopting a universal jurisdiction law that allowed Belgium courts to try persons accused of war crimes and crimes against humanity in absentia even when there was no link between Belgium and alleged perpetrator of the crime, the victims of the crime or the criminal act. The law was used to bring a wide range of cases against then President Saddam Hussein, the late Congolese ruler Laurant Kabila and his foreign minister, the Rwandan president and former Iranian president, Israeli

²²⁴ Kosovo report, *supra* note 221.

²²⁵ *See id.*

²²⁶ The approach of the Commission contrasts dramatically with the moral absolutism and deontic approach of the ICTY and ICTR in dealing with less reputable defendants where even a single act of torture or rape or murder may constitute a violation of the laws of war or an international crime. But then the whole notion of proportionality fits more comfortably with a utilitarian or consequentialist approach than a deontological approach that places seemingly infinite value on a single life in treating some individual rights as trumps.

²²⁷ On the other hand, domestic courts in third countries would not have to accept the results of decisions not to prosecute by a country involved in a conflict. The Kahan Commission found that Sharon was not criminally responsible for the massacres at the refugee camps on Sabra and Shatila after a lengthy investigation, and yet the Belgium courts refused to dismiss the case. The ICC also has the authority to disregard domestic decisions not to prosecute. See *infra* note 281.

²²⁸ Application of international war crimes law or its counterpart in domestic legislation by domestic courts trying their own citizens, military personnel or government officials for war crimes also presents problems of bias and excessive politicisation. See, e.g. Vivian Grosswald Curran, *Politicizing the Crime against Humanity: The French Example*, 78 NOTRE DAME L. REV. 677 (2003) (discussing the role of politics and ideology in France's treatment of crimes committed by the Vichy government and in Algeria). On the problems of domestic courts applying the laws of war in the context of transitional justice, see *infra* notes 334-347.

Prime Minister Ariel Sharon, Yassar Arafat, Fidel Castro, former Guatemalan generals, oil companies accused of collaborating with military rulers in Burma, and the BBC for allegedly seeking to assassinate a British citizen.²²⁹ The experiment ended when actions were brought against former President George H.W. Bush, Vice President Dick Cheney, Secretary of State Colin Powell and General Norman Schwarzkopf for acts in the 1991 Gulf War and against General Tommy Franks and other U.S. military officers in regard to the present Iraqi war.²³⁰ Under pressure from the U.S., including the threat to relocate NATO headquarters, Belgium amended the law to provide jurisdiction only where the alleged perpetrator or the victim was a Belgian national or resident, and to funnel all suits through the federal prosecutor whose decision whether to prosecute will be final.²³¹

The expansion of crimes of universal jurisdiction including crimes against humanity and war crimes raises the possibility of victims of U.S. military actions holding U.S. officials or military personnel criminally accountable for violations of vague humanitarian laws of war in heavily politicized domestic courts, or of Palestinians pursuing Israeli officials for crimes against humanity or war crimes in the courts of sympathetic countries that have in the past themselves been at war with Israel. Whatever one thinks of the substantive merits of such claims, such cases highlight the thin rule of law requirement that laws be applied impartially and call attention to the important albeit sometimes faint line between law and politics.²³²

The vagueness and undeveloped state of international laws of war highlight another thin rule of law concern that has plagued the international rights movement since Nuremberg: the retroactivity of laws. The requirement that laws generally be prospective enhances predictability and fairness. Although the predictability of law is often considered especially valuable for business people, the prospectivity of law is equally if not more important in the criminal context, as captured in the notion of no crime without penalty (*nullum crimen sine lege*). The arguments against retroactive criminal laws take on even greater weight in the context of international law, where the specter of victor's justice is so often close at hand.

Recognizing this, the Report of the Secretary General that provided the foundation for the establishment of the ICTY declared that the tribunal would only follow clear international laws.²³³ Yet the rules followed by the ICTY were far from clear. Several of the tribunal's decisions were based at least in part on customary international law (CIL). However, the very notion of what constitutes CIL is now much contested. According to the influential Restatement 3rd of Foreign Relations Law, customary international law results from a general and consistent practice of states followed out of a sense of legal obligation.²³⁴ In recent years, these

²²⁹ Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach*, WASHINGTON POST FOREIGN SERVICE, Sept. 30, 2003, at A1.

²³⁰ Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or the Pursuit of Politics?*, 25 CARDOZO L. REV. 247 (2003).

²³¹ See *id.*, at 261, 264.

²³² Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 338 (2001) ("there is the real risk of prosecutions that are politically motivated; that are carried out without due process; that apply law that exceeds what is universally accepted as established international law; or that are undertaken without sufficient political control to avoid dire consequences on the international plane.").

²³³ See *Report of the Secretary-General Pursuant To Paragraph 2 of Security Council Resolution 808 (1993)*, Presented May 3, 1993, (S/25704), para. 34: "In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law."

²³⁴ Restatement (Third) of Foreign Relations Law of the U.S., § 102.

requirements have been significantly watered down. No longer is the practice of the state primarily determined by reference to the state's actual behavior. Rather, state practice may now be based on verbal statements and symbolic or legal acts such as the ratification of treaties or voting in favor of a particular resolution or declaration.²³⁵ Thus, official government statements condemning torture are evidence of state practice, even though the states that issue such statements may in fact continue to engage in torture.²³⁶ Similarly, the test for a general and consistent practice is now much less stringent, as evidenced by the ICTY cases in which the tribunal noted extensive differences in state practice and yet somehow managed to extract a clear rule of international law.²³⁷

In *Erdemovic*, which raised the issue of duress as a defense, the Appeals Chamber noted that states varied widely on the issue.²³⁸ In general, civil law countries tend to treat duress as a complete defense, whereas in some common law countries duress may be a complete defense, in others it may be a complete defense except with respect to first-degree murder, rape and some other crimes, and in still others duress is only a mitigating factor.²³⁹ Yet the Appeals Chamber then opted for an unfavorable interpretation from the defendant's perspective, holding duress was not a complete defense but only a mitigating factor.²⁴⁰

In reaching their decision, some judges drew on particular philosophical justifications that implicate different thick conceptions of rule of law, specifically rejecting a utilitarian approach.²⁴¹ They also drew on contested policy considerations, including the desire to "facilitate

²³⁵ Reading some of the more forward-leaning claims about what constitutes customary international law found in the reports of human rights organizations and law reviews would lead one to believe that the noble intentions expressed in the writings of legal scholars and activists alone would be sufficient to create a new customary international law: simply repeating that some aspirational goal is a right would make it so by transforming it into customary international law. *But cf.* *United States v. Ramzi Yousef et al.* 98-101 et. Seq., slip. Op. at 6627 (2nd Cir., April 4, 2003). ("Some contemporary international law scholars assert that they themselves are an authentic source of customary international law, perhaps even more relevant than the practices and acts of States.... This notion that professors of international law enjoy a special competence to prescribe the nature of customary international law wholly unmoored from legitimating territorial or national responsibilities, the interests and practices of States, or (in countries such as ours) the processes of democratic consent – may not be unique, but it [is] certainly without merit.").

²³⁶ See Todd Landman, *supra* note 175 (noting more than half of countries continue to commit torture today).

²³⁷ It is not always clear whether the tribunal is engaging in statutory interpretation and using state practice and CIL as references for interpretation purposes or whether the tribunal is basing its holding directly on CIL. However, disputes over statutory interpretation of treaty law, including the ICTY statute and rules, raise similar issues about retroactivity and whether rulings based on contested interpretations meet the requirement of applying only clear international law.

²³⁸ Appeals Chamber Judgment, *Prosecutor v. Drazin Erdemovic*, IT-96-22, Judgment, 7 October 1997, para. 19; Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 48-50, 59-66, 72.

²³⁹ *Id.*

²⁴⁰ Cf. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9*, 17 July 1998, art. 22, which would require that the court in the case of ambiguity, the definition of a crime "shall be interpreted in favour of the person being investigated, prosecuted or convicted."

²⁴¹ McDonald and Vohrah state in their opinion:

[A]s we have confined the scope of our inquiry to the question whether duress affords a complete defense to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary

the development and effectiveness of international humanitarian law and to promote its aims and application by recognizing the normative effect which criminal law should have upon those subject to them.”²⁴² However, it is not clear, particularly given the judges’ opposition to utilitarian reasoning and the requirement to apply only clear international law at the time, why the interests of the individual defendant in this case should be sacrificed to produce a better law for future cases. In dissenting, Cassese rejected such considerations: “[T]he majority of the Appeals Chamber has embarked upon a detailed investigation of ‘practical policy considerations’ and has concluded by upholding ‘policy considerations’ substantially based on English law. I submit that this examination is *extraneous to the task of our Tribunal*.”²⁴³

The fact that judges on the same ICTY panel often disagreed about state practices or whether a particular rule constituted CIL is difficult to reconcile with the requirement of clear and consistent practice to constitute CIL and the ICTY’s mandate to only follow clear international law.²⁴⁴ Indeed, as in *Erdemovic*, the opinions of the tribunal often document at great length *the lack of any clear practice* among states. In some cases, the tribunal attempted to avoid the problem by relying on general principles of law rather than CIL.²⁴⁵ The Trial Chamber in *Furundzija* noted that states define rape in different ways, and in particular that they differ over whether forced oral sex constitutes rape or the lesser offense of sexual assault.²⁴⁶ Nevertheless, the Chamber then found that forced oral sex does constitute rape based on general principles of international law. But appealing to even less determinate general principles of international law cannot meet the ICTY mandate to apply only clear international law. The panel attempted to

soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analyzed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defense to a crime in which he killed one or more innocent persons.

Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 84.

²⁴² *Id.*, para. 75.

²⁴³ Separate and Dissenting Opinion of Judge Cassese, para. 11.

²⁴⁴ Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PENN. L. REV. 1, 89 (2002) (noting ICTY Appeals Chamber affirmed the trial panel’s ruling in full in only one out of seven cases). For instance, the Appeals Chamber overruled the tribunal of first instance in *Tadic* on the issue of the proper test for determining when there is state control over subordinate armed forces or militias. The Appeals Chamber rejected the Trial Chamber’s “effective control” test established by the International Court of Justice in *Nicaragua* case in favor of a somewhat less stringent “overall control” standard. The Appeals Chamber justified the deviation from existing international standards on policy grounds: “To the extent that [the overall control standard] provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure ‘protection of civilians to the maximum extent possible.’” Appeals Chamber, *Prosecutor v. Zlatko Aleskovski*, IT-95-14/1, Judgment 24 March 2000, para. 146. The *Aleskovski* Trial Chamber however applied a “specific instruction” standard that was closer to the “effective control” standard than the “overall control” standard. The Appeals Chamber overruled, citing, ironically, rule of law considerations: “It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception.” *Id.* at para. 109. However, the Appeals Chamber took care to leave itself adequate room to forego the rule of law principles of certainty and predictability to achieve other values: “in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.” *Id.* at para. 107.

²⁴⁵ See the Joint Separate Opinion of Judge McDonald and Judge Vohrah, paras. 56-57.

²⁴⁶ Trial Chamber Judgment, *Prosecutor v. Furundzija*, No. IT-95-17/1, Judgment, 10 December 1998, paras. 180, 182.

justify its decision by arguing that forced oral sex constitutes an offense to human dignity.²⁴⁷ While this is surely true, not all offenses to human dignity, or even all sexual offenses to human dignity, constitute rape in many legal systems much less violations of general principles of international law. Many serious offenses to human dignity are not illegal, and surely do not rise to the level of violations of general principles of international law. Ignoring the pleas of a starving child as you enter Starbucks to buy a double mocha latte is a serious affront to human dignity. But that type of day-to-day indifference to the plight of others is not illegal.²⁴⁸ Human dignity is a vague notion.²⁴⁹ General principles of international law cannot just boil down to whatever the tribunal believes constitutes a serious offense to human dignity.

Some of the other previously unsettled issues that were resolved by the tribunals include the U.N.'s authority to create a tribunal under Chapter 7 when the conflict is not international; whether crimes against humanity may be based on persecution; whether state involvement is necessary for crimes against humanity; and whether common article 3 is part of customary international law.²⁵⁰ Apparently unaware of the requirement that only clear international law be applied, many rights advocates have praised the ICTY for developing and advancing international humanitarian law without attempting to address the issues of retroactivity and the consistency of these practices with the ICTY statute or the requirements of a thin rule of law. Similar issues arise with respect to other international tribunals as well as domestic courts that base their decision on CIL or treaties interpreted in a purposive and evolutionary fashion. To be sure, all law whether international or domestic evolves, and international as well as domestic courts may adopt a purposive approach.²⁵¹ Nor is every retroactive application of law illegal or morally

²⁴⁷ *Id.* at para. 183. The tribunal attempts to counter charges of retroactivity by arguing that under the rules of the ICTY the punishment is the same for rape or the lesser offense of sexual assault when the latter constitutes a war crime. The tribunal notes that the stigma attached to being convicted of rape as opposed to sexual assault may be greater, but dismisses this concern as a "product of questionable attitudes." *Id.* at para. 184. However, the tribunal then nonchalantly adds that in any event, "any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape." *Id.* But in allowing that the definition of rape is being broadened, even if for good moral reasons, the tribunal concedes that the law is being created on the spot and applied retroactively, and thus that it is acting beyond the scope of its authority as set forth in the statute. Whether or not one agrees with the reasoning and the normative judgment of the tribunal, the tribunal's holding remains difficult to reconcile with the ICTY mandate to apply only clear international law existing at the time the offenses occurred.

²⁴⁸ Clearly there are ways of distinguishing forced oral sex from refusing to aid a starving child, which may justify the former being prohibited as general principle of international law and the latter not. The point however is that what distinguishes them and justifies one being a general principle and the other not so treated is not whether the act affronts human dignity.

²⁴⁹ See Jeremy Rabkin, *What Can We Learn about Human Dignity from International Law*, 27 HARV. J.L. & PUB. POL'Y 145 (2003) (arguing that the "contemporary ideas about the role of international law are grounded on a very misplaced notion of what human dignity is").

²⁵⁰ See Terree Bowers, *Keynote: Process and Function of the International Criminal Court*, 8 J. OF INT'L L. & AFF. 3 (2004) (describing and evolution of law at the ICTY and ICTR, and noting that the tribunals have been making daily and weekly decisions that constitute "an indigenous body of law that is very active and developing").

²⁵¹ One might argue that the inability to agree on an accepted philosophical justification for rights and the need to apply international laws in contexts where parties may hold different philosophical and normative views suggests that courts applying international should not base interpretations on contested philosophical or normative views. Rather they should attempt to interpret the laws in a way that would create an overlapping consensus. While perhaps good advice in general, there is no overlapping consensus on many issues because of differences in deep commitments. In some cases, the only justification for a decision will be a normatively contested one.

Nevertheless, concerns for retroactive punishment might justify adopting an interpretation that is most favorable to the defendant, as contemplated in the Rome Statute for the ICC. Now that the ICC has been established, judges and others unhappy with the current state of law could

blameworthy.²⁵² However, the ICTY was expressly required to apply only clear international law. More generally, international law differs in that CIL is supposed to be based on clear and consistent general state practices, and also in the potential for abuse when non-elected international bodies or domestic courts with a political axe to grind are charged with making the decisions in often highly politicized contexts.

The elements of a thin rule of law are to a large extent tied to notions of procedural rather than substantive justice. However, the ICTY and ICTR developed many of their procedural rules on the fly, as it were.²⁵³ The tribunals were given greater leeway to invent procedural rules as needed. Article 15 of the ICTY Statute provides that “[t]he judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of witnesses and other appropriate matters.”²⁵⁴ While providing a sounder legal basis for rulemaking by the tribunal, the provision nevertheless fails to satisfy the basic rule of law requirement that rules should be prospective. Critics of the provision have objected that the tribunal is both making the rules and applying them, and then where necessary amending them, violating principles of separation of powers, undermining predictability and certainty, and creating the possibility of partiality and arbitrariness.²⁵⁵

A number of procedural justice issues arose along the way that highlighted the thin rule of law value of a fair trial. The lengthy detention before trial led to concerns about arbitrary detention and violations of the right to a speedy trial.²⁵⁶ Some defendants were in custody for

push for amendments in the way crimes and defenses are defined in the Rome Statute, rather than attempting to rewrite humanitarian rule of law through retroactive judicial decisionmaking. To be sure, the cumbersome treaty process and the absence of an effective international legislature make judicial activism more tempting for judges seeking to develop international humanitarian law in accordance with their normative preferences and views about the merits on policy issues.

On the general issue of treaty interpretation and the conflicting views of classicists or textualists and those who favor a purposive or evolutionary approach, compare Franck, *supra* note 196 (arguing for a dynamic, evolutionary approach), with Michael Byers & Simon Chesterman, *Changing the rules about rules? Unilateral humanitarian intervention and the future of international law*, in HUMANITARIAN INTERVENTION, *supra* note 162, at 177 (raising a number of objections to the purposive approach and to the changing criteria for establishing customary international law).

²⁵² Thin theories of rule of law also give rise to normative issues of the kind that tend to separate advocates of different thick conceptions of rule of law. However, thin theories reduce the range of issues where such substantive values will be relevant and hence the scope of possible conflict. For instance, in what circumstances laws may be imposed retroactively will turn in part on one's deeper normative commitments. Stephen Munzer, *A Theory of Retroactive Legislation*, 61 TEXAS L. REV. 425 (1982). Thus, one can debate whether the tribunals were justified in any particular instance in putting normative considerations ahead of concerns for the niceties of a thin rule of law.

²⁵³ For the rules and their various updates and amendments, see *Rules of Procedure and Evidence*, available at <http://www.un.org/icty/basic.htm>.

²⁵⁴ *Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted 25 May 1993, by Resolution 827, available at <http://www.un.org/icty/legal/doc/index.htm>.

²⁵⁵ See Scott Johnson, *On the Road to Disaster: The Rights of the Accused and the International Criminal Tribunal for the Former Yugoslavia*, 10 INT'L LEGAL PERSP. 111 (1998); John Laughland, *The Anomalies of the International Criminal Tribunal are Legion This is not Victor's Justice in the Former Yugoslavia – in Fact it is No Justice at All*, LONDON TIMES June 27, 1999, at 24 (ICTY is a “rogue court with rigged rules”); Megan Fairlie, *Rulemaking from the Bench: A Place for Minimalism at the ICTY*, 39 TEXAS INT'L L.J. 257 (2004).

²⁵⁶ The Rwandan government threatened not to cooperate with the ICTR when the Appeals Chamber ordered the release of Jean-Bosco Barayagwiza on the ground that prolonged detention violated his rights. In reaching its decision, the Appeals Chamber dramatically declared in typical morally righteous language: “Nothing less than the integrity of the Tribunal is at stake in this case. Loss of public confidence in the Tribunal as a court of

months before they obtained access to lawyer.²⁵⁷ Defendants have also been unable to secure the attendance of defense witnesses.²⁵⁸ In some cases, the witnesses may be reluctant to testify out of safety concerns. In other cases, potentially key witnesses such as former government leaders may be prevented from giving testimony based on national security exemptions.²⁵⁹ To be sure, international tribunals operate under difficult conditions, and raise many complicated issues of law that take time to research. Trials are often located far from the place where the conflict occurred and witnesses reside, need to rely on the cooperation of sometimes hostile states to provide witnesses and are hard-pressed to provide effective witness protection programs to prevent retaliation against witnesses. Moreover, both the ICTY and ICTR were underfunded, and lacked the resources to pursue all of the cases in an expeditious way. Nevertheless, the utility of the international tribunals as a model for demonstrating the value of rule of law to countries around the world is surely diminished when they fall far short of rule of law standards required of domestic legal systems.

While these sorts of procedural issues raise questions about the fairness of the proceedings, they pale in comparison to the more fundamental criticism that the proceedings are simply victor's justice. Although the ICTY and ICTR are not as obviously the political tool of the states that created them as was the case in Nuremburg and for the Tokyo trials, the reality is that the tribunals are still supported by, and thus accountable to, the states that must approve their establishment and cooperate with them if they are to be successful.²⁶⁰ Critics initially questioned to what extent Western powers were committed to tribunals given the lack of adequate funding, claiming that tribunals were just a way of placating the pangs of conscience among citizens in

valuing human rights of all individuals – including those charged with unthinkable crimes – would be among the most serious consequences of allow [the defendant] to stand trial in the face of such violations of his rights.” Dec., *The Prosecutor v. Barayagwiza*, No. ICTR-97-19, Appeals Chamber, International Criminal Tribunal for Rwanda, Nov. 3, 1999, ¶ 113.

Chief Prosecutor Carla Del Ponte promised the Rwandan government that she would do everything in her power to convince the appeals chamber to change its decision. Eventually, AC reversed its decision, citing new facts provided by the prosecutor. Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 135 (2002) (noting that while the judges denied being coerced into changing their decision, the Rwandan government threats likely played a role). Robert Kushen and Kenneth Harris, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501 (1996).

²⁵⁷ See Sherrir L. Russel-Brown, *Poisoned Chalice?: The Rights of Criminal Defendants Under International Law, During The Pretrial Phase*, 8 UCLA J. INT'L L. & FOREIGN AFF. 127 (2003) (noting ICTR defendant was arrested without a warrant based for being in home of another person detained based on “reasonable suspicion” even though the prosecutor did not appear to have any such information at the time of detention; defendant was detained for three months without being charged; he was informed of his charges in a language he did not understand; and he was not provided a lawyer for five months.).

²⁵⁸ See Appeals Chamber Judgment, *Prosecutor v. Dusko Tadic*, IT-94-1, Judgment 15 July 1999, para 52 (noting that the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts, the Appeals Chamber dismissed Tadic's arguments that the inability to call witnesses deprived him of the right to a fair trial).

²⁵⁹ See ICTY, Rules of Procedure and Evidence, Rule 54bis. Claiming to have been illegally kidnapped by bounty hunters, Stevan Todorovic filed a motion for judicial assistance to obtain documents and testimony from the multinational stabilization force in Bosnia, NATO and other states operating in Bosnia. The Trial Chamber issued a subpoena to U.S. General Eric Shinseki to testify in regard to the arrest. The Prosecutor, and several states including the U.S., Denmark, Canada and the U.K. filed a request for review of the decision. The U.S. asserted that Shinseki's testimony would prejudice compelling operation security concerns and warned ominously that the decision would affect U.S. cooperation with the tribunal. See Cogan, *supra* note 156, at 124.

²⁶⁰ See, e.g., RICHARD MINEAR, VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

Western states.²⁶¹ Once established, however, the prosecutors were under pressure to indict quickly, which led to the indictment of several “small fry” when prosecutors at the ICTY could not get their hands on the “big fish”. Prosecutors were also under pressure to avoid the perception of bias and victor’s justice by indicting parties from both sides of the conflict.²⁶² As a result, some Muslims were arrested after critics complained about the failure to indict any Muslims in the first fifty indictments.²⁶³ On the other hand, Bosnian Croats argue that they are over-represented as perpetrators and under-represented as victims,²⁶⁴ while Serbs almost universally see the tribunal as anti-Serbian.²⁶⁵ In Rwanda, many Hutus, who contain to protest their innocence, claim that too few Tutsis have been convicted;²⁶⁶ in Sierra Leone, the RUF complains, with considerable merit, that it is being unfairly singled out even though the Kamajors, Civil Defense Forces and the Nigerian peacekeeping forces all committed war crimes.²⁶⁷

Although the judges may have no stake in the outcome of the ethnic conflicts per se, many of the judges who heard the cases had a long commitment to the development of international law and the advancement of human rights, and saw it as their responsibility to decide cases consistent with the promotion of human rights and dignity.²⁶⁸ They were also likely

²⁶¹ Makau Mutua, *From Nuremberg to the Rwanda Tribunal: Justice or Retribution*, 6 BUFF. HUM. RTS. L. REV. 77 (2000); David Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 CRIM. L. F. 401 (1994).

²⁶² Former prosecutor for the ICTY and ICTR Terree Bowers noted that prosecutors were concerned about “keeping the numbers balanced” to maintain credibility. See Bowers, *supra* note 250, at 14.

²⁶³ Michael Scharf & Valerie Epps, *The International Trial of the Century?* 26 CORNELL INT’L L. J. 635, 645 (1996).

²⁶⁴ Ivan Simonovic, *The Role of the ICTY in the Development of International Criminal Adjudication*, 23 FORDHAM INT’L L. J. 440, 457 (1999).

²⁶⁵ Tina Rosenberg, *Defending the Indefensible*, N.Y. TIMES, April 19, at 46.

²⁶⁶ Mutua, *supra* note 261 at 91.

²⁶⁷ See Celina Schoken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERK. J. INT’L L. 436, 455 (2002).

²⁶⁸ Compare *R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No.2) [1999] 1 All ER 577, finding bias where one of the judges was at the time of the hearing of that case a Director of Amnesty International Charity Limited, with Appeals Judgment, *Prosecutor v. Furundzija*, IT-95-17/1, Judgment, 21 July 2000, where the Appeals Chamber found that the prior participation of one of the judges on the Trial Chamber in the United Nations Commission on the Status of Women, which allegedly had a role in affirming and defining rape as a war crime, did not constitute actual bias or even an unacceptable appearance of bias. The Appeals Chamber argued, somewhat formalistically, that a person in such capacity serves as a representative of the country and not on his or her own behalf, *id.* at para. 199. In any event, the Appeals Chamber reasoned, “even if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.” *Id.* at para. 200. Moreover, Article 13(1) of the Statute expressly provides that “[i]n the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.” Accordingly, the Chamber found it odd that a person would be excluded by bias for possessing the very qualifications required to serve as a judge on the ICTY. *Id.* at para 205. While dedication to human rights advocacy may qualify someone to be a judge, and may not be adequate grounds for removal, having staked out a position on a particular issue crucial to the disposition of the case in question is another matter. See also Anthony D’Amato, *Defending a Person Charged with Genocide*, 1 CHI. J. INT’L L. 459, 466 (2000) (noting institutional bias at ICTY, where members of the Registrar, judges and prosecutors took up most of the space in the building, saw each other socially and tended to share a sense of pride when a war criminal was convicted).

to be influenced by the general sense of outrage created by media reports that tended to simplify the events and dehumanize one side.²⁶⁹ Few judges are likely to have spent much time under the wartime conditions that military commanders must operate under. Looked at from afar, war is ugly, and morally reprehensible. It is hard to fathom many of the actions that occur in war, or how seemingly decent people could carry out such acts.²⁷⁰ Furthermore, surely all judges were aware that a steady string of acquittals on narrow technical grounds would have undermined support among the general public and the states responsible for funding the tribunals. It is even less conceivable that the judges would have found the ICTY was improperly established, notwithstanding legitimate concerns about the authority of the U.N. to establish such a tribunal.²⁷¹

Most damaging to the credibility and legitimacy of the ICTY and supportive of the claims of victor's justice and political bias is the failure to prosecute NATO for alleged violations of the laws of war. Carla del Ponte, prosecutor for the ICTY, ultimately decided not to pursue claims relating to the justifiability of the bombing campaign as a whole or specific incidents or even to conduct an in-depth investigation, reasoning that "either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences."²⁷² In contrast, Amnesty International issued a detailed report that concluded that NATO was guilty of war crimes.²⁷³ In one instance, a NATO pilot dropped not one but two bombs on a passenger train crossing a bridge, killing ten people and injuring fifteen more. Even assuming the pilot,

²⁶⁹ Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 INT'L L. & POL. 355, 358 (2002) (The Organization of African Unity's International Panel of Eminent Personalities stated that "there are hardly any important aspects of the story that are not complex and controversial; it is almost impossible to write on the subject without inadvertently oversimplifying something or angering someone."). Judges in domestic courts also come to the bench with background beliefs and attitudes on various issues, in some cases strongly held. Nevertheless, judges are likely to have a deeper and more nuanced sense of issues that arise in their own societies. In any event, even in domestic trials, parties may and frequently do question the legitimacy of the proceedings when they feel judges hold certain normative or political views or are committed to certain causes that are at odds with their own views or interests.

²⁷⁰ The danger is that judges far removed from the heat of the battle will second-guess commanders who must make instantaneous decisions based on imperfect information under extreme conditions of duress or impose unreasonable obligations on soldiers. The majority's view that a soldier such as Erdemovic, with a wife and nine-month old son waiting at home, is expected to give up his life because a soldier assumes such risks illustrates the dangers of arm-chair judgments. Soldiers might assume certain risks, but being threatened at gunpoint if one does not shoot innocent civilians is not one of them. How many civilians or soldiers would give up their own life in such circumstances, knowing that doing so will serve no constructive purpose as the other soldiers will kill the civilians anyway? To expect soldiers to be superheroes is unreasonable. On the hand, there is a danger given the vague of laws that judges will be too deferential. Adopting a good faith standard rather than a reasonable person standard, the Nuremberg Tribunal acquitted a Gernam commander for ordering troops to kill starving civilians fleeing a besieged city on the grounds that office believed the decision was militarily necessary. Jochnick & Normand, *supra* note 206, at 94.

²⁷¹ Scharf & Epps, *supra* note 263, at 393-394 (observing that in deciding Tadic's challenge to the legality of the ICTY, "the judges that made that decision could not be seriously expected to decide the issue impartially, given that their incredibly prestigious, \$200,000-per-year jobs would have been instantly extinguished if they had decided otherwise.").

²⁷² See the Final Report to the Prosecutor, *supra* note 223. As Mandel points out, although the unsigned report was attributed to an anonymous committee, the report appears to have been written by ex-Nato lawyer, retired Canadian Armed Forces Frigate Captain William Fenrick. See Mandel, *supra* note 201, at 117.

²⁷³ Amnesty International, NATO/Federal Republic of Yugoslavia, "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force, EUR 70/018/2000, June 6, 2000, available at <http://web.amnesty.org/library/index/ENGEUR700182000>.

focusing on the target, did not see the train approaching until too late, and that the smoke prevented the pilot from noticing that the train had continued forward into the second target zone, it would seem that pilot acted recklessly in not verifying that the second target zone was clear before firing. After all, there was no immediate need to take out the bridge. Unless the pilot and NATO commanders were justified in believing that destroying the bridge at that particular moment was of such military importance as to justify the number of civilian casualties likely to be caused by continuing the attack, the attack should have been called off in accordance with the Geneva Convention.²⁷⁴ Moreover, evidence would not have been an insurmountable problem, as suggested by del Ponte, because there was a cockpit video, which NATO subsequently admitted speeding up almost five times in an apparent attempt to explain away the incident as an unfortunate accident resulting from the need to make a quick decision under adverse conditions.²⁷⁵ The ICTY's decision not to prosecute or even investigate numerous alleged crimes led to characterizations of the tribunal as a hoax and a propaganda arm for NATO, and to dismissals of the report as an amateur whitewash and a fraud.²⁷⁶

While the ICC will be an improvement on the ICTY and ICTR in many ways, it will still be subject to many of the same concerns and limitations. The crime of aggression remains undefined. Many of the crimes remain vague, which is one of the reasons why the U.S. has opposed the ICC.²⁷⁷ Although the court, like the ICTY, is required to apply only laws in place at the time of the crime,²⁷⁸ the court may apply statutory law, rules of law and jurisprudential principles from previous cases, customary international law and general principles of law.²⁷⁹

²⁷⁴ Article 57 of Protocol I of the Geneva Conventions requires that an attack be cancelled or suspended if it becomes clear that attack "may be expected to cause incidental loss of civil life...which would be excessive in relation to the concrete and direct military advantage anticipated."

²⁷⁵ See Mandel, *supra* note 201, at 121.

²⁷⁶ *Id.* at 95-96 (noting at 117 that the unsigned committee report apparently was largely the product of an ex-NATO lawyer and relied primarily on NATO press releases, which the committee assumed were generally reliable, honest and accurate accounts of the events).

²⁷⁷ Cf. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT'L. L. 337 (1999) (noting that U.S. opposition stems in part from whether U.S. would be held accountable for such events as the bombing in Sudan of an alleged chemical weapons plant that turned out to be a pharmaceutical plant or the bombing of Amariyah air-raid shelter which the Dept. of Defense claimed to be a military bunker that led to 400 civilian deaths in Baghdad, although journalists saw no evidence of structural reinforcements, although that such risks do not justify the refusal to ratify the Rome Statute). Cf. also Jack Goldsmith, *Centennial Tribute Essay: The Self-Defeating International Criminal Court*, 70 UNIV. CHIC. L. REV. 89, 96 (2003) (discussing a number of vague provisions although noting that procedural safeguards plus the threat of U.S. retaliation make it unlikely that U.S. officials will end up in the ICC dock).

²⁷⁸ The Rome Statute of the ICC, effective 2002, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute], art. 22 provides: "1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted."

²⁷⁹ Rome Statute, *id.*, art. 21 provides "1. The Court shall apply: (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards. 2. The Court may apply principles and rules of law as interpreted in its previous decisions."

Thus, what appear on their face to be relatively unobjectionable provisions are likely to be expanded over time in a controversial and retroactive manner, as in *Erdemovic*.²⁸⁰

In addition, the decision-making processes, and the operation of the court more generally, are likely to remain highly politicized. The complementarity principle allows domestic systems the first opportunity to try alleged criminals, although the ICC will be able to try cases if the domestic trials are deemed a sham.²⁸¹ The ICC may not hesitate to declare the trials of military officers in the military or even civilian courts in authoritarian regimes a sham. However, it remains to be seen whether the ICC will someday declare the trials of U.S. or English soldiers in American or English military courts a sham, or to prosecute senior officials from Western countries under the same broad theories of command responsibility or aiding and abetting applied to dictators should the domestic system fail to prosecute.

With relatively weak powers of enforcement, the ICC will also be dependent on the cooperation of other countries for extradition of defendants, assistance with collection of evidence and access to witnesses.²⁸² The U.S. has already attempted to undermine the court by refusing to cooperate with the court and threatening other states that do cooperate with the court in prosecuting Americans. In 2002, President Bush signed the American Servicemembers' Protection Act, which prohibits U.S. state or federal agencies from cooperating with the ICC, prohibits military assistance to most countries that ratify the ICC, restricts transfer of law enforcement and military information to states that become parties to the ICC, bars U.S. participation in U.N. peacekeeping missions unless American soldiers are given immunity, and, miraculously, authorizes the President to use "all means necessary and appropriate" to free U.S. citizens held by or on behalf of the ICC.²⁸³ The Act conjures up absurd images of U.S. soldiers

²⁸⁰ Michael A. Newton, *Should the United States Join the International Criminal Court*, 9 U.C..DAVIS J. INT'L L. & POL. 35 (2002) (noting that many of the Elements of Crime are unclear and will need to be interpreted, and that there have already been attempts to interpret some elements in a more expansive way than was originally intended).

²⁸¹ See Rome Statute, *supra* note 278, art. 17(2): 2. In order to determine unwillingness [to investigate or prosecute] in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable: (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5; (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice; (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice. Article 20(3) adds: "No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court: (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice."

The ICC will not have jurisdiction over U.S. soldiers who tortured Iraqis as neither Iraq nor the U.S. has ratified the Rome Treaty. However, the U.K. has ratified the Treaty. Moreover, some day U.S. soldiers in all likelihood will commit alleged crimes in some country that is a member of the ICC.

²⁸² Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Resolution*, 88 GEO. L.J. 381, 389, 416 (2000) (arguing that ICC was revolutionary in providing for prescriptive jurisdiction over states, but that states' concerns with sovereignty and national interest were evidenced in the Court's "paltry" enforcement powers and in the complex and burdensome procedural regime governing challenges to jurisdiction and admissibility; as a result, the role of the ICC might be much less revolutionary in practice than in theory).

²⁸³ American Servicemembers' Protection Act, 22 U.S.C. § § 7421-7433 (2002).

parachuting into The Hague to free comrades accused of war crimes. The U.S. has also required other countries to sign bilateral agreements that they will not extradite any US citizen sought for war crimes or crimes against humanity by ICC, at pains of losing trade benefits, economic aid or military assistance.²⁸⁴ Whether the court will be able to function and acquire legitimacy without U.S. support remains to be seen.

In sum, the laws of war present numerous problems from a rule of law perspective. The laws are vague and easily manipulated to serve political ends. They may even legitimate the use of force by providing superpowers the legal fig leaf needed to cover their acts of naked aggression.²⁸⁵ The selective establishment of war tribunals and singling out of the leaders of a few countries calls into question the generality of the regime and highlights one of the central pretenses of international law: the equality of all states large or small. The rapid development of laws of war resulting from the alleged need to revise rules regarding pre-emptive strikes in the face of new threats and terrorism, the recent jurisprudence and case law of the ICTR and ICTY and the creation of the ICC, the expansion of customary international law and its implications for interpretation of the Geneva Conventions have all diminished, for better or worse, stability in this area of law, and increased the likelihood of retroactive application of the newly minted laws. While future development of this body of law may address some of the issues related to vagueness, stability and retroactivity, political factors are likely to continue to undermine the key rule of law principle of impartial application and implementation, particularly in the principles of universal jurisdiction becomes more widely accepted. Although the establishment of the ICC may obviate the need for universal jurisdiction to some extent, the effectiveness of the ICC is likely to be undermined without U.S. support. In any event, the ICC is unlikely to challenge strong states on which it must rely for financial support and enforcement. The failure to indict officials from the strong states while relying on an increasingly moralistic body of law to impose punishments on a steady parade of officials from failed states or states defeated militarily by the U.S. and NATO will undermine significantly the legitimacy of the ICC and tarnish its claims to the mantle of rule of law. Nor is it likely that a more developed body of law or even more rigorous and impartial implementation by the ICC, other international bodies or domestic courts will present much of a deterrent to initiating war or to the commission of atrocities in the waging of war. The Nuremberg and Tokyo Trials, the ICTY and ICTR and the establishment of the ICC have not resulted in any noticeable decrease in acts of aggression or wartime atrocities.²⁸⁶

²⁸⁴ Johan D. van der Vyver, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* by Bruce Broomhall, 18 EMORY INT'L L. REV. 133, 143 (2004) (book review) (noting some 74 countries have been pressured into signing bilateral immunity agreements, and that the U.S. has imposed sanctions on 23 countries that have refused to sign them). The U.S. has inserted clauses prohibiting extradition of U.S. personnel into Status of Forces Agreements that provide for placement of U.S. military personnel in other countries. It has sought similar clauses in Security Council resolutions, going so far as to veto the continuation of U.N. peacekeeping operations in Bosnia unless the Security Council approved such a clause. Despite objections of even some of the U.S.'s closest allies, the U.S. refused to budge. In the end, Security Council passed a resolution allowing for a one-year deferral of prosecution for peacekeepers from non-ICC countries for all peacekeeping operations in exchange for U.S. support for the Bosnian mission, Deller et al., *supra* note 20 at 123-24. With the horrific images of Americans soldiers torturing Iraqis still being broadcast on the nightly news, the U.S. government had the audacity to seek an extension from the Security Council. However, after Kofi Annan openly criticized the extension as unwise and a violation of fundamental rule of law principles, the U.S. backed down and gave up on seeking an extension. The U.S. then removed some peacekeepers from Kosovo and Africa. See *U.S. removes peacekeepers over war crimes court*, REUTERS, July 3, 2004, available at <http://www.etaiwannews.com/World/2004/07/03/1088822454.htm>.

²⁸⁵ Jochnick & Normand, *supra* note 206, at 50.

²⁸⁶ Neil J. Kritz, *Progress and Humility: The Ongoing Search for Post-Conflict Justice*, in POST-CONFLICT JUSTICE, *supra* note 193, at 55, 73 (noting violations of war increased after the ICTY was established and Milosevic indicted).

Rule of law requires that the gap between law on the books and actual practice be reasonably narrow. The gap between actual practice and human rights law in general, and laws of war in particular, is remarkably wide, and is likely to remain so. Similar failings in domestic systems - including weak institutions and enforcement powers, vague and changing laws applied retroactively, heavily politicized decisionmaking, external influence on the decisionmakers including the threat to withhold resources and refuse cooperation in an attempt to undermine the independence of the court and tribunal, a widespread sense among those subject to the system that the system is biased and illegitimate – would result in screaming howls of protest from the international rights community and assertions that the system does not even merit the label of a “legal system” much less the honorific title of “rule of law.”²⁸⁷

VI. Rule of Law, Transitional Justice, Nation Building and the Establishment of Rights-Respecting Regimes: The Limits of Law, Political Will and Knowledge

Rule of law is central to efforts to hold former leaders accountable and establish a rights respecting regime. However, transitional justice and nation-building create special challenges from a rule of law perspective. As we have seen in Somalia, Bosnia, East Timor, Liberia, Afghanistan, Iraq, the former Soviet Republics and now Haiti (again), regime change is the relatively easy part. The difficult task is the post-regime construction of a new state capable of good governance, implementing rule of law and democracy, and respecting human rights.

The success in rebuilding Germany and Japan after World War II may have produced a false sense of confidence in our ability to create liberal democracies. Germany and Japan were militarily defeated states, with homogenous populations, and a public that broadly supported the imposed political reform goals of constitutionalism, democracy and rule of law. In contrast to Germany and Japan, most of the states today are weak or failed states, often torn by ethnic conflict. In some cases, as in Somalia and Iraq, significant segments of the population remain armed and loyal to militia groups headed by local warlords, often organized along ethnic lines. Neighboring countries may also have a stake in the outcome and continue to support militia groups competing for power. In addition, many of the states today are beginning from a much lower level of economic and institutional development. They lack the educational and technological bases of Germany and Japan.

Nor is there a broad social consensus on the goals of constitutionalism, democracy and human rights, much less on more specific issues such as the proper form of power sharing or the rights of women and laborers.²⁸⁸ Nevertheless, the international community all too often seeks to impose with missionary zeal an overly narrow liberal democratic thick conception of rule of law that emphasizes, in addition to the basic requirements of a thin rule of law, general elections, neoliberal economic policies and a liberal interpretation across a range of specific human rights issues.²⁸⁹

²⁸⁷ See CHINA'S LONG MARCH, *supra* note 11, at 130-45, 564-568 (discussing and rejecting arguments that China lacks a “legal system” and discussing different approaches to the threshold issue of the minimum requirements of rule of law).

²⁸⁸ See Mark Selden, Notes from Ground Zero: Power, Equity and Postwar Reconstruction in Two Eras, Japan Focus, at <http://www.japanfocus.org/126.html> (noting that a “consensus between Japan and the U.S. emerged in the early occupation years on a reform agenda that included the Peace Constitution, demilitarization, land reform, labor reform, democratization, and women's rights”, in Afghanistan and Iraq “social reform of all kinds, including land, labor and gender, are strikingly absent from the agenda, and in fact are anathema to the supply-siders running the occupation, leaving a rhetorical emphasis on democracy and a real emphasis on military control, privatization, and war profiteering.”).

²⁸⁹ See *supra* notes 89-90. See also Rosa Enrich Brooks, *The New Imperialism: Violence, Norms and the “Rule of Law”*, 101 MICH. L. REV. 2275, 2280 (2004) (“In an increasing number of

Some attribute the limited success of efforts to rebuild legal systems and ensure rule of law largely to cultural differences that complicate the task of legal transplants.²⁹⁰ Imposition of too narrow a thick conception of rule of law does lead to conflict about the purposes of legal reforms and the nature of the legal system in the new polity, and may undermine efforts to carry out more technical reforms required to establish a thin rule of law. However, the main reasons for the limited success in establishing a legal system that meets the requirements of a thin rule of law tend to be institutional and material in nature. Notwithstanding legitimate concerns about imperialism and the lack of consensus on thick conceptions of rule of law, there is widespread support among virtually all groups in all countries for a thin rule of law. Culture has not proven an insurmountable barrier to establishing legal systems that meet the requirements of a thin rule of law in East Asian states with a Confucian heritage such as Japan, South Korea or Singapore or in Islamic countries such as Malaysia. As we have seen, rule of law is largely a function of wealth. The demand for a thin rule of law is often led by the commercial sector, especially multinational companies used to playing by such rules and unable to rely on social networks and corporatist connections to government officials as substitutes for rule of law. Granted, there may be little demand for rule of law from the commercial sector in some failed states because the level of economic development is low, the economy is primarily based on rural agriculture and there is little foreign investment.

However, rule of law is not only valued by businesspeople. People in failed repressive states where dictatorial leaders ruled by whim appreciate the advantages of an administrative law system that reins in the government and prevents arbitrary actions. The average citizen also has an interest in a system able to handle minor civil disputes or to decide divorce issues in a fair and efficient manner. To be sure, the demand on the formal legal system for even these services varies from place to place. There may be traditional village mechanisms for resolving minor civil disputes. Sharia-based religious tribunals may have jurisdiction over personal law matters such as marriage disputes and inheritance. Nevertheless, a formal legal system is often necessary or useful as a backstop should informal mechanisms of dispute resolution fail, and a thin rule of law is capable of accommodating Sharia based personal law systems and other forms of legal pluralism.

Given differences in demand and other circumstances, the pace at which the legal system meets the requirements of rule of law will differ from country to country, by regions within countries with urban areas ahead of rural areas, and by area of law. Commercial law is usually the sector that develops most rapidly. In part this reflects the high priority assigned to economic development by most governments and their desire to attract foreign investment. Governments in nonliberal authoritarian states such as Vietnam or China or Islamic states that are wary about the broader liberal democratic agenda may nonetheless support legal system reforms in the

places, promoting the rule of law has become a fundamentally imperialist enterprise, in which foreign administrators backed by large armies govern societies that have been pronounced unready to take on the task of governing themselves.”). Cf. Garth, *supra* note 162 at 395-96 (noting that the changing policies exported to other countries under the banner of law and development and rule of law are a hegemonic process that reflect the salient issues of the time in developed countries; in short, we export our palace wars); Paul W. Kahn, *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order*, 1 CHI. J. INT’L L. 1, 18 (2000) (“The project of a global order of law founded on universal rights will be seen as a Western project, a kind of cultural imperialism doing work for a more traditional political imperialism. Nor is this view completely wrong. To the degree that we believe in the values for which the United States stands - values of democracy, law, and markets - we should support these assertions of power. But we should not think that framing the issue as one of international law somehow eliminates politics or delegitimizes opposing claims... This is our world, and speaking the language of law is not going to make it any different.”).

²⁹⁰ Brooks, *supra* note 289; see also PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (1999).

commercial sector. It also reflects to some extent the priorities of international agencies such as the World Bank and IMF. However, in other largely rural agrarian states where the demand from commercial sector is weak, other aspects of the legal system such as the administrative law regime may develop faster. Conversely, some failed states may have little capacity to develop an administrative law regime. Germany and Japan were starting from a much higher state of institutional development than East Timor and Somalia. In comparison to East Timor and Somalia, the new regimes in Afghanistan and Iraq have inherited more functional administrative systems.²⁹¹

The pace and nature of criminal law reform will also differ from place to place. Because the criminal law system was often a tool of repression for the previous authoritarian regime, criminal law reform is high on the rule of law agenda of the international community, particularly the human rights community and agencies with a broader agenda of promoting human rights. Accordingly, one of the first orders of business is to rewrite the criminal law usually in a way that incorporates the most liberal, forward-leaning ideas of the human rights community. Thus the criminal law will include generous protections for the rights of the accused and increasingly be based on an adversarial system with short detention periods, early entrance by and a large role for lawyers, emphasis on exclusion of tainted evidence and so on. Although citizens in the target country generally appreciate the need to reform the former repressive system, they are fearful of the rise in crime that typically follows in the wake of regime change and more generally accompanies modernization. Time and again the general public has grown weary of the liberal criminal laws and demanded law and order from the government. Government officials usually respond with a war on crime and a retreat from the liberal laws favored by the international rights community in favor of increasingly harsher laws that shifts the balance away from the rights of the accused toward the interests of society in maintaining order. In Hungary, for instance, polls showed two-thirds of Hungarians were willing to sacrifice personal freedoms for greater public safety. Accordingly, laws were passed to restrict civil liberties to those who obeyed the law, to crack down on white collar crime, to toughen the penalties for recidivists, and to allow more discretion to judges in sentencing, which resulted in heavier punishments.²⁹² Bulgaria, where more than one-quarter of the population was willing to sacrifice democracy in favor of a strong leader who promised to fight corruption, adopted similar measures and, in addition, reinstated capital punishment and abolished pretrial discovery for criminal suspects where their guilt was clear.²⁹³ Should government leaders refuse to placate the public, they are likely to be voted out of office and replaced by others such as Vladimir Putin with fewer qualms about crackdown on criminals.²⁹⁴

The development of criminal law will also be shaped by different social narratives in each country about crime and punishment. In Afghanistan, people particularly in rural areas have

²⁹¹ See William H. Spencer, *Establishing Rule of Law in Post-Taliban Afghanistan*, 17 CONN. J. INT'L L. 445, 447 (2002); JAMES DOBBINS ET AL., *AMERICA'S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* xxiv (2003).

²⁹² Jonathan H. Siegelbaum, *The Right Amount of Rights: Calibrating Criminal Law and Procedure in Post-Communist Central and Eastern Europe*, 20 B.U. INT'L L.J. 73, 110, 118 (2002).

²⁹³ *Id.* at 74, 110.

²⁹⁴ Kurczewski & Sullivan, *supra* note 14, at 281–82. One poll found in 1994 that almost half of Russian respondents were more concerned about letting a genuine criminal go rather than wrongly convicting an innocent person, while just over one-third were more concerned about convicting an innocent person. The authors also cite survey data showing that several years after the fall of the Soviet Union, citizens no longer attached as much importance to free speech and association as in the early years. In some cases, democratization and a more pluralistic society led to chaos and disorder. In addition, citizens began to worry more about social stability, law and order, and economic growth. *Id.* at 286–87.

for years settled disputes through village mediation or self-help remedies in which the family of the victim sought revenge unless blood money was paid or some other arrangement agreed on by the parties.²⁹⁵ Such cultural practices challenge the state's monopoly on violence. However, village mediation and blood feuds have their own shortcomings, particularly as society becomes more urbanized. Over time, the state may be able to exert more control over violence and criminal punishment. Alternatively, or in addition, the criminal law in Afghanistan may have different contours than elsewhere. The formal law may develop in ways that take into account cultural practices, for example by providing broader defenses for blood feuds. Or actual practice may diverge from the law on the books. If the gap becomes too large, the legitimacy of the legal system may be undermined. By insisting too strenuously on a particular conception of criminal justice, the international rights community may undermine efforts to establish rule of law and a legal system that enjoys the support of the populace.²⁹⁶

Thus, there will be differences in thick conceptions of law that affect how institutions function, the rate of progress of different areas of law and ultimately the type of rule of law that prevails. Culture will be one factor in determining the path of development. In some cases, cultural differences will lead to significant variations in the nature of the legal system as a whole, for example when the conflict is between liberal democrats and adherents of conservative Islam or nonliberal authoritarian or communitarian regimes. However, in many cases there will be broad support in the target country for liberal democracy, or at least some form of democracy. Rather than conflict at the grand level of the nature of the regime, disputes between international and local actors and within the local populace will more often be over more specific issues. The disputes will reflect differences in cultural values and in other contingent circumstances between stable developed countries and oftentimes unstable developing countries or between ethnically homogenous states and ethnically diverse ones. Countries with rising crime rates may be tougher on crime. Ethnic violence or demands for secession may result in broad national security laws that provide the executive wide-ranging authority to declare states of emergency and derogate from rights to ensure stability.

Although participants in the new law and development movement claim that they have learned their lessons from earlier law and development movement and now appreciate the need to be more sensitive to context and to empower locals rather than providing top-down, one-size-fits-all solutions, all too often international actors engaged in rule of law rescue efforts lack the local knowledge to tailor solutions to local circumstances or simply are normatively committed to a competing agenda, whether it be democracy, neoliberal economic policies, or liberal human rights. To be successful, the international community must be more tolerant of diversity, particularly on the types of contested issues that divide the human rights community more generally. At minimum, there is a need to recognize that forcing through controversial issues about women's rights or the rights of the accused in the face of local opposition has serious costs, and to consider possible alternative means to the same ends that may be more acceptable to the local population.

In light of the difficulties in obtaining consensus on a thick conception of rule of law, some international agencies have focused more on the institutional changes required to implement a thin rule of law. Critics complain that the narrow focus on institution building and technical

²⁹⁵ Thomas J. Barfield, *On Local Justice and Culture*, 17 CONN. J. INT'L L. 437, 439 (2002).

²⁹⁶ Similarly, in China, traditional views about punishment and rehabilitation have led to heavy reliance on administrative punishments rather than the formal criminal law system to respond to less serious crime. This practice has been universally condemned by the international rights community, even though eliminating administrative detention is likely to hurt those it is intended to help by pushing many marginal offenders into the harsh and decidedly unfriendly penal system, forcing them to live with hardened criminals, and resulting in their being forever stigmatized as convicts. Peerenboom, *supra* note 184.

aspects of thin rule of law ignores the normatively important issues of democracy and rights. However, this is often an advantage. Although in failed states international actors may have a freer hand in imposing democracy and a liberal rights agenda, in nonliberal but thriving developing states such as China or Vietnam government leaders may resist the broader liberal democratic thick rule of law agenda.²⁹⁷ By couching their proposals in terms of technical assistance, international actors may be allowed to participate in the legal reforms.

Human rights organizations often accuse international agencies and actors that cooperate with such states of being apologists for authoritarian regimes or for contributing to a stronger regime better able to withstand demands for political reforms. It is true that the instrumental aspects of legal reforms may enhance the efficiency of authoritarian governments. In the absence of democracy and pluralist institutions for public participation in the lawmaking, interpretation and implementation processes, law may come to serve the interests of the state and the ruling elite. However, the choice facing reformers is not authoritarianism or democracy, but authoritarianism with rule of law or without it. Authoritarianism is not the result of legal reforms to implement rule of law. On the contrary, the ruling regime would be even more authoritarian in the absence of legal reforms. Where legal rules are applied with principled consistency to both the state and its citizens, as required by a thin rule of law, they generally restrain rather than expand the arbitrary exercise of state power.²⁹⁸

Critics suggest that the limited success of achieving rule of law in non-liberal democratic states calls into question whether narrow technical changes are possible without broader political reforms. Such doubts have in turn led reformers to adopt a more holistic approach to reform that emphasizes the full set of operating principles of a Western liberal democracy, including transparency, a free press, channels for participation and interest representation.²⁹⁹ Apart from

²⁹⁷ Significantly, when the U.S. and China agreed on a project aimed at improving China's legal system during the 1997 Jiang-Clinton summit, the Chinese side rejected the label "rule of law" in favor of "legal cooperation." Presumably PRC representatives rejected "rule of law" because of its vagueness and the potentially broad implications for political reform. Clearly, the government did not want to be perceived as endorsing a liberal democratic conception of rule of law. Nevertheless, even though the PRC government's statist socialist rule of law differs from a liberal democratic conception of rule of law, both sides were able to find common ground when it came to many concrete programs aimed at strengthening the legal system. For instance, they agreed to judicial exchange and training programs aimed at improving the quality of PRC judges; programs to assist in the development of a legal aid system; exchanges to strengthen the securities regulatory system and the administrative law system; seminars on electronic commerce, corporate law and the enforcement of arbitral award and court judgments; as well as a symposium to discuss the legal aspects of protecting human rights, including issues such as China's legal responsibilities under international rights agreements, the rights of criminal defendants and the legal protection of religious freedom.

²⁹⁸ Even the critics of the earlier law and development movement found value in rule of law as a weapon against authoritarianism. Gardner, for instance, objected to the original law and development movement on the ground that its "legal instrumentalism proved vulnerable because it lacked, indeed rejected, any carefully developed philosophical or ethical perspective and because it offered a vision of law inadequately differentiated from state and power, and thus was unable to discriminate between 'ends' externally defined." Yet he also noted that the ideology of rule of law was useful in limiting the arbitrary acts of the government. JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

²⁹⁹ As noted, the World Bank and IMF are prevented by their charters from directly intervening in political affairs. Accordingly, they have traditionally avoided direct consideration of human rights issues and favored a thin conception of rule of law and good governance. However, the failure of structural adjustment programs to produce development together with the equity issue of rising income disparity even when there has been growth has resulted in an expansive interpretation of good governance and a more holistic approach to reform. Similarly, in the face of widespread criticism that its structural adjustment policies caused increased hardships for many of the least well off, the IMF has now begun to consider ways to mediate the negative affects of its policies. Historically, Scandinavian, Dutch and German donors have tended to emphasize not just efficient markets and governance but human rights

assuming support for controversial liberal values and institutions, the holistic approach overlooks the limited capacity of governments in failed states. By attempting to change too much at once, this approach runs the risk of undermining the long term possibilities for reform. As noted, rule of law does not necessarily coincide with democracy, much less liberal democracy. A more incremental, context-specific approach that accomodates nondemocratic forms of government, nontransparent corportist arrangements between government and businesses or a different role for civil society and the press than in liberal socities may be preferable in some instances.³⁰⁰

Even setting aside substantive differences in normative views that lead to different thick conceptions of rule of law, creating the institutions necessary to ensure a thin rule of law is no easy task. In the wake of regime change, the legal system is often weak or non-existent. To gain some feel for the enormity of the challenge, there were no East Timorese lawyers with experience as judges or prosecutors because none had been appointed to such positions under Indonesian rule. The exodus of prison guards and the burning of prisons forced the U.N.'s International Force for East Timor to rely on U.N. civil police officers to run overcrowded makeshift detention centers, and to release individuals accused of serious crimes to make room for those charged with grave violations of humanitarian law.³⁰¹ Similar institutional problems exist in Kosovo, Rwanda and Sierra Leone. Building prisons, training police, prosecutors, lawyers and judges, creating an administrative law system and a functional legislature, raising legal consciousness and expanding access to justice through the creation of legal aid centers cannot be accomplished overnight. Nor can the international community afford to focus on judicial reforms while refusing to get involved in the "dirty work" of working with police and prison guards.³⁰²

The diversity of experiences in nation-building in recent years demonstrates that there is no single approach to reconstruction or any recipe capable of guaranteeing success. However, nation-building at minimum requires time, money, manpower and local knowledge. A Rand study found that "while staying long does not guarantee success, leaving early ensures failure."³⁰³ The report pointed out that no effort at "forced democratization" has succeeded in less than five years, although it also noted that democratization without ongoing long-term support from Western powers is not likely to succeed.³⁰⁴

Unfortunately, the U.N., the international rights community and state powers generally lack the political will, resources, know-how and local knowledge to succeed in reconstructing failed states and creating functional legal systems capable of implementing rule of law. American altruism reached its limits in Somalia when U.S. soldiers were killed, well before the heavy lifting started. Nor was the U.S. willing to risk American lives by engaging in a ground attack in Kosovo, preferring the safety of high altitude aerial raids. The U.N. has withdrawn

and administrative justice. Patrick McAuslan, *Law, Governance and the Development of the Market: Practical Problems and Possible Solutions*, in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 121 (Julio Faundez ed. 1997).

³⁰⁰ Randall Peerenboom, Social Networks, Civil Society, Democracy and Rule of Law: A New Conceptual Framework, in THE POLITICS OF AFFECTIVE RELATIONS: EAST ASIA AND BEYOND I (Daniel Bell et al. eds., 2004).

³⁰¹ Hansjorg Strohmeyer, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107, 117-18 (2001).

³⁰² Neil Kritz, *Promoting a Formal System of Justice in the Post-Taliban Afghanistan*, 17 CONN. J. INT'L L. 451 (2002) (noting reluctance of international community to work on prison reforms and police training). The international community has been similarly reluctant to work with prison guards, the police or even prosecutors in China until recently.

³⁰³ DOBBINS ET AL., *supra* note 291.

³⁰⁴ *Id.*

peacekeeping forces and other personnel when some peacekeepers have been killed or U.N. offices attacked in Somalia, Rwanda, East Timor and Iraq. Americans and the international community now appear to lack the political will to stay the course in Iraq as well, especially since many saw the war as an illegal act of aggression in the first place. U.S. citizens were balking at the huge price tag for the rebuilding of Iraq even before congressional reports criticized the Bush administration for overstating the threat of weapons of mass destruction in the rush to war. Appalled by the deaths of U.S. soldiers and the beheading of civilians, the majority of American citizens now feel the war was a mistake.³⁰⁵ Despite all of the talk of U.S. determination to see the war or terrorism through to the end and to transform Iraq into a shining beachhead of democracy in the sea of Mid East Islamic states, the Bush regime is desperately trying to extract itself as quickly as possible from the mess. While ethnic conflicts threaten to undermine democracy, rule of law and human rights in Iraq as well as geopolitical stability in the region, Bush appears more concerned that the increasingly hostile public opinion will undermine his chances for reelection. Opposition to the war in Iraq has already led to the downfall of the government in Spain and the withdrawal of troops by Spain, the Philippines and others despite intensive U.S. efforts to hold the line.

Reconstruction efforts are also failing or encountering difficulties in other countries because of lack of funds and political will. With the economy sputtering, the opium-trade growing and security breaking down outside Kabul as warlords contend for power and U.S. and Pakistani forces battle the Taliban and other insurgents, Afghan President Hamid Karzai was forced to make the rounds of foreign capital appealing for additional funding and support in June 2004.³⁰⁶ Having fallen off the international radar screen as new crises have arisen in Liberia, Sudan and elsewhere, the former Yugoslavian republics, Haiti, Somalia, East Timor and Sierra Leone continue to struggle to maintain law and order, overcome ethnic conflicts and stimulate economic growth while at the same time creating the institutional infrastructure for rule of law, democracy and human rights.³⁰⁷

Emblematic of the difficulty maintaining international support for post-regime change reconstruction efforts, the prosecution of war crimes in the FYR, Rwanda and elsewhere is being undermined by the failure of states to make good on their financial promises. The ICTR and ICTY are in financial trouble because member states have failed to pay their dues, with ICTR having only received one quarter of its budget for 2004 and 2005.³⁰⁸ The President of the ICTY has warned that the tribunal's ability to complete the remaining cases by the 2010 deadline is being hindered by the failure of member states to pay up as well as the failure to extradite some

³⁰⁵ Susan Page, *Polls: Sending Troops to Iraq a Mistake*, USA TODAY, June 24, 2004, available at http://www.usatoday.com/news/politicselections/nation/polls/2004-06-24-poll_x.htm (majority of citizens believe the war was a mistake and that the U.S. is now more vulnerable to terrorism). Almost two-thirds of Americans do not believe the war was worth the loss of American life according to a CNN/Gallup poll on July 19-21, 2004. See PollingReport.com, *Time Poll Conducted by SRBI Public Affairs*, at <http://www.pollingreport.com/iraq.htm>. (visited August 5, 2004).

³⁰⁶ See generally Human Rights Watch, *Afghanistan*, in WORLD REPORT 2003, available at <http://www.hrw.org/wr2k3/asia1.html>; Spencer, *supra* note 291 (noting gap between rhetoric of assistance from Western powers and reality).

³⁰⁷ See e.g., Hansjorg Strohmeier, *Making Multilateral Interventions Work: The U.N. and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25 FLETCHER F. WORLD AFF. 107, 111 (2001) (noting increase in crime in organized and violent crime in Kosovo and East Timor); see generally Brooks, *supra* note 289.

³⁰⁸ Cathy Majtenyi, *Rwanda War Crimes Court in Financial Trouble*, VOA NEWS, July 1, 2004, available at <http://www.voanews.com/article.cfm?ObjectID=02F497D0-65C3-4037-AD1E840006DDA931&Title=Rwanda%20War%20Crimes%20Court%20in%20Financial%20Trouble&db=voa>.

of those indicted. The lack of funding has resulted in a recruitment freeze and staffing shortages. The Sierra Leone court was supposed to be funded through voluntary donations from states and nongovernmental organizations rather than by the U.N. However, when the contributions failed to materialize, the budget had to be slashed from \$30 million for first year and \$84 for next two years to \$16.8 for the first year and \$57 million for the next three years. As a result, the court was forced to reduce the number of staff, establish only one trial chamber instead of two and prosecute just 20 defendants.³⁰⁹ The Sierra Leone Truth and Reconciliation Commission, meant to complement the special court, was postponed because only \$1.2 million of an expected \$10 million budget was pledged.³¹⁰

Even assuming adequate resources, steadfast political will and a willing local populace, the lack of know-how and local knowledge often undermines efforts to rebuild states and implement rule of law.³¹¹ The U.N. was ill prepared to assume responsibilities for running Kosovo and East Timor.³¹² In his article *How Not to Run a Country: Lessons from Kosovo and East Timor*, de Mello described the U.N. approach as benevolent despotism.³¹³ In some cases, the errors may be avoidable. For instance, the U.N. administrators decided to retain Serbian laws to avoid a legal vacuum. The decision, taken without adequate consultation with local authorities or public debate, angered the populace who saw Serbian law as a symbol of their repression.³¹⁴

In other cases, the problems may be virtually insurmountable. International agencies often lack the necessary linguistic skills to effectively train police, lawyers and judges, much less adequate knowledge of local laws and the legal culture to provide effective training. Even if they have the necessary local knowledge and legal skills, there may not be time to devise a coherent reform plan tailored to local circumstances. The highly bureaucratic U.N. machinery takes time to get up and running. Decision-making in the context of multilateral consortiums is equally slow, and may be hindered by differences among donors. As a result, there is a tendency to pull a

³⁰⁹ Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J INT'L L 436, 452 (2002).

³¹⁰ Nsongurua J. Udombana, *Globalization of Justice and Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55, 127 (2003).

³¹¹ Local knowledge has been on short display in the Iraq debacle, from the failure to obtain accurate information about weapons of mass destruction, to the woefully misguided notion that Iraqis would welcome American occupying forces as liberators to the lack of sufficient translators to assist the military in conducting searches and obtaining intelligence information to thwart further attacks on U.S. soldiers. Military manuals preach that the way to counter an insurgency is to win the hearts and minds of the public. Instead, U.S. soldiers busted down doors and ordered the terrified occupants around in English, cursing louder when the terrified occupants who have no idea what is being said fail to respond accordingly. One poll found that 42% of Iraqis felt American soldiers showed disrespect for Islamic places of worship, while 46% felt they showed disrespect for Iraqi women and 60% felt they showed disrespect for Iraqi people when searching houses. Two-thirds felt American soldiers were not trying at all to keep Iraqi civilians from being killed or injured in gun battles. Not surprisingly, over 70% of Iraqis saw coalition forces as occupiers rather than liberators, with 57% calling for their immediate withdrawal even though most people feel they would be less safe after the withdrawal. See Key findings: Nationwide survey of 3,500 Iraqis, *supra* note 202.

³¹² IAN MARTIN, SELF-DETERMINATION IN EAST TIMOR 121-125 (2001) (noting that Kofi Anan has admitted that did not foresee chaos and carnage and that if had, he would not have gone forward; that the U.N. assumed a best case scenario and did little planning until eleventh hour for what might happen after the vote; and that UN peacekeepers were not armed and had no means or mandate to protect citizens). See also Sergio Vieira de Mello, *How Not to Run a Country: Lessons from Kosovo and East Timor* (2000), available at <http://www.jsmp.minihub.org/Reports/INTERFET%20DETAINEE%20MANAGEMENT%20UNIT%20IN%20EAST%20TIMOR.pdf>.

³¹³ *Id.*

³¹⁴ Strohmeyer, *supra* note 301 at 112. See also Brooks, *supra* note 289, at 2293 (noting that the pre-1989 law favored by the Kosovar Albanian community was far less consistent with contemporary human rights norms than the rejected Serbian law).

standard menu of lowest common denominator reforms off the shelf and thus to impose one-size-fits-all-solutions, with laws for developing countries modeled on those from developed countries and lawyers and judges trained in much the same way as their counterparts are trained in countries with advanced legal systems.³¹⁵

More fundamentally, the international community lacks the ability to overcome deeply seated ethnic animosity. Ethnic conflicts continue to exist in Rwanda, East Timor and Afghanistan. In Kosovo, which has received more than twenty-five times the funding and fifty times as many troops as Afghanistan,³¹⁶ ethnic violence in March 2004 left 19 deaths and almost 1000 wounded, displaced 4100, and resulted in the destruction of over 500 houses and 27 churches and monasteries.³¹⁷ Serbian police officers refused to work with Albanian police officers accused of participating in or passively watching the ethnic violence.

In Bosnia and Herzegovina, the constitution resulting from the Dayton Peace Agreement was intended to accommodate the interests of the main ethnic groups or “constituent peoples” – the Bosniaks, Croats and Serbs. The constitution created a federalist structure organized along ethnic lines with a weak centralized government and two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. Each of the three groups is represented equally in all of the major central organs, and retains a veto over legislation that would be destructive of the legitimate vital interests of their ethnic group. The complicated constitutional balancing act has not prevented ethnic violence.

In Iraq, the U.S. brokered constitution creates an uneasy balance among Shiites and Sunnis. Already Kurds have threatened to withdraw support for the interim regime over what they believe to be inadequate autonomy and protection of their interests.

Consociational constitutions that emphasize group rights run the danger of discounting the rights of individuals.³¹⁸ When the democratic process threatens the rights of individuals, international trustees may attempt to impose solutions more protective of individual rights.³¹⁹ To be sure, how to balance protection of individual rights with claims of self-determination and minority or group rights is one of the general fault lines that divides the human rights regime. While there may be no perfect solutions, solutions imposed by international trustees are likely to lack legitimacy, alienate the local populace and diminish the good will and cooperation needed to succeed in the complicated task of nation-building.

³¹⁵ See THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD* (1999) [hereinafter *AIDING DEMOCRACY ABROAD*], at 165 - 168 (referring to the Rule of Law Assistance Standard Menu of institutional reform of the judiciary, legislature, police and prison system, the drafting or amending of criminal, civil and commercial laws and the training of lawyers and support for the bar association and legal aid providers). See also Wendy Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371 (2001) (recommending less theoretical and more practical training for judges and lawyers). The fault should not be placed entirely on the shoulders of imperialistic international actors. The new government, frequently an interim or caretaker government, will often be preoccupied with other pressing matters such as security, lack experience in governing or perhaps be bogged down in struggles for power among different factions jockeying for position in upcoming elections.

³¹⁶ DOBBINS ET AL., *supra* note 291, at xix, xx.

³¹⁷ OSCE MISSION IN KOSOVO, *HUMAN RIGHTS CHALLENGES FOLLOWING THE MARCH RIOTS* (2004), at http://www.osce.org/documents/mik/2004/05/2939_en.pdf.

³¹⁸ AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 47-50 (1977).

³¹⁹ See Brooks, *supra* note 289, at 2295 (noting that in Kosovo, “when a majoritarian form of self-determination came up against human rights, self-determination lost; and the sequence of events leading to those decisions hardly looked like due process. Basically, UNMIK wanted the decisionmaking process to be as participatory and democratic as possible, but when the Kosovar participants came up with suggestions or demands that UNMIK found unpalatable, UNMIK simply dismissed them and made the decisions on its own”).

Ongoing civil war, terrorist attacks on government officials, the killing of police and suicide bombings prevent the government from functioning and render rule of law impossible. The first order of business in nation-building is therefore to ensure security. However, the need to restore law and order frequently contributes to physical integrity violations and other human rights abuses as the government resorts to force and violence to quell dissent and ensure stability. During this period, states of emergency and derogation of some rights may be necessary. Courts may be prevented from reviewing declarations of states of emergency by law, or simply too weak to challenge executive decisions. Even if they have the authority, they may not want to oppose decisions widely supported by the populace worried about the breakdown in law and order and the rise of organized and violent crime that often accompanies regime change.

Rule of Law and Transitional Justice

As order is being restored, the new regime will face transitional justice issues that add to the difficulties of nation-building and present challenges for rule of law and the protection of human rights. The literature on transitional justice is vast, and many of the normative, legal and practical issues are beyond the scope of this article.³²⁰ Rather, I focus on some of the concerns that arise about transitional justice from a rule of law perspective.

A first worry is that rule of law principles may not be applicable to moments of constitutional crisis. In the extreme, revolutions and coups may give rise to a new regime that simply replaces the previous constitution and legal regime with a new one, without any regard to the existing legal mechanisms for constitutional change. In other cases, the courts may be asked to decide on the constitutionality of revolutions, coups or changes to the constitution that are pushed through by an authoritarian leader without following proper procedures for amending the constitution. For instance, in the Philippines, the court had to decide on the legality of President Marcos' amendment of the constitution, which was ratified by a show of people's assemblies, a procedure not in conformity with the constitution at the time. A few years later, the court again had to decide a similar issue when Cory Aquino became president and replaced the Marcos era constitution with her Freedom Constitution, again without complying with the rules in place at the time. A strict interpretation of the laws would most likely have resulted in a constitutional crisis. In the first case, Marcos may very well have replaced the judges, as happened in Malaysia in 1986 when the court dared to oppose Mahathir. In the Aquino case, the court would have incurred the wrath of the people, compromising its legitimacy and authority and undermining its efforts to emerge as a political force in the new regime. In both cases, what the court did do was simply bow to political reality and find the constitutional amendments constitutional even though they clearly did not comply with the stipulated procedures for constitutional amendment.³²¹ To be sure, that these acts, especially by Marcos, could be challenged in court, suggests that rule of law is a powerful motivating ideal, one which even dictators cannot dismiss without tarnishing their legitimacy. However, they also show the limits of law.

Second, the requirements of transitional justice and a thin rule of law are often at odds. Holding former leaders accountable may require setting aside laws that legitimated their actions

³²⁰ See, e.g., STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (1997); TRANSITIONAL JUSTICE AND RULE OF LAW IN NEW DEMOCRACIES (A. James McAdams ed. 1997); POST-CONFLICT JUSTICE, *supra* note 193; RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000).

³²¹ See Pangalangan, *supra* note 80.

ignoring amnesty agreements entered into as a condition for relinquishing power.³²² To secure a ceasefire in the brutal civil war in Sierra Leone, the 1999 Lome Agreement called for power sharing between the Revolutionary United Front and the Kababah government, and provided an immediate and absolute pardon to RUF leader Foday Sankoh, who had been captured and sentenced to death for his role in the civil war.³²³ The Agreement also granted complete amnesty to all combatants up to time of signing of agreement. The U.S., U.K. and the other states supported the agreement. In response to criticisms by human rights organizations that the agreement sheltered war criminals, the U.N. representative who signed it accused human rights groups of being sanctimonious for not acknowledging that without the agreement the war would have continued, resulting in more civilian deaths.³²⁴ By the time the Sierra Leone special court was established several years later, the political winds had shifted in favor of a policy of "no impunity." As a result, the agreement between the government and Sierra Leone to establish the special court prevents anyone from relying on the "absolute and free pardon" of the 1999 Lome Peace Agreement with respect to such crimes.³²⁵

Domestic courts in Argentina, Chile, El Salvador and Honduras have also restricted the scope of amnesties by holding them inapplicable to serious human rights violations and by requiring a case-by-case determination of their validity.³²⁶ In some cases, government leaders may grant themselves amnesties. In other cases, some form of amnesty will be a condition for ceasefire or for stepping down and clearing the way for a transition to democracy. For the international community to simply disregard amnesties, particularly of the second type, is difficult to square with thin rule of law principles. Of course setting aside amnesties in some circumstances may be justified regardless of the cost to rule of law. Those who advocate prohibiting or ignoring amnesties sometimes claim that authoritarian leaders would have relinquished power anyway or been forced from power: "leaders leave kicking and screaming because their time was up."³²⁷ However, it is striking that virtually every transition in last several decades has involved some form of amnesty.³²⁸ Moreover, should the practice of setting aside amnesties become widespread, authoritarian leaders will take note and adjust accordingly, clinging to power rather than putting their faith in some non-enforceable guarantee that they will not be prosecuted and end up in prison for the rest of their lives or perhaps executed. Nor will they risk travel to other countries where they might be extradited, although as the example of Milosevic demonstrates, no place may be safe if superpowers are committed and use their economic leverage to buy extradition. Most problematically, overriding an amnesty negotiated to secure the departure of an authoritarian leader and facilitate transition to a more democratic order deprives citizens of the state in question of the right to determine their own future. The

³²² Robert Alexy, *A Defense of Radbruch's Formula 15*, in RECRAFTING THE RULE OF LAW (David Dyzenhaus ed. 1999) (discussing prosecution of East German soldiers who shot people trying to escape over the wall).

³²³ Celina Schocken, *supra* note 309, at 439.

³²⁴ *Id.* At the last minute, the Secretary General instructed the U.N. representative to add a handwritten disclaimer stating that the U.N. opposes amnesty in respect of international crimes such as genocide, crimes against humanity or other serious violations of international humanitarian law. *Id.*

³²⁵ Article 10 of the Agreement Between the Government of Sierra Leone and the United Nations on the Establishment of a Special Court for Sierra Leone.

³²⁶ See also Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence on Amnesty*, 20 HUM. RTS. Q. 843 (1998).

³²⁷ Reed Brody, *Practical Implications of Universal Jurisdiction*, 8 UCLA J. INT'L L. & FOR. AFF. 71, 73 (2003).

³²⁸ Ruth Wedgwood, "Universal Jurisdiction" – *The Limits of International Justice*, 8 UCLA J. INT'L L. & FOR. AFF. 45, 50 (2003).

international community claims for itself the right to override domestic agreements and to impose the costs for the decision on the citizens of that state, including perhaps plunging the nation back into a state of brutish civil war characterized by unspeakable violence and massive human rights violations.³²⁹

Third, the insistence on no impunity raises questions about the purpose or purposes of punishment for which appeal to rule of law provides little guidance. Advocates of punishment for anyone who committed war crimes or crimes against humanity often appeal to a variety of rationales, including retribution, deterrence, vengeance, facilitation of truth-finding and reconciliation, and an educative function in clarifying the norms for society and distinguishing the new regime from the previous regime. Critics have taken issue with each of these justifications.³³⁰ In particular, the notion that criminal punishment will serve as much of a deterrent in such cases is not credible given the nature of the crime, the psychology of mass violence and the low likelihood of ever being punished. Indeed, the best way to ensure that one is not prosecuted for war crimes is to make sure that one wins the war, as victors continue to be judged less harshly or generally to remain beyond the reach of law. But that may only exacerbate the tendency to do what it takes to win the war, leading to more human rights abuses.

Fourth, issues of fairness and selective application of the laws arise when only a few individuals, often not high level government officials or the worst offenders, are prosecuted even though large numbers of people are involved in genocide, ethnic violence or the perpetuation of authoritarian regimes. Whatever the substantive merits of a policy of “no impunity”, the reality is that relatively few people are ever prosecuted either in domestic or international courts for their participation in mass societal violence, war crimes or abuses under authoritarian regimes.³³¹

Fifth, the choice of forum raises important procedural and substantive justice issues. Apart from already discussed concerns about victor’s justice and a variety of thin rule of law shortcomings, trials in far away international courts decrease the legitimacy of the process in the eyes of many local citizens, fail to provide the requisite sense of vengeance and justice, and undermine the authority of the domestic legal system. Rwandans objected to the ICTR because they wanted capital punishment and harsh punishments, and resented their oppressors being sent to prisons that by local standards are relatively cushy.³³²

On the other hand, trials in domestic courts frequently fall even farther short of minimal rule of law requirements. Shortcomings include lack of access to habeas review of the detention decision, long pretrial detentions, lack of qualified interpreters, lack of adequate time to prepare defense and in many cases lack of qualified public defenders, lack of access to prosecution evidence, inability to secure attendance of witnesses and allow for cross-examination, serious

³²⁹ The issue of immunity for current heads of office also has the potential to produce conflicts between the international community and domestic constituencies and to upset the domestic order in the name of human rights. See Rome Statute, *supra* note 278, article 27.

³³⁰ Laurel E. Fletcher and Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24.3 HUM. RTS. Q. 573 (2002); Carrie Gustafson, *International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means*, 21 HOUS. J. INT’L L. 51 (1998).

³³¹ Less than 6500 out of 90,000 cases brought to trial for Nazi war crimes resulted in convictions. GEIKO MULLER-FAHRENHOLZ, *THE ART OF FORGIVENESS: THEOLOGICAL REFLECTIONS ON HEALING AND RECONCILIATION* ix (1997).

³³² Robert Kushen and Kenneth Harris, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AMER. J. INT’L L. 501 (1996). The Statute for the Special Court in Sierra Leone does not allow for capital punishment but allows for imprisonment in Sierra Leone or other countries, with conditions of imprisonment governed by the laws of the enforcing state. See Articles 19 and 22.

doubts about the partiality of defense counsel, prosecutors and judges, trials in absentia,³³³ and poor prison conditions.³³⁴

War crimes prosecutions in the first fourteen months of UNMIK administration in local Kosovo courts involved several instances of overcharging, including for genocide. An OSCE report concluded that the genocide charges were “in light of the trial evidence, inflated, not grounded by serious legal consideration and solid analysis.”³³⁵ Other problems included vague and overly broad pleadings, the failure to secure Serbian defense witnesses in part due to safety concerns in transporting Serbians to Kosovo courts, problems with the credibility of witnesses many of whom were the victims of crimes or may have been influenced by media reports, the absence of appropriate findings on the nature of the defendant's criminal liability particularly in relation to joint criminal activity and command responsibility charges, the failure to distinguish factual from legal issues, the failure to cite legal authority for holdings, and incorrect findings on lesser included offenses.³³⁶ The March 2004 ethnic riots put further pressure on an already weak and overloaded legal system, exacerbating concerns about access to the courts by minorities, bias on the part of Kosovo Albanian judges against Serbs, judicial independence and political pressure on the courts, lengthy and inappropriate pretrial detention and prison overcrowding.³³⁷

In Rwanda, after the regime change there were only five judges and fifty lawyers, few of whom had any criminal law experienced.³³⁸ With the domestic courts disposing of cases at a rate of only 300 a year and a pool of over 127,000 cases as of January 1998, it would have taken over 400 years to work through the backlog.³³⁹ The government attempted to introduce a plea-bargaining system but the system did not work as planned in part because leaders of the genocide threatened anyone who would confess and implicate others, and everyone was housed in the same jails.³⁴⁰ In the end, many persons were tried in Gacaca “courts” originally meant to handle minor civil disputes among members of the local community.³⁴¹ The courts were given jurisdiction over

³³³ UNMIK prohibited trials in absentia for serious violations of international humanitarian law after January 2001. OSCE Mission in Kosovo, Kosovo's War Crimes Tribunals: A Review 32 (2002), available at http://www.osce.org/documents/mik/2002/09/857_en.pdf.

³³⁴ Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling The Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 545 (1998) [hereinafter *Rule of Law Amid Lawlessness*]. The Special Rapporteur noted the terrible conditions of detention. Detainees were barely able to sit, much less lie down. They slept on the floor, where given one meal a day consisting of maize and beans, lacked adequate water and suffered from malaria, dysentery and tuberculosis. See Report on the Situation of Human Rights in Rwanda Submitted by Rene Degni-Segui, Special Rapporteur of the Commission on Human Rights, U.N. Human Rights Commission ESCOR, 51st Sess., Agenda Item 12, U.N. Doc. E/CN.4/1995/7 (1994). See also Wondwossen L. Kidane, *The Ethiopian Red Trials*, in POST-CONFLICT JUSTICE, *supra* note 193, at 667-694.

³³⁵ OSCE Mission in Kosovo, *supra* note 333, at 34. The report noted that prosecuting a charge of genocide requires extensive logistical and human resources not available even now in Kosovo courts. *Id.* at 35.

³³⁶ *Id.* at 38.

³³⁷ OSCE MISSION IN KOSOVO, KOSOVO: REVIEW OF THE CRIMINAL JUSTICE SYSTEM: “THE ADMINISTRATION OF JUSTICE IN THE MUNICIPAL COURTS” (2004), available at http://www.osce.org/documents/mik/2004/03/2499_en.pdf (citing problems with the rights to a speedy trial, to trial by a tribunal established by law, to trial by an impartial tribunal, to a public hearing and to cross-examine witnesses). The report also noted many problems with respect to property rights, including the allocation of housing and welfare benefits for minorities, and access to education, medical treatment and work opportunities.

³³⁸ Daly, *supra* note 269, at 367-68.

³³⁹ Jennifer Widner, *Courts and Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AMER. J. INT'L L. 64, 68 (2001).

³⁴⁰ *Rule of Law Amid Lawlessness*, *supra* note 334.

³⁴¹ Daly, *supra* note 269; Widner, *supra* note 339.

intentional and unintentional homicides, assaults and property crimes.³⁴² Trials before these courts fell far short of international standards of due process. Judges were local leaders with only a few months of legal training, and defendants did not even have the benefit of legal counsel.

Even when trials are held, there is often at best a slim possibility of obtaining a just verdict³⁴³. In Kosovo, local courts with a majority of local judges reached a guilty verdict in eight of nine war crimes cases, dropping the prosecution in just one case. In contrast, panels with a majority of international judges acquitted in seven cases, found two defendants guilty and two more guilty but on lesser charges.³⁴⁴ The Supreme Court with a majority of international judges reversed eight out of eleven verdicts.³⁴⁵ Problems with bias in Croatian, Serbian and Montenegro courts are so severe that the ICTY refuses to transfer cases involving even mid to lower level defendants to them for fear that they could not obtain a trial that meets the basic requirements of fairness and rule of law.³⁴⁶

With trials in domestic courts raising the specter of kangaroo justice, and prosecutions in far off criminal tribunals suffering from legitimacy and other concerns, a middle path has been to use hybrid or mixed courts in which international judges sit with domestic judges in local courts. Hybrid courts have their advantages, but do not resolve all rule of law concerns. Mixed panels may encounter problems resulting from a clash of legal cultures or systems given the different background of the judges. The lack of adequate translators may also compromise justice. More fundamentally, the legitimacy of such courts depends in large part on whether foreign or domestic judges make up the majority on the panels. To avoid bias, the U.N. created the Kosovo War and Ethnic Crimes Court with both locals and international judges, only to scrap the court shortly thereafter and rely on international judges in district courts.³⁴⁷ Simply providing for international judges to sit on district courts did not solve the problems however as there were not enough international judges for all courts, thus leaving some courts with all Kosovo Albanian judges. Moreover, each panel consisted of two professional judges and three lay-judges, with each judge having a single vote, and thus the presence of one international judge was not enough to ensure impartiality. Faced with different results in similar cases, UNMIK passed regulations providing defendants the right to petition for international prosecutors and a majority of international judges.³⁴⁸ While the international community is likely to feel more assured when the cases are heard by a majority of foreign judges, local citizens may feel just the opposite.

³⁴² Gacaca courts did not have jurisdiction over organizing or inciting genocide or crimes relating to sexual violence, or allowed to impose the death penalty. Defendants could also appeal to state courts. Daly, *supra* note 269.

³⁴³ There has been widespread criticism of Indonesian courts for acquitting or imposing light sentences on people accused of war crimes in East Timor. Human rights activists have called the trials a sham. Describing the trials as seriously flawed and lacking credibility, the U.S. State Department announced profound disappointment regarding the performance and record of the court. Laksamana.net, Review – Politics: Jakarta Rejects US Criticism, Aug. 16, 2004, at http://www.laksamana.net/vnews.cfm?news_id=7388 (visited Aug. 16, 2004); Matthew Moore, *Megawati gives ground to critics on human rights trials*, SYDNEY MORNING HERALD, Aug. 17, 2004, available at <http://www.smh.com.au/articles/2004/08/16/1092508376666.html?oneclick=true> (visited Aug. 17, 2004).

³⁴⁴ OSCE Mission in Kosovo, Kosovo's War Crimes Tribunals, *supra* note 333, at 54-55.

³⁴⁵ *Id.* at 48.

³⁴⁶ Press Release, Address of Judge Theodor Meron, President of The International Criminal Tribunal For The Former Yugoslavia, To The United Nations Security Council (June 29, 2004), available at <http://www.un.org/icty/pressreal/2004/p863-e.htm>.

³⁴⁷ Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371 (2001).

³⁴⁸ OSCE MISSION IN KOSOVO, KOSOVO WAR CRIMES TRIALS, *supra* note 333, at 10-11.

Whether the high cost of international and mixed panels is justified has also been questioned given the shortage of resources available for the creation of the domestic legal system and the establishment of basic social services in failed states. The ICTR budget for 2004 and 2005 alone was \$212 million.³⁴⁹ As of July 2004, the ICTR had completed just twenty-two prosecutions.³⁵⁰ The ICTY has enjoyed a larger budget,³⁵¹ but has still managed to complete just seventeen trials involving thirty-five defendants, with seventeen more defendants pleading guilty.³⁵² Part of the budgets goes to salaries for foreigners that are astronomically high by local standards, adding to the tension between the international rule of law relief workers and the local populace.

Such shortcomings suggest that in some circumstances a legal approach centered on individual prosecutions may not be the best approach, and that greater or least equal emphasis should be placed on finding a political solution and social healing and reconciliation. The advantages and disadvantages of truth and reconciliation commissions need not be rehearsed here.³⁵³ However, one concern from the narrow perspective of rule of law is the relationship between truth commissions and criminal courts. The trend is to confer greater powers on truth commissions including the right to issue subpoenas and to conduct searches and seize evidence. While such powers may facilitate the investigation and documenting of war crimes, they also raise issues of self-incrimination and the right to lawyer. Similarly, truth commissions have offered immunity to those who come forward and confess their crimes. Building on experiences elsewhere, the East Timor Truth and Reconciliation Commission provides immunity to individuals but not groups, provided such acts do not constitute "serious crimes." Individuals must give a full description of relevant acts, assume responsibility for them and accept the act of reconciliation proposed by the TRC panel, which may be reparations, a public apology and/or other acts of contrition. However, the East Timor special court has jurisdiction over serious crimes and is not bound by the view of the TRC as to what constitutes a serious crime.³⁵⁴ In light of the potential for self-incrimination, truth and reconciliation commissions have begun to function more like courts, with more attention paid to due process rights, including the right to be

³⁴⁹ Majtenyi, *supra* note 308.

³⁵⁰ Press Release, President and Prosecutor Update Security Council on Completion Strategy (July 9, 2004), available at <http://www.ictor.org/ENGLISH/PRESSREL/2004/394.htm>. The ICTR is supposed to wrap up trials by 2008 and appeals by 2010. To expedite clearing of docket, the ICTR will transfer middle and lower level defendants to national courts, decrease the number of days to hear cases, increase the number of ad litem judges and encourage pleabargaining.

³⁵¹ The ICTY budget has grown steadily from over \$10 million in 1994 to \$271 million for 2004-2005. See ICTY AT A GLANCE, General Information, at <http://www.un.org/icty/glance/index.htm>.

³⁵² More than thirty defendants are in detention or standing trial. Press Release, *supra* note 346.

³⁵³ See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS (2001); Carsten Stahn, *Accommodating individual criminal responsibility and national reconciliation: the U.N. Truth Commission for East Timor*, 95 AMER. J. INT'L L. 952 (2001); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 78 (1998); Audrey Chapman & Patrick Bell, *The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala*, 23.1 HUM. RTS. Q. 1 (2001); TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS (Robert I. Rotberg & Dennis F. Thompson eds., 2000).

³⁵⁴ While it would seem that there is a clear difference between ordinary crimes and genocide, crimes against humanity and serious violations of human rights, and thus self-incrimination would be unlikely, a relatively minor criminal act such as property crime may constitute a crime against humanity when committed within the context of larger group of actions forming part of widespread of systematic attack against civilian population. Stahn, *supra* note 353, at 961.

informed of and respond to allegations, to cross-examine witnesses and to be represented by a lawyer.³⁵⁵

Finally, courts emerging out of an authoritarian past may be eager to secure legitimacy and authority within the new regime by taking an activist approach on a wide range of issues, including many social and economic issues for which the judges do not necessarily possess the necessary expertise. The result may be overreaching, ideologically-driven decisions that have negative social, economic and political consequences. In Eastern Europe, courts decided cases based on neo-liberal economic dogma that did not always fit the times and conditions.³⁵⁶ Conversely, in the Philippines, a recurring complaint is that the courts interfere too much in “economic decision-making” by second-guessing government policy-makers.³⁵⁷ In their effort to gain authority with the new polity, the courts may pander to the public, resulting in inconsistent and unprincipled decisions as the court seeks to keep up with rapidly changing public opinion.³⁵⁸

More generally, the expanding role of the courts in transitional states raises questions about the preferred form of constitutional review and whether relying too heavily on the judiciary may hinder the development of political processes needed to consolidate and sustain democracy. Courts are increasingly being called on to decide controversial issues that plunge the judiciary into the middle of political disputes. In Russia, the judiciary faced the issue of Chechnya’s claim to independence; in Egypt, courts have decided cases involving Sharia principles that determine the nature of public life; in South Africa, courts have decided on the legality of amnesty provisions and even the constitutionality of the constitution.³⁵⁹

Whatever the long term impact on the development of democratic institutions, these decisions by the highest court are driven more by policy considerations than law. They highlight the differences in social, economic, political and normative beliefs that support competing thick conceptions of rule of law in a society. As a result, parties on all sides of the issue will invoke “rule of law” to support their preferred outcome and to criticize the courts if the court’s decision does not comport with their preferences, leading to doubts about the meaning and value of rule of law.

In summary, efforts by the U.N. and other development agencies to stimulate economic growth, establish democracy and implement rule of law have not been particularly successful in poor but stable countries. The likelihood of success in failed states or states with ongoing ethnic conflicts, particularly in which some of the parties may remain heavily armed and continue to receive military and financial support from other countries, is even slimmer.

Nevertheless, the international community cannot simply give in to despair and do nothing. We have learned some lessons from since the old law and development movement

³⁵⁵ *Id.* at 955.

³⁵⁶ Bojan Bugaric, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT’L L. J. 247 (2001).

³⁵⁷ Pangalangan, *supra* note 80. On the other hand, the Hungarian constitutional court enjoyed strong public support even though it adopted a strict legalistic or “rule of law approach” to transitional justice issues, striking several of the more punitive laws passed by the democratically enacted legislature for being retroactive. Gabor Halmai and Kim Lane Scheppele, *Living Well is the Best Revenge: The Hungarian Approach to Judging the Past*, in TRANSITIONAL JUSTICE AND RULE OF LAW IN NEW DEMOCRACIES 15, *supra* note 323.

³⁵⁸ Pangalangan, *supra* note 80, at 371 (describing how the desire of the Filipino courts to please the public has led to an outcome-oriented jurisprudence, “as if the courts were in a perpetual popularity contest refereed by polling groups and single-interest lobbies, all of them oblivious to the professional demands of the legal craftsman”).

³⁵⁹ Ran Hirschi, *Restituting the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J. L. & JURIS. 191 (2002).

began in the 1960s and from recent efforts at nation-building.³⁶⁰ But we should not delude ourselves as to the difficulty of nation-building or the likelihood of success. We need to realize the limits of our political will, resources and knowledge, and make sure that we do not make matters worse by trying to do good.

The recent experience with a diverse range of transitional experiences demonstrates that there is no single solution, and no perfect solution. Accordingly, we should be wary of the growing trend to press for univocal solutions by codifying hard and fast rules against amnesties or head of state liability, by empowering courts to set aside the judgments of truth and reconciliation commissions and by promoting a narrow liberal democratic version of rule of law. While singular solutions with courts as the final backdrop may seem to serve the rule of law values of predictability and certainty, the rules will give way to practical concerns, political considerations and the need to adopt a more pragmatic approach to facilitate a transfer of power and ultimately rule of law. Transitional states are characterized by uncertainty and unpredictability. The legal system must be sufficiently flexible to accommodate unexpected twists and turns on the road to rule of law. Tough choices between imperfect alternatives will have to be made, and deviations from both rule of law and current human rights standards will be necessary. An overly restrictive legal regime will only undermine respect for rule of law as the laws are set aside to further other important social goals or to accommodate reality, while an overly restrictive political agenda that insists on liberal democracy may thwart efforts to establish even a thin rule of law.

VII. Rule of Law and Terrorism

Terrorism, perhaps even more so than conventional war, remains largely outside the framework of rule of law. Just as it has proven impossible to define aggression, so has it proven impossible to come up with a generally accepted definition of terrorism, and for much the same reasons.³⁶¹ The international community has repeatedly failed to reach agreement on a general definition of terrorism because of the inability to define legitimate struggles for power. Nelson Mandela was once identified by the State Department as a terrorist before he won the Nobel Prize and became the president of South Africa; fellow Nobel Prize winner Yasir Arafat is a hero to some and terrorist to others.³⁶² Although not all terrorists are freedom fighters or likely to win a Nobel Prize, there is some truth to the assertion that one person's freedom fighter is another

³⁶⁰ I cannot here discuss the lessons learned from the old law and development movement of the 1960s or 1970s or the updated version that took off in the 1990s. Nor can I discuss the voluminous literature on legal transplants or offer particular country studies to illustrate the problems or the lessons learned. See generally, CHINA'S LONG MARCH, *supra* note 11, at 150-75; Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. Pa. J. In' l Econ. L. 179 (1999); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2nd ed. 1993), CAROTHERS, , *supra* note 315.

³⁶¹ W. Michael Reisman, *International Legal Responses to Terrorism*, 22 HOUS. J. INT'L L. 3, 23, 58 (1999) (noting that U.S. supported U.N. initiative to draft a comprehensive treaty banning terrorism but was opposed by members of the Non-Aligned Movement that wanted to focus on the causes of international terrorism and to distinguish between terrorism and legitimate struggles for liberation that use force, but also noting that the U.S. has resisted including terrorism within the jurisdiction of the ICC and carved out exceptions to protect U.S. military during armed conflict or peacekeeping missions). Cf. M. Cherif Bassiouni, *Legal control of international terrorism: a policy-oriented assessment*, 43 HARV. INT' L L. J. 83, 92 (2002) (claiming that the U.S. has consistently been opposed to a general definition of terrorism "so that it can pick and choose from these disparate norms those that it wishes to rely upon. Above all, the United States does not want to have an effective multilateral scheme that would presumably restrict its unfettered political power to act unilaterally.").

³⁶² Beverly Allen, *Talking "Terrorism": Ideologies and Paradigms in a Postmodern World*, 22 SYRACUSE J. INT'L L. & COM. 7, 8 (1996).

person's terrorist. As a result, while there are treaties that outlaw specific acts, there is no general anti-terrorism treaty. The lack of a general definition allows for a politicized use of the rhetoric and law of terrorism, partial compliance with U.N. resolutions aimed at countering terrorism, and inconsistencies in practice – all of which are inimical to rule of law.

Terrorism is also largely beyond rule of law in the practical sense that law is powerless to prevent terrorism. To be sure, international and domestic laws may provide a basis for punishing terrorists, holding states that promote terrorism liable or make terrorism more difficult by hindering the flow of funds to support terrorists and authorizing wire-tapping and intelligence gathering techniques. However, no law can deter suicide bombers.

Addressing terrorism requires a broader approach than recourse to law or even military force. The starting point must be greater efforts at understanding terrorists. All too often people confuse attempts to explain why terrorists resort to violence against innocent civilians with justification or apology for terrorism. Hypernationalism under the guise of patriotism hindered discussion of U.S. foreign policies and actions that might explain why the U.S. was attacked. To be sure, many people find it hard to believe that others might not share our values, see modernity as a threat rather than a blessing, or take issue with attempts to impose liberal democracy and a liberal interpretation of human rights on them. It is much easier to dismiss suicide bombers as deluded religious fanatics. But dismissing suicide bombers as religious fanatics or irrational fails to appreciate that many Americans and Europeans were willing to embark on missions that would almost inevitably result in their death during WWII to fight for a cause they believed in: their way of life. Indeed, self-sacrifice in the name of the higher good has been celebrated throughout history. To be sure, the methods and causes differ. But the willingness to give one's life in the name of something that one believes in is the same. Demonizing groups as terrorists provides victims psychological comfort and captures the reprehensible nature of killing innocent civilians for political purposes. However, it does not address the justness of the overall cause, take into account that civilian lives are often lost on both sides of a conflict, or help address the root causes of terrorism.

Terrorism is largely a function of failed states, wide disparities in power and wealth, and fundamental ideological differences. When people are deprived of economic, political, legal and military channels to press their claims to a deeply held way of life, terrorism is regrettably likely to appeal to some as the only option, especially since it is sometimes effective.³⁶³ As John F. Kennedy said in 1961, "Those who make peaceful evolution impossible, make violent revolution inevitable."³⁶⁴ Today, Islamic fundamentalists believe, reasonably enough, that their way of life is being threatened by globalization and the forces of modernity, and an international legal, political and military order whose endorsement of secular liberal democracy is largely incompatible with their preferred way of life. It matters little whether the threat is in the form of carrots - foreign aid and assistance aimed at "consciousness-raising," the promotion of liberal democratic values and the building of institutions, including legal institutions, necessary to implement democracy and protect rights – or sticks, including censure, sanctions and regime-changing humanitarian intervention in extreme cases. The U.S. is held directly responsible because of particular policies in the Mid-East and indirectly responsible as the symbol of an encroaching, otherwise faceless, modernity. Attacks on other states that have joined the U.S. in the war in Iraq and the beheading of citizens from such states demonstrate however that objection is not just to U.S. foreign policy but the broader set of forces that are threatening the ability of the terrorists to pursue their chosen way of life.

³⁶³ Witness for example the Philippines withdrawal of troops after terrorists threaten to behead a Filipino hostage. *Philippines to Start Withdrawing Iraq Force to Save Hostage*, AGENCE FRANCE PRESSE, July 16, 2004, 2004 WL 86379582.

³⁶⁴ Bassiouni, *supra* note 361, at 103.

A more holistic approach that addresses the root causes of terrorism is needed. Addressing economic imbalances may alleviate some of the appeal of terrorism. However, terrorism is not always only or primarily motivated by concerns about economic injustice. In the case of Islamic fundamentalism, it is about a way of life that is radically at odds with the way of life envisioned under the current human rights regime. In the end, the international community must decide what the limits of tolerance are, what lifeforms fall outside the margin of appreciation, and how imperialistic we will be in imposing a particular conception of the good on others who do not share that view. Dressing up these contested normative judgments in the garb of allegedly universal human rights or pointing out that terrorism violates humanitarian laws will do nothing to persuade terrorists committed to different norms and goals that the international legal regime is legitimate or to dissuade them from relying on terrorism in the face of asymmetrical military, economic and political power. On the other hand, the highly instrumental use of law as a tool to draw politically motivated and normatively contested distinctions as to who is and who is not a terrorist and the blatant manipulation of the legal system to serve the interests of powerful states further delegitimizes international law in the eyes of the terrorists.

The attacks on the U.S. have led to a series of actions and assertions that have challenged the international legal framework and rule of law both internationally and domestically. While terrorism had previously been treated as a crime, after 9-11 President Bush escalated the rhetoric by declaring a war on terrorism, with significant legal consequences for those detained.³⁶⁵ Similarly, while prior to 9-11 the dominant view was that terrorist acts by private organizations did not constitute an armed attack, there is now wide acceptance that armed conflict need not be limited to states.³⁶⁶ Bush's simplistic assertion that states are either with the U.S. or against the U.S. followed by the attacks on Afghanistan and Iraq have also raised the issue of the proper standard for holding states liable for terrorists within their territory. Even if the Bush regime's theory of "harboring" terrorists as a justification for an armed is not accepted, there is likely to be some shift from the prior standard of effective control.³⁶⁷ While a lower standard still may not justify regime change and occupation, it might legitimate more targeted use of force within a country calculated to undermine a state's efforts to support terrorists or justify sanctions or

³⁶⁵ Jordan J. Paust, *There is No Need to Revise the Laws of War in Light of September 11th*, an American Society of International Law Task Force on Terrorism Paper (Nov. 2002), available at <http://www.asil.org/taskforce/paust.pdf> ("Contrary to the assertion of President Bush, the United States simply could not be at war with bin Laden and al Qaeda as such, nor would it be in the overall interest of the United States for the status of war to apply merely to conflicts between the United States and al Qaeda."). See also Leila Nadya Sadat, *Terrorism and Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135 (2004) (arguing for a criminal approach).

³⁶⁶ Derek Jinks, *State Responsibility for the Acts of Private Armed Groups*, 4 CHIC. J. INTL. L. 83 (2003) (noting the Security Council did not find an armed attack after 1998 bombings of U.S. embassies in Africa); Cf. Jordan J. Paust, *Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L. J. 533, 534-35 (2002) (suggesting that there was authority for the position that non-state actors could carry out an armed attack prior to 9-11 but that the authority for that position is now clearer).

³⁶⁷ In *Nicaragua v. United States* (1986), the International Court of Justice held that the U.S. was not liable for the attacks by Contras, which could not be attributed to the U.S. absence of showing of effective control over their actions. The "financing, organizing, training, supplying, and equipping of the Contras, the selection of its military and paramilitary targets, and the planning of the whole operation" did not constitute "effective control." Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), para 115. The Appeals Chamber in *Tadic* lowered the standard from effective control to overall control, although the state must still do more than finance or support the private actor. See Appeals Chamber Judgment, *supra* note 258, at para 137 ("The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.").

damage claims.³⁶⁸ U.N. Resolution 1368 called on all states to work together to bring justice to the perpetrators, organizers and sponsors of the terrorist attacks on the U.S., and affirmed the right of self-defense. Resolution 1373 imposed a number of binding obligations on states, and prohibited active and passive support for terrorism. Accordingly, some commentators have argued that whereas prior to 9-11 terrorism was generally not considered a universal crime, these resolutions suggest “a sea change in *opinio juris*” on the issue, and demonstrate that a state’s obligation to try or extradite terrorists (the principle of *aut dedere, aut judicare*) is now part of customary international law.³⁶⁹

Even before 9-11, military responses such as the U.S. bombings of Libya in response to a bombing of a nightclub in Berlin and the missile attacks of Afghanistan and Sudan in 1998 in response to the bombings of U.S. embassies, while nominally justified on the basis of self-defense, smacked of retaliation, calling into question the ban on reprisals.³⁷⁰ After 9-11 the distinction between reprisals and self-defense has been all but obliterated for terrorists. The concept of self-defense has not only been stretched backward to legitimate reprisals; it has also been pushed forward to permit countries to strike out at vague potential threats barely visible on the distant horizon, threats that just might – but then again might not – materialize one day. To be sure, the failure to discover weapons of mass destruction in Iraq may take some wind out of the sails of the doctrine of pre-emptive self-defense in the short term. At minimum, it is likely to result in a higher standard of evidentiary proof to demonstrate that there is in fact a threat, a more transparent review process, and a more public debate of the evidence, even allowing that security concerns will limit the amount of information made available to the broad public. Nevertheless, it is much too early to write off pre-emptive self-defense. Many level-headed commentators have long argued that the previous standard requiring an imminent attack is no longer viable in this age of more powerful weapons, rogue states and terrorists.³⁷¹

The rules regarding *jus in bello* also appear to be changing, although there seems to be considerably more opposition to changes in this area than regarding *jus ad bellum*.³⁷² The rights of unlawful combatants, the use of military tribunals, and the right of states to declare a state of

³⁶⁸ See Paust, *supra* note 366, at 557 (arguing that U.S. use of military force against the Taliban in Afghanistan could not be justified on a theory of harbouring or supporting terrorists but that state responsibility for terrorists may lead to political, diplomatic, economic and judicial sanctions).

³⁶⁹ Sadat, *supra* note 365, at 141.

³⁷⁰ See IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 281 (1963) (“The provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force.”). But see Jack M. Beard, *America’s War on Terror: The Case for Self-Defense Under International Law*, 25 HARV. J. INT’L L. 559, 561-565 (2002) (pointing out while foreign reaction to the bombing in Libya was generally negative, in part because of concerns about retaliation, reaction was mixed regarding the bombing in Afghanistan and Sudan, and foreign criticism was muted regarding the 1993 missile attack on Baghdad in response to the assassination attempt of former President Bush). He also notes that there is considerable debate about the ability to draw a distinction between reprisal and self-defense and the justifiability of retaliation as a means of deterring future attacks. *Id.* at 584.

³⁷¹ See W. Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 AM. J. INT’L L. 82 (2003); W. Michael Reisman, *Aftershocks: Reflections on the Implications of Sept. 11*, 6 YALE HUM. RTS. & DEV. L. J. 81 (2003); see also Glennon, *supra* note 205. Daniel Webster’s statement in the Caroline case is often cited as the pre-September 11 standard for self-defense based on an imminent attack: “the necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment of deliberation.” See Paust, *supra* note 366 at 535, n. 6.

³⁷² Steven R. Ratner, *Jus ad bellum and jus in bello after September 11*, 96 AM. J. INT’L L. 905 (2002).

emergency and derogate from civil and political rights are all being contested.³⁷³ The passage of anti-terrorist laws such as the Patriot Act has also raised constitutional and domestic law issues regarding separation of powers, the rights of foreigners, and the extent to which civil and political liberties can and should be restricted in the name of fighting terrorism.³⁷⁴ Other issues now in play include collective punishment, torture, hostage taking, riot control with live ammunition, and assassinations.³⁷⁵

Supporters argue that such changes facilitate the struggle against terrorism and peace among nations, and that terrorism requires suspension of normal rules.³⁷⁶ When asked about long detentions of suspected terrorists without being charged or brought before judge, U.S. Deputy Assistant Attorney General John Yoo: "Does it make sense to ever release them if you think they are going to continue to be dangerous even though you can't convict them of a crime?"³⁷⁷ Vice President Cheney, sounding more like one of the dictators long criticized by the U.S. than one of the leaders of the "Free World," stated: "These people are criminals illegally entering into the United States, killing our citizens. They do not deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process."³⁷⁸

Detractors argue that many of the changes are detrimental to U.S. interests, rule of law and geopolitical stability. Treating terrorism as war could legitimate some attacks by non-state actors on the U.S. such as the 9-11 bombings of the Pentagon or the attack on the U.S. Cole.³⁷⁹ Broad rules against harboring and supporting terrorists will impede states, including the U.S.,

³⁷³ Paust, *supra* note 215; Derek Jinks, *International Human Rights Law and the War on Terrorism*, 31 DENV. J. INT'L L. & POL'Y 58, 66-67 (2002).

³⁷⁴ See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. 107-056 (expanding the government's authority to issue wiretaps and intercept and monitor written, oral and electronic communication), National Security; Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55, 062-66 (Oct. 31, 2001) (to be codified as 28 C.F.R. pts. 500-01) (permitting the monitoring of attorney-client communications between inmates in its custody and their lawyers). See also David Klinger and Lt. Col. Dave Grossman, *Who Should Deal with Foreign Terrorists on U.S. Soil?: Socio-legal Consequences of September 11 and the Ongoing Threat of Terrorist Attacks in America*, 25 HARV. J.L. & PUB. POL'Y 815 (2002) (arguing for the deployment of U.S. military in domestic law enforcement actions and that "Foreign individuals or groups (and U.S. citizens aiding and abetting them) who commit acts of war on U.S. soil should not be viewed as people who need to be apprehended under the aegis of the Fourth Amendment of the Constitution, which properly requires substantial restraint on law enforcement officials seizing citizens"; rather, such people should be treated as enemy soldiers under laws of war, whereby the military should have the right to make "informed decisions" that the people they are dealing with are foreign terrorists (or U.S. aiders) and attack using reasonable force, including tanks and missiles to blow planes out of the sky).

³⁷⁵ See generally, LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW AND SECURITY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES (2003), available at http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf; Tom J. Farer, *Beyond the Charter Frame: Unilateralism or Condominium*, 96 AM. J. INT'L L. 359, 364 (2002).

³⁷⁶ See Dickinson, *supra* note 19 (noting justifications for military tribunals include that (i) trials take too long and cost too much, and are a nuisance or danger when fighting terrorism; (ii) civilian judges and witnesses would be at risk; (iii) there is no need to protect the rights of terrorists; (iv) normal rules do not fit the circumstances – soldiers in the field can hardly be expected to read Bin Laden his Miranda rights; it is not possible to maintain the chain of custody for evidence out in the field; and state secrets are involved; (v) witnesses will use public trials to grandstand for political purposes).

³⁷⁷ See, e.g., Warren Richey, *How Long Can Guantanamo Prisoners Be Held?*, CHRISTIAN SCI. MONITOR, April 9, 2002, at 1, 4.

³⁷⁸ See Ta Kung Pao Accuses US of Violating Human Rights with Proposed Military Tribunals, FBIS-CHI-2001-1126, Nov. 26, 2001.

³⁷⁹ Paust, *supra* note 365, at 3.

from supporting groups such as the Contras and the Northern Alliance, which may frustrate global democracy promotion and antiterrorism efforts.³⁸⁰ U.S. soldiers will be more vulnerable if the U.S. fails to provide Taliban or Iraqi soldiers POW status or allows "torture light". The use of military tribunals will legitimate the use of such tribunals by other countries, prevent extradition of prisoners to the U.S. and create rifts in the united front against terrorism. The reliance on force will lead to excessive military responses and undermine non-military efforts to deal with terrorism. The broad rhetoric of war on terrorism will be used as an excuse by Russia, China and other countries to justify a harsh crackdown on separatist groups, and thus contribute to widespread human rights violations. Doctrines of pre-emptive self-defense and unilateral actions without Security Council will undermine the U.N., and result in "unrestrained use of violence by client regimes acting in the name of counterterrorism....Once the frame of order is broken, we can reasonably anticipate increasingly norm-less violence, pitiless blows followed by monstrous retaliation in a descending spiral of hardly imaginable depths."³⁸¹ Conversely, upholding existing norms regarding due process and civil liberties even during a time of crisis will demonstrate commitment to rule of law, serve an educative function in isolating terrorists and distinguish their unjust means from our just and venerable methods, while promoting the development of laws and norms regarding terrorism.³⁸²

The controversies over the various changes in the law and the actions taken to combat terrorism demonstrate the conceptual and practical limits of rule of law. Surely it is worrisome when both sides appeal to rule of law to justify their actions. To be sure, rule of law is not just an empty slogan whose invocation can rationalize any measure to combat terrorism. At minimum, rule of law requires fair trials and that the rules be applied equally to all. The rules for trials in military tribunals fall far short of the minimal requirements necessary to ensure a fair trial and thus of the minimal requirements of rule of law.³⁸³ However, appeal to rule of law will not resolve many, indeed most, of the issues regarding what the laws for dealing with terrorists should be.³⁸⁴ Nor obviously will invoking the mantra of rule of law resolve debates about

³⁸⁰ Jinks, *supra* note 366.

³⁸¹ Farer, *supra* note 375.

³⁸² See generally Dickinson, *supra* note 19, at 1435-67 (offering a number of strategic reasons for upholding legal process values to counter the sceptical arguments of realists and others that legal niceties must be jettisoned in periods of national emergency). See also Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2648 (2004) (O'Connor, J.: "Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.").

³⁸³ See Dickinson, *supra* note 19, at 1412-35; Paust, *supra* note 215.

³⁸⁴ The Supreme Court terrorist decisions confirmed and demonstrated that due process depends on the circumstances. Hamdi v. Rumsfeld, *supra* note 385, at 2646 (citing Mathews v. Eldridge, 424 U. S. 319 (1976), the process due in any given instance is subject to a balancing test that weighs "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process, and that considers "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute safeguards.").

The Rasul decision confirmed noncitizen detainees at Guantanamo Bay have the right to file habeas corpus petitions in the federal courts to challenge the legality of their detention, while the Court in Hamdi held that a U.S. citizen captured abroad and detained in the U.S. as an "enemy combatant" has the right to "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Rasul v. Bush, 124 S.Ct. 2686 (2004); Hamdi, *supra* note 385, at 2648. However, the Court did not specify in Hamdi what procedures would satisfy the requirement for a "fair opportunity" to rebut the classification as an enemy combatant, rejected the district

whether rule of law, including the right to fair trials, should be set aside in times of emergency. Significantly, while both sides invoke rule of law rhetoric, at the end of the day most issues turn on other considerations such as: Which laws will best serve U.S. interests? Will the proposed changes be effective in countering terrorism or will they lead to more terrorism? Is there an absolute right not to be tortured or a deontic obligation on states to not torture regardless of the consequences? Should self-avowed terrorists who openly pledge to continue the righteous war against Satanic western powers be released for lack of evidence to convict for a crime?

Whatever the outcome on these issues, the response to terrorism once again demonstrates the role of power politics in the international order, and how international rule of law on matters of high politics remains a distant aspiration. There can be little doubt that the U.S. has manipulated both the rhetoric of war on terrorism and the rhetoric of rule of law to serve its own interests. At minimum, the reaction to terrorism demonstrates the point made by critics of universalism and an increasingly juridified and rigid international legal system that rights are dependent on a variety of contingent circumstances. Less charitably, the rush to pass anti-terrorism legislation even in Western liberal democracies demonstrates once again the hypocrisy in the attempts to export democracy, rule of law and human rights while failing to live up to such standards at home. Terrorism had existed long before 9-11, and yet Western powers including the U.S. were content to treat it as a crime rather than an occasion for a global war with no foreseeable endpoint.³⁸⁵ Prior to September 11, the U.S. State Department and Western rights organizations regularly criticized countries for cracking down on terrorists, insurgents and others who threatened the social order, firmly opposed the use of military courts, and ever so self-righteously denounced derogation of civil and political rights and deviations from The Rule of Law. In 2000, then-Secretary of State Madeleine Albright preached perseverance in the face of terrorism, rising crime and a breakdown in social order in Uzbekistan:

court's position that meaningful review required extensive discovery of military intelligence and procedural protections similar to those in criminal trials as unduly burdensome in light of military operations, and opened the door to hearsay evidence and a presumption in the government's favor. The court also suggested that an "appropriately authorized and properly constituted military tribunal" might satisfy the requirement of a hearing before a neutral decisionmaker, and acknowledged the authority of Congress to suspend the writ of habeas corpus as provided in the Constitution in times of rebellion or invasion.

As for how long enemy combatants could be detained without trial, the Court declined to state how long is too long. Rather, the Court stated that indefinite detention for interrogation was not permissible, but that enemy combatants could be detained for the duration of the conflict. As U.S. troops were still stationed in Afghanistan, the Court found the conflict to be ongoing and thus Hamdi's two-year plus detention to be legal. The Court raised but sidestepped the issue of how long a person could be detained in an unconventional war on terror that may last for generations and has no clear ending point.

The Court also held that Hamdi had the right to counsel and to meet with counsel in private, although the Court did not specify when the right to counsel would attach or address other possible limitations on counsel such as the requirement that counsel have security clearance, as currently provided in the Military Authorization Act. *See Dickinson, supra* note 19. Nor did the court decide who could be considered an enemy combatant, other to accept that the term would reach someone who, as alleged to be the case for Hamdi, was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States."

³⁸⁵ "The war against terrorists of global reach is a global enterprise of uncertain duration... American will hold to account nations that are compromised by terror, including those who harbor terrorists - because the allies of terror are the enemies of civilization." Military Force Authorization Bill, S. J. Res. 23 (Sept. 18, 2001). The bill authorized the President to use all necessary force against any organization or state found to have been involved in the planning of or having committed terrorist acts in the U.S., or any state providing a safe haven to terrorist organizations.

[T]he United States will not support any and all measures taken in the name of fighting drugs and terrorism or restoring stability. One of the most dangerous temptations for a government facing violent threats is to respond in heavy-handed ways that violate the rights of innocent citizens. Terrorism is a criminal act and should be treated accordingly – and that means applying the rule of law fairly and consistently. We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights.³⁸⁶

These sagely words of caution and moral exhortation were delivered just one year before the U.S. declared a war on terrorism, arrested up to 5000 suspected terrorists many of whom have ended up being detained incommunicado for years without access to a lawyer or even the chance to notify their families, and authorized the use of military tribunals where defendants without the right to a lawyer of their choice or even to know the charges against them would be tried in closed proceedings before military personnel with the normal rules of evidence suspended and no right of appeal whatsoever of a guilty verdict that could be based on a lower standard of proof than the usual “beyond a reasonable doubt.”³⁸⁷

In criticizing other countries for derogating from human rights in the face of terrorism and insurgent groups vowing to topple the government, Western governments prior to September 11 often claimed that the life of the nation was not at stake.³⁸⁸ The restrictions were perceived as required to keep the ruling regime in power but not constituting a threat to the state as such. Yet surely the threats faced by many countries are more serious than the threats currently faced by the U.S. After all, it stretches credulity to suggest that isolated acts of terrorism, deplorable as they may be, could bring the U.S., with the strongest military in history, to its knees – although the terrorists may succeed in causing a major change in the nature of the state if the government’s repressive policies to combat terrorism erode the very liberties they are supposed to protect. In contrast, many states, weakened by ethnic strife, economic crisis and insurgent movements whose express purpose is to overthrow the government, do confront challenges that could result in the collapse of the state. Ironically, before September 11, some Asian states that had been criticized by the U.S. for excessive reliance on draconian national security laws had amended or repealed the laws or limited their use, often as a result of a transition to democracy. However, the U.S. is now pressuring these same states to reinstate, or to apply more aggressively, national security laws, often dangling the bait of a bilateral trade agreement, despite protests by citizens in these countries that such laws will turn back the clock on democratization, empower the military and lead to violations of civil liberties.³⁸⁹

³⁸⁶ Secretary of State Madeleine Albright, Speech at University of World Economy and Diplomacy, Tashkent, Uzbekistan (Apr. 17, 2000), available at <http://secretary.state.gov/www/statements/2000/000417.html>.

³⁸⁷ Dickinson, *supra* note 19, at 1414-18 (noting Secretary of Defense Rumsfeld stated that prisoners may continue to be detained even if the military tribunals acquitted them). See also DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 26 (2003) (noting that of the estimated 5000 people arrested by May 2003, not one had been charged with involvement in the attacks on Sept. 11 and only a handful have been charged with terrorist-related crimes).

³⁸⁸ ICCPR, art. 4. Principle 39 of the Siracusa Principles interprets “threat to the life of the nation” to mean that a danger (i) is present or imminent; (ii) is exceptional; (iii) concerns the entire population, and (iv) constitutes a threat to the organized life of the community. See Symposium: Limitation & Derogation Provisions in the International Covenant on Civil & Political Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 7.1 HUM. RTS. Q. 3, 7 (1985).

³⁸⁹ Rebecca Buckman, *Next U.S. Deal? Try Thailand*, FAR EASTERN ECONOMIC REVIEW, Aug. 28, 2003, at 18-19. For complaints that pressure may undermine democracy, see Shaw W.

Apparently, rights are a luxury. When stable, Euro-America can afford to preach to developing countries struggling with terrorists about the value of civil and political rights and the importance of rule of law. But when faced with threats, much cherished rights go out the window.³⁹⁰ If there is anything universal, it would seem to be disregard for rights whenever there are real or perceived threats to stability and social order.³⁹¹

VIII. U.S. Exceptionalism and Rule of Law

A final reason for the recent popularity of rule of law lies in its utility in challenging U.S. exceptionalism, which threatens the universality of the human rights movement and the legitimacy of the international legal order based on the principle of the legal equality of all states.

The U.S. has not ratified CEDAW, ICSECR, or the Covenant on the Rights of Child. Indeed, the U.S. is the only state other than Somalia to not ratify the Covenant on the Rights of the Child. When the U.S. ratified the ICCPR, it attached a reservation that would prevent it from having any domestic affect. Similarly, when the U.S. finally ratified the 1948 Genocide Convention in 1988, it attached a reservation to address opponents' fears that Convention would be used to press claims of genocide against Native and African Americans.³⁹² Although apologists for the U.S. often claim that U.S. laws are more protective of individual rights than international rights instruments, the U.S. is at odds with the international human movement on a range of issues such as the death penalty (including for juveniles) and hate speech.³⁹³ The U.S. had the dubious distinction of being the major opponent to an 18-year old age limit on child soldiers, insisting on an exception to allow 16-year old volunteers. The U.S., which maintains the largest stockpile of antipersonnel mines in the world and exported over 5.6 million mines to thirty-eight countries between 1960 and 1992, also continues to oppose the land mine ban. The U.S. has also withdrawn support for the Kyoto protocol, rejected the Comprehensive Test Ban Treaty in 1999, and refused to support the Biological and Toxic Weapons Convention and Draft Protocol on the grounds that it did not protect important bio-defense and industrial information and would not be effective in detecting cheating.³⁹⁴

Crispin & Jeremy Wagstaff, *The Terror War's Next Offensive*, FAR EASTERN ECONOMIC REVIEW, Aug. 28, 2003, at 12-16.

³⁹⁰ The U.S. Supreme Court might eventually stand up for civil rights and impose further limits on military trials or declare parts of the recent terrorism laws and regulations unconstitutional. However, those incarcerated will already have suffered the harm. The Court had a chance to take a stronger stand in *Hamdi* but ended up issuing a pragmatic opinion that recognized the need to interpret due process flexibly in light of the circumstances, opening the door to significant limitations in times of crisis.

³⁹¹ See Richard Morin and Claudia Deane, *The Ideas Industry*, WASH. POST, Sept 3, 2002, at A 15 (post 9-11 poll found 49% of the public thought the first amendment went too far, up from 39% in 2001, 22% in 2000). See also Keith & Poe, *supra* note 110; Wood, *supra* note 208; Bingham, *supra* note 208.

³⁹² Reservations by the United States of America upon the Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide ("nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."), available at <http://www.unhchr.ch/html/menu3/b/treaty1gen.htm>.

³⁹³ Vyver, *supra* note 20, at 71-72.

³⁹⁴ Deller et al., *supra* note 20 at xxviii ("The policy might be explained by the U.S. commitment to biodefense work, much of which has been carried out in secret . . . As part of its biodefense program, the United States has already constructed a model bio-bomb, weaponized anthrax, built a model agent-producing laboratory and begun developing a genetically enhanced superstrain of anthrax.").

In the last twenty-five years, the U.S. has been involved in some forty military actions, including wars in Iraq, Afghanistan, Yugoslavia, regime-changing invasions in Grenada, Panama and Haiti, military assistance to rebel groups in Angola, El Salvador and Nicaragua, and missile attacks on Lebanon, Libya, Yemen and Sudan.³⁹⁵ Under Bush, the U.S. no longer intervenes only for self-defense or balance of power. Rather, the U.S. now is engaged in the messianic mission to liberate and save the world from evil.³⁹⁶ Little wonder the U.S. has opposed any attempt to define aggression and actively sought to undermine the ICC, as discussed previously.

Rule of law may seem like the answer to U.S. exceptionalism. After all, all states are supposed to play by the same rules and be treated equally. There is no doubt that rule of law provides a rhetorical basis for challenging U.S. exceptionalism, and in some instances the U.S. may modify its behavior to placate international or domestic critics.³⁹⁷ However, the preceding discussion of the U.S.-led war on terrorism should caution against placing too much faith in the ability of rule of law to deter the U.S. or any other superpower when significant interests are at stake. Appealing to rule of law has had and is unlikely to continue to have limited impact on U.S. actions. Bush and other government officials have repeatedly made clear that the U.S. will not be bound by the views of the Security Council or other nations when it comes to protecting U.S. interests.³⁹⁸

Carl Schmitt argued that at the heart of rule of law is the power to make decisions and decide what the law will be in times of emergency.³⁹⁹ It is the power to determine when the normal rules apply and when they don't, and to define who is the enemy, the aggressor or a terrorist, and then to legitimate these discretionary and essentially political decisions by cloaking them in the language of law. Now, the U.S. and other western powers are able to impose their way of life on the rest, and to make it appear natural, inevitable and legitimate by writing their

³⁹⁵ See Zoltan Grossman, a Partial List of U.S. Military Interventions from 1890 to 2004, at <http://www.uwec.edu/grossmzc/interventions.html>.

³⁹⁶ Hurst Hannum, *Bellum Americanum*, 27 FLETCHER F. WORLD AFF. 29 (Wntr-Spring 2003) (Pax Americana has become bellum Americanum, with the desire to keep peace taking a back seat to the desire to accomplish good through the use of force and war.). President George W. Bush, Remarks at the Graduating Class of 2002 at the United States Military Academy, May 23, 2002, available at <http://www.whitehouse.gov/news/releases/2002/06/20020601-3.html> (visited Aug. 12, 2005) ("Our nation's cause has always been larger than our nation's defense. We fight, as we always fight, for a just peace – a peace that favors human liberty... Building this just peace is America's opportunity and America's duty."); see also The White House, The National Security Strategy of the United States of America 3 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (visited Aug. 12, 2004):

In pursuit of our goals, our first imperative is to clarify what we stand for: the United States must defend liberty and justice because these principles are right and true for all people everywhere. No nation owns these aspirations, and no nation is exempt from them.... America must stand firmly for the nonnegotiable demands of human dignity; the rule of law; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.

Suffice it to say that not everyone shares "the American" conception - as if there were one unified American view - or more particularly the Bush's regime's conception of justice, liberty or rule of law, or of what constitutes proper restrictions on free speech, or how the principle of religious and ethnic tolerance is to be squared with the need to preserve order in the face of ethnic violence and secession movements.

³⁹⁷ See John E. Noyes, *American Hegemony, U.S. Political Leaders, and General International Law*, 19 CONN. J. INT'L L. 293 (2004).

³⁹⁸ *World Reacts Cautiously to Bush's Speech*, THE GLOBE AND MAIL, June 29, 2003 (President Bush stated that "[t]he course of this nation does not depend on the decisions of other nations."). President George W. Bush, State of the Union Address (Jan. 20, 2004), available at <http://www.whitehouse.gov/news/releases/2004/01/print/20040120-7.html> ("America will never seek a permission slip to defend the security of our country.").

³⁹⁹ CARL SCHMITT, THE CONCEPT OF THE POLITICAL (George Schwab trans., 1996).

normative preferences into human rights instruments and the laws of war, and changing or setting aside those laws when doing so suits their needs. However, the excessively self-interested and narrowly parochial way in which U.S. flaunts its power while at the same time promoting the allegedly universal values of secular liberalism, democracy, free markets and rule of law undermines their normative appeal and the moral authority of the U.S. as a role model.

The failure of international rule of law to restrain U.S. power or at least to cabin it within an institutionalized context of normal politics demonstrates the limits of rule of law, and that while the enduring value of rule of law lies in ensuring predictability and certainty during normal times, ultimately the value of rule of law depends on the rules and who is determining them. We would be living in a very different world if for example Confucian communitarians rather than Western liberals ruled the world, as seemed to be a possibility for a moment when Japan and the Asian Tigers were ascending economically and might yet be the case if China continues its march toward becoming a world power. The relationship between rule of law and human rights is therefore in the end a contingent one: the international legal system and rule of law rhetoric will serve whatever norms the dominant powers codify in law as rights.

Conclusion

We should not place too high of hopes on rule of law as a means of promoting human rights. Rule of law, whether thick or thin or both, provides no guarantee that rights will be taken seriously in practice. Thin theories are normatively thin, and thick conceptions of rule of law may be at odds with international human rights norms and standards, sometimes radically and sometimes to a lesser degree. Non-democratic countries such as Islamic theocracies or soft-authoritarian socialist states such as Vietnam or China constitute profound challenges to the human rights regime, as do nonliberal states such as Singapore and Malaysia that have well developed legal systems that comply with the requirements of a thin rule of law. But even liberal democracies such as the U.S. have refused to bring domestic rights policies into compliance with international standards on issues from hate speech to the death penalty.

Rule of law will not settle many of the currently contested issues regarding the proper interpretation and justification of rights. Indeed, rule of law provides little guidance on many of the most contested issues. Rule of law is also consistent with a wide-range of institutions, the choice and development of which are to a large extent path-dependent.

As a practical matter, the legal institutions in many countries are so weak that compliance with the requirements of even a thin rule of law is difficult if not impossible. Divided by civil war, too weak to pursue prudent economic policies and politically unstable, failed or failing states are responsible for many of the most egregious, systematic and widespread violations of human rights. But rule of law requires political stability and a state with the capacity to establish and operate a functional legal system.

While the theoretical differences in thick conceptions of rule of law are likely to attract the most attention from academics, the weakness of many legal systems frustrates the implementation of human rights even when there are no conceptual or normative issues at stake. Many legal systems in developing countries are plagued by incompetent judges, judicial corruption, high court fees and long delays. The average citizen may be as concerned, if not more concerned, about these types of thin rule of law problems than with broader concerns about political philosophies or even many rights issues.

There is a danger in promising too much in the name of rule of law, lest the extravagant promises result in disillusionment, which is likely to happen if rule of law is conflated with justice and all things goods and wonderful including all of the rights set out in international rights instruments. We should be wary of attempts to hide contested normative views about human

rights under the seemingly more neutral façade of rule of law. We should take care to distinguish between thin and thick and not overly rely on rhetorical value of rule in pressing particular thick conception. We should not hold out unrealistic hopes that rule of law will somehow magically settle deeply contested rights issues or resolve many of the interpretive and institutional issues that impede implementation of human rights or put an end to war, poverty, political stability and the other factors that are the main causes of human rights violation in the world.

But we should not be unduly dismissive of rule of law either. Efforts to implement rule of law are likely to improve the quality of life for most people and to further the goals of the international human rights movement both directly and indirectly. Even a thin rule of law entails limits on the state and the ruling elite who are also bound by the law, provides a legal basis for citizens to challenge government arbitrariness, and serves to protect the rights and interests of the non-elite. A functional legal system, with a reasonably independent judiciary, is no doubt useful and most likely necessary if human rights are to be fully implemented. Rule of law is necessary if not sufficient for sustained economic growth, which in turn accounts for much of the variation in rights performance and quality of life. It is indeed striking that while critics in many developed countries have the luxury of belittling the concept of rule of law, those who have had the misfortune to suffer its absence appreciate its virtues and count among its biggest supporters.