

Defining the Rule of Law for Military Operations

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‘One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles,’ declares Carothers.¹ The United Nations in particular considers it a ‘critical civilizing influence in every free society,’ characterised by democracy, liberty, equality and justice.² In some ways, this kind of rhetoric has replaced the nineteenth century argument that the civilising power of law justified colonial expansion,³ as it fosters growing intervention into independent states.

It is trite to acknowledge the fundamental lack of clarity about the ‘rule of law,’⁴ but it becomes a high risk with the proliferation of military interventions designed to achieve it through ‘rule of law operations.’⁵ The essential misunderstanding about the rule of law by both theorists and by military doctrine

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¹ T Carothers, ‘The Rule-of-Law Revival’ in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 3, 3.

² United Nations Commission on Global Governance, *Our Global Neighbourhood* (1995) 303.

³ On the latter, see further, A Riles, ‘Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture’ (1993) 106 *Harvard Law Review* 723.

⁴ For example, H W Arndt, ‘The Origins of Dicey’s Concept of the Rule of Law’ (1957) 31 *Australian Law Journal* 117.

⁵ In this article a ‘rule of law operation’ is one which intervenes in the domestic judicial structure with an avowed purpose of constructing the ‘rule of law.’ The ‘rule of law’ has been seized upon, but not clearly defined, in international discussions about both unilateral and multilateral interventions in Palestinian occupied territories, in Iraq, East Timor, Kosovo, Afghanistan and earlier in Somalia during the 1990s and Cambodia: see further, J M Farrall, *United Nations Peacekeeping and the Rule of Law* (Issues Paper No 1, Australian National University Centre for International Governance and Justice, March 2007) especially 4–5. It is not always raised in the initial authorisation for intervention, but regularly emerges as a subsequent mission goal, as it did in Iraq and Somalia.

— that it is a universal end-state characterised by a defined rights-based institutional model —ensures that operational missions are currently directed to unrealistic goals. Importantly, while rule of law practitioners and, to a lesser extent, military doctrine demand a rights-based institutional blueprint, extant international law actually permits derogation of many rights, including the right to a fair trial, in times of emergency.⁶

While interventions may take steps to restore a basic level of security, the rule of law in a real sense will not be achieved. That is essentially because the rule of law is not an end state,⁷ nor is it universal, nor is it necessarily fixed. It is instead an on-going dialogue among the people who are its subjects, which must be *preceded* by the establishment of a sufficient level of security for the conversation to commence.⁸ Its form may differ as a result of a range of cultural, religious, economic, social or other variables. As non-participants in the domestic legal system, interveners cannot create or impose such a relationship,⁹ although by their example they might guide it.¹⁰

This article compares extant military doctrine with current rule of law theory, seeking to identify their definition of the rule of law in intervention and the difficulties it entails. It proceeds in five parts. The first analyses the current standpoint of military doctrine; that is, the idea of the rule of law and the operational role ascribed to it by contemporary military forces. The second compares doctrine with the theory and expression of the rule of law in international practice, as that body of law which informs intervention and demands of it rule of law outcomes. The third section considers the difficulties, practical and otherwise, of intervention based on these precepts. Building on these problems, the fourth part

⁶ Including arts 4 and 14, International Covenant on Civil and Political Rights (16 December 1966), 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

⁷ Here, the rule of law ‘end state’ is one which demonstrates the institutional forms, and rules based on human rights, which are said of themselves to comprise the rule of law. Theories which postulate the rule of law as an ‘end state’ assume that there is a single and immutable system which is the rule of law, so that once those features are realised, so is the rule of law. Chesterman defines the solution as seeing the rule of law ‘as a means rather than an end, as serving a function rather than defining a status.’ S Chesterman, ‘An International Rule of Law?’ (2008) 56 *American Journal of Comparative Law* 331, 331.

⁸ See, eg, T Nardin, ‘Theorising the International Rule of Law’ (2008) 34 *Review of International Studies* 385.

⁹ Chesterman, above n 7, 341–2; J Charney, ‘Universal International Law’ (1993) 87 *American Journal of International Law* 529, 533; J Stromseth, D Wippman and R Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions* (2006) 65, who also discuss the immunity of other ‘outsiders:’ international organisations, especially UN agencies, international donors and non-government organisations, who are ‘those most actively involved in promotion of rule of law.’

¹⁰ Chesterman, *ibid* 349, referring to the UN Mission in Kosovo. Stromseth et al make this point more generally, arguing that the credibility of the intervener depends on their own adherence to rule of law principles during the intervention: *ibid* 4.

proposes a new definition of the rule of law as a relationship, while the final section proffers an explanation for persistence in international efforts to intervene in the domestic rule of law of states. The article does not undertake a comprehensive survey of current or recent rule of law operations, although examples are drawn on to illustrate the case for a new understanding of the rule of law.

It will be submitted that the emerging and more nuanced view of the rule of law as community self-ordering, or an internal relationship, on the basis of law¹¹ provides both a more convincing theory of the rule of law, and a sustainable role for military interveners not in creating the rule of law but in refocussing on their primary role of restoring order and security. It rejects the claim to universality of forms and values, and allows space for language and culture to guide each society's choice of self-ordering based on law, without *necessarily* meeting any institutional forms. Like the debate on the convergence between international human rights law and international humanitarian law that Modirzadeh has recently challenged, the assumption that 'rule of law institutions' are both good as an end-state and imposable by coercion must be seriously questioned.¹²

I. The Rule of Law in Military Operational Doctrine

The concept of the rule of law has explicitly penetrated military doctrine developed since the turn of the twenty-first century. While a 1994 US Army *Peace Operations* manual did not mention the phrase at all,¹³ the 2003 *Stability Operations and Support Operations* manual asserted that it 'is fundamental to peace and stability.'¹⁴ The 2003 doctrine's approach to the rule of law demanded 'limited support'¹⁵ from military forces for the primarily civil task of maintaining law enforcement through effective police and a judiciary.¹⁶ It follows from the post-11 September conclusion that the rule of law is antithetical to terrorism and threats to national and international security. That is, since the rule of law's rights focus is directed to eliminating abuses, it must therefore also eliminate the conditions which foster terrorism and violence.¹⁷

¹¹ See Nardin, above n 8.

¹² N K Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' in R A Pedrozo (ed), *The War in Iraq: A Legal Analysis* (86, US Naval War College International Law Studies (Blue Book) Series 2010) 349.

¹³ US Department of the Army Field Manual 100-2, *Peace Operations* (December 1994) <[http://www.dtic.mil/doctrine/jel/service_pubs/fm100_23 .pdf](http://www.dtic.mil/doctrine/jel/service_pubs/fm100_23.pdf)>.

¹⁴ US Department of the Army Field Manual 3-07 (Field Manual 100-20), *Stability Operations and Support Operations* (February 2003) [4-106] <<http://www.globalsecurity.org/military/library/policy/army/fm/3-07/fm3-07.pdf>>.

¹⁵ Ibid.

¹⁶ Ibid [4-106], [4-43]. In any case, the commander is to be involved in the 'interagency process to determine the tasks and responsibilities in relation to the rule of law aspects of the operation:' *ibid*.

¹⁷ Stromseth et al, above n 9, 59-60 (references omitted).

The 2008 current edition of the US *Stability Operations* manual goes further again. It requires military forces to ‘support’ broader efforts ‘to establish a safe and secure environment; facilitate reconciliation among local or regional adversaries; establish political, legal, social, and economic institutions; and help transition responsibility to a legitimate civil authority operating under the rule of law.’¹⁸ The rule of law itself is defined as:

a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decisionmaking, and legal certainty.¹⁹

For the first time, measures are identified as to what such a system should look like, including enforcement of laws, ‘just’ legal frameworks (including a constitution), ‘access to justice,’ a ‘culture of lawfulness’ and ‘public security.’²⁰ An ‘interagency’ approach is to be preferred where the security situation allowed it, although the agencies identified are primarily US government departments, rather than local organisations or international NGOs.²¹ Where security concerns prevent interagency programs, the military intervener is to take direct control of forming capable police and judicial structures and prepare for a transfer to local authorities when they are deemed capable.²²

Translated to practice in the joint campaign plan for the US Mission in Iraq and the Multi-National Force – Iraq (MNF-I), this doctrinal definition has been reduced to seven ‘effects,’ as part of an overall move to ‘effects-based operations.’ They are:

1. state monopoly on the use of force in dispute resolution;
2. security of individuals in their persons and property;
3. that the state is itself bound by law and does not act arbitrarily;

¹⁸ US Department of the Army Field Manual 3–07, *Stability Operations* (October 2008) vi–vii <<http://usacac.army.mil/cac2/Repository/FM307/FM3-07.pdf>>.

¹⁹ Ibid [1–40]. The terms of this definition are very similar to that in United Nations Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008), <http://www.peacekeepingbestpractices.unlb.org/Pbps/Library/Capstone_Doctrine_ENG.pdf>. The definition relies on a ‘principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.’ 98.

²⁰ Ibid [1–84].

²¹ For example, the Department of State, Department of Justice and USAID: *ibid* [1–42].

²² Ibid [1–83], [2–50], [2–52]; and see [3–26] specifically on initial military reform of the judiciary, including personnel selection and human rights-based corrections.

4. readily determinable and stable law which allows individuals to plan their affairs;
5. meaningful access to an effective and impartial legal system for individuals;
6. protection of human rights and fundamental freedoms by the state; and
7. reliance in daily life on the existence of legal institutions and the content of law.²³

By comparison, the UN *Peacekeeping Operations* manual's preferred 'benchmarks' for measuring the rule of law, 'established through dialogue with national interlocutors,' emphasise human rights (especially for women and minorities), restoration of 'state institutions for security,' adequate security capability in local police and armed forces, 'progress towards the establishment of an independent and effective judiciary and corrections system' and 'legitimate' post-election political institutions.²⁴

What is important when compared to the theoretical approaches below is the emphasis that doctrine places on security and institutional reform as *co-conditions* for the restoration of the rule of law in transitional societies, and its universal institutional components. These institutions are often un-elaborated, as in the list of rule of law 'effects,' because their expected form seems to be so well-understood. The essence of the stability operations doctrinal approach is that institutional justice reform proceeds in tandem with security sector reform in pursuit of the rule of law.²⁵

Counter-insurgency (COIN) operations doctrine in the US and UK — styling itself as a mix of offensive, defensive and stability operations — takes a similar view, linking security reform and justice sector reform (police, judiciary and correction services) with the quest for the restoration of the rule of law and therefore a stable and legitimate local government.²⁶ The rule of law, 2006 US doctrine states clearly, 'is a key goal and end state in COIN.'²⁷ 2009 British Army

²³ US Department of Defense, *Directive 3000.05: Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations* (2005), [4.3] <www.dtic.mil/whs/directives/corres/pdf/300005p.pdf>; for further details see R Pregent, 'Rule of Law Capacity Building in Iraq' in R A Pedrozo (ed), *The War in Iraq: A Legal Analysis*, (vol 86, US Naval War College International Law Studies (Blue Book) Series 2010) 349, 324.

²⁴ United Nations Peacekeeping Operations: Principles and Guidelines, above n 19, 89.

²⁵ See, eg, Field Manual 3–07 (2008), above n 18, [3–28], [6–38].

²⁶ Foreword by Lieutenant General D H Petraeus and Lieutenant General J F Amos, US Department of the Army Field Manual 3–24 (MCWP 3-33.5), *Counterinsurgency* (December 2006), <<http://usacac.army.mil/cac2/Repository/Materials/COIN-FM3-24.pdf>>. See also Ministry of Defence, *British Army Field Manual Volume 1 Part 10 Countering Insurgency* (2009) [1–119], [1–120], [1–131], [3–38] (hereinafter British Army Field Manual). The same view appears in *United Nations Peacekeeping Operations: Principles and Guidelines*, above n 19, 27.

²⁷ Field Manual 3–24 (2006), *ibid* [D–38].

counterinsurgency doctrine reflects the same conclusion, unsurprising given their similar operational background in Iraq, arguing that insurgency is itself a symptom of ineffective rule of law.²⁸

COIN doctrine again acknowledges that the complete rule of law reform task cannot be achieved by military forces alone,²⁹ but adds that ‘using force precisely and discriminately strengthens the rule of law that needs to be established’³⁰ by addressing those who ‘cannot be co-opted into operating inside it.’³¹ British military legal advisors are also directed that they should involve themselves in COIN activities ‘related to the maintenance or development of the rule of law’ which lie outside their commander’s direct military control, presumably purely civilian judicial and law enforcement matters, and are to assess ‘the effectiveness of the rule of law’ by the ‘capacity and quality’ of the judicial, police and prison systems.³²

However, COIN argues strongly for as much host nation involvement as its capacity allows.³³ Its operational method is one of ‘clear, hold and build one village, area or city’ at a time, by securing it and rebuilding institutions and the ‘rule of law.’³⁴ The familiar primary role of courts and the judiciary is emphasised, in conjunction with policing,³⁵ but the doctrine concedes that ‘not all laws will look familiar’ and counsels sensitivity for military interveners.³⁶ Interestingly, the British Army recognises the role of tribal or clan divisions in fostering criminal insurgency, which it says is best dealt with as a law enforcement function.³⁷

The example of Iraq between 2003 and 2008 demonstrates the powers and pitfalls of these would-be ‘rule of law operations.’ The rule of law was not directly appealed to as a justification for the US-led intervention there, beginning in March 2003, which lacked clear authority from the UN Security Council. This was despite longstanding evidence of human rights abuses against Shi’ites and Kurds in

²⁸ British Army Field Manual, above n 26, [2-2].

²⁹ Field Manual 3-24 (2006), above n 26 [1-4].

³⁰ Ibid [1-150].

³¹ Ibid [5-38].

³² British Army Field Manual, above n 26, [12-1]. These efforts include training of local staff, security arrangements for them, human rights reform and local liaison to process British-held detainees through the domestic courts. The Manual acknowledges that security limitations may mean that military lawyers are the only ones able to participate in such activities, and counsels them to seek advice from British civilian agencies when doing so: [12-26].

³³ See Field Manual 3-24 (2006), above n 26, [5-6] et seq.

³⁴ Ibid [5-52] and see British Army Field Manual, above n 26, Table 4-2: A summary of successful and unsuccessful practices from a century of counterinsurgency operations, which clearly rejects a kinetic effects (casualties/destruction) approach to mission assessment.

³⁵ Field Manual 3-24 (2006), *ibid* [6-90] and [6-102].

³⁶ Ibid [8-48].

³⁷ British Army Field Manual, above n 26, [2-A-9] et seq.

particular, and the establishment of the extraordinary Revolutionary Court during the Ba'athist regime of Saddam Hussein.³⁸ Instead, protagonists argued that Iraq was in possession of weapons of mass destruction contrary to previous Security Council Resolutions and that earlier Security Council authority could be relied upon for the 2003 invasion.³⁹

In any case, the Security Council recognised the Coalition⁴⁰ as 'occupying powers' in Iraq on 22 May 2003,⁴¹ governing through the Coalition Provisional Authority (CPA) until it could transfer authority to an Iraqi government. That occurred on 28 June 2004. Thereafter, at Iraqi request, the Coalition, in the guise of the Multi-National Force — Iraq (MNF-I), remained with an expansive Security Council mandate to restore security in the country.⁴² Although they are the basis of operational rule of law doctrine as explained above, and despite the fact that during initial Coalition military actions in Iraq most legal infrastructure was destroyed, court records lost or destroyed and detention facilities proved unable to hold all those detained,⁴³ these issues were not explicitly addressed in the authorisation of MNF-I.

³⁸ See, eg, C Tripp, *A History of Iraq* (3rd ed, 2007) 234–50, and Chief Judge Medhat al-Mahmoud, 'The Judicial System in Iraq: A Review of the Legislation Regulating Judicial Affairs in Iraq' Iraqi Judicial Forum: The Judicial System in Iraq, Facts and Prospects, Baghdad, 2004.

³⁹ In fact, the major protagonists on the Security Council differed strongly on the legality of the war. None of the major Coalition participants (see n 40 below) relied on self-defence, arguing instead that Iraq was in 'material breach' of SC Res 687 (1991), which had provided for its disarmament and the end of the First Gulf War. This was argued to justify reactivating the original authority to use force against Iraq in that war in SC Res 678 (1990). The same argument was relied on for interventions in Iraq in 1998. However, several Security Council members took objection, including France and Russia, and a compromise Resolution 1441 (2002) recognised that Iraq was in 'material breach' and warned of 'serious consequences' if it continued. For a detailed review, see Stromseth et al, above n 9, 47–9.

⁴⁰ According to the United States Government Accountability Office, Committee on Foreign Affairs, Subcommittee on International Organizations, Human Rights, and Oversight, US House of Representatives: 'In March 2003, a US-led multinational force began operations in Iraq. At that time, 48 nations, identified as a 'coalition of the willing,' offered political, military, and financial support for US efforts in Iraq, with 38 nations other than the United States providing troops.' The latter included the United Kingdom, Poland, Republic of Korea and Australia. See the Statement of J A Christoff, Director International Affairs and Trade, Stabilizing and Rebuilding Iraq: Coalition Support and International Donor Commitments, *GAO-07-827T* (r9 May 2007) <www.gao.gov/new.items/d07827t.pdf>.

⁴¹ SC Res 1483 (2003). The letter dated 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538), referred to in the Resolution, does not mention 'occupation.'

⁴² SC Res 1546 (2004).

⁴³ Center for Law and Military Operations, *Rule of Law Handbook* (2007) 8, 116, 126 (hereinafter CLAMO); J C Williamson, 'Establishing the Rule of Law in Post-War Iraq: Rebuilding the Justice System' (2004) *Georgia Journal of International &*

However, to varying extents Coalition forces in fact intervened in the Iraqi civilian judicial system with a view to creating the rule of law. There was a concerted effort to foster transitional justice, to try and punish those most responsible for major crimes committed by the deposed regime.⁴⁴ The main structural focus was on purging government service of Ba'athist elements (as had occurred with Nazis in Germany and individuals judged as militarist nationalists in Japan) and establishing two outposts of the CPA's flagship judicial institution, the Central Criminal Court of Iraq (CCCI), during and after occupation. Notwithstanding a jurisdictional focus on terror-related crimes, the new CCCI was intended to address day to day legal affairs and to be permanent, unless later Iraqi authorities took positive action to change it.⁴⁵ Such measures, although they technically meet the requirement of occupation law not to make permanent structural changes in domestic criminal justice,⁴⁶ have a permanent effect in practice and they need to be distinguished from, for example, a court that is

Comparative Law 229, 232–3; Stromseth et al, above n 9, 365–6.

- 44 Transitional justice, meaning the imposition of accountability for crimes committed by the deposed regime, is said to be an essential requirement for the society to (re)create the rule of law: D Tolbert and A Solomon, 'United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies' (2006) 19 *Harvard Human Rights Journal* 29, 34. However, when it is sought to be achieved by intervention, it is often the domestic community which participates least, for example through Security Council-authorized international ad hoc tribunals such as the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda or through mixed national international tribunals as in Sierra Leone and Cambodia (see 36–40). Some practitioners dispute the need for intervention in transitional justice, suggesting it is the better province of the domestic community: M Plunkett, 'Rebuilding the Rule of Law' in W Maley, C Sampford and R Thakur (eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States* (2003) 207, 213.
- 45 Coalition Provisional Authority Order 13 – The Central Criminal Court of Iraq (Revised) (Amended) (entered into force 22 April 2004), established the Central Criminal Court. It had no end date, and was preserved at the transfer of authority to the Iraqi Interim Government on 28 June 2004 (Coalition Provisional Authority Order 100 — Transition of Laws, Regulations, Orders and Directives Issued by the Coalition Provisional Authority, (entered into force 28 June 2004). In country-wide terms in Iraq during 2005, US\$400 million in 2005 was being spent by 'multiple [US] federal agencies for rule of law programs,' with another US\$1 billion for police training, US\$300 million for justice infrastructure and US\$100 million for 'a variety of capacity-building programs.' United States Department of State, *Inspection of Rule-of-Law Programs*, (26 October 2005) <<http://oig.state.gov/lbry/reporthighlights/57056.htm>>.
- 46 Permanent changes to the structure of criminal justice are precluded by art 43, Annex to Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land (18 October 1907), 2 AJIL Supplement 90–117 (entered into force 26 January 1910) and art 64, Convention IV Relative to the Protection of Civilian Persons in Time of War (12 August 1949), 75 UNTS 287 (entered into force 21 October 1950). The Hague Regulations were upheld as representative of customary law relating to military occupation in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ [89].

explicitly labelled interim and endowed with limited jurisdiction to fill lacunae under occupation.

In reality, between 2003 and 2008, both outposts of the CCCI in al-Karkh and al-Rusafa in Baghdad were significantly hampered in their day to day proceedings by lack of security and by criticisms of the genuineness of the ‘rule of law’ they administered from their inception. For example, despite the CPA direction for open trials in accordance with Iraqi law, the public was kept from hearings because of security concerns.⁴⁷ Threats of assassination and “political interference” were also reported, by Iraqi and Coalition forces alike, as a significant influence on judicial outcomes, exacerbated by the lack of secure housing for judges.⁴⁸ A significant focus of criticism was the involvement of Coalition forces in the creation and administration of domestic judicial institutions at all. After 31 December 2008, MNF-I was much more limited in authority by the terms of its agreement with Iraq on the terms of its continued presence, and direct rule of law participation ceased.⁴⁹ This experience questions the presumed relationship between rule of law institutions and security reform in doctrine.

COIN doctrine, the more recent focus and the result of considerable operational experience (which does challenge its assumptions), continues to uphold the universal institutionalist model of the rule of law based around police, courts and prisons, which is to be reformed in conjunction with the security sector to re-establish the rule of law. This is the military baseline which will now be contrasted with rule of law theory as propounded by lawyers and with extant international law. However, COIN doctrine does allow for local cultural variations within the limits of that model. With the introduction of a ‘culture of lawfulness’ as an element of the rule of law definition, these are early indications that the importance of a normative domestic relationship to law is being recognised. This will be pursued in parts III and IV below.

II. The Rule of Law in Theory and International Legal Practice

Analysing why and how international law is concerned with the rule of law, considering both what theorists say it means and what accepted international law

⁴⁷ Section 10(4), CPA Order 13, above n 45, except for Felony Court verdicts which were always to be public (s 10(5) CPA Order 13, above n 45); Michael Moss, ‘Iraq’s Legal System Staggered Beneath the Weight of War’ *New York Times* (17 December 2006), <http://www.nytimes.com/2006/12/17/world/middleeast/17justice.html?ei=5090&en=7fa73a4895399700&ex=1324011600&partner=rssuserland&emc=rss&page_wanted=all>.

⁴⁸ In December 2006, only 12 of the 30 judges had been found secure accommodation in the Green Zone: Moss, *ibid*.

⁴⁹ Agreement between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of their Activities during their Temporary Presence in Iraq (17 November 2008), <<http://www.globalsecurity.org/military/library/policy/dod/iraq-sofa.htm>> (entered into force 1 January 2009). A comprehensive survey of US-led rule of law efforts in Iraq, especially during the 2008 transition period, is in Pregent, above n 23.

says it means, assists in explaining the doctrinal phenomenon of ‘rule of law operations’ and in highlighting why it tends to fail. As a starting point, the idea of law as a normative constraint on the sovereign has, since the time of the Magna Carta, displaced that of law as an entirely permissive means of ruling. This is considered the essence of the rule of law.⁵⁰ It is the ‘moral’ concept which distinguishes the rule of law as constraint on power from mere law, which is an ‘instrument of power.’⁵¹

The two traditional rule of law schools comprise formalists, who are not interested in the content of the law but only in certain procedural requirements to identify and apply it, and substantivists.⁵² More recently, a practitioner-centric model best described as an institutional blue-print centred on the protection of individual rights has emerged.

(a) Formalism vs substantivism

For formalists, the constraint of officials is addressed procedurally by the existence of rules about the system for making law, the clarity of the law itself, and the temporal scope of its application.⁵³ To amount to the rule of law, they must be

⁵⁰ Nardin, above n 8, 392. See also Chesterman, who distinguishes this kind of system from one of rule *by* law, but prefers to describe a principle of equal and non-discriminatory rather than general application of law. His three-point view is summed up as ‘government of laws, the supremacy of the law, and equality before the law.’ above n 7, 342. Much earlier, Plato argued that ‘rule by law’ was a suitable second alternative to rule by a philosopher king: *The Republic* (T J Saunders trans, 1970) 715d; Aristotle took the opposite view, based on a range of Greek constitutions, preferring ‘rule of law’ rather than the subjection of law to any individual’s authority: *The Politics* (B Jowett trans, 2004) III.16.

⁵¹ Nardin, *ibid* 385.

⁵² These are also known as the ‘thin’ and ‘thick’ concepts of the rule of law, respectively: Chesterman, above n 7, 340; D J Simsovic, ‘No Fixed Address: Universality and the Rule of Law’ (2008) 35 *Revue Juridique Thémis* 739, 751. Chesterman would add a third group, functionalists, who are not interested in rules or their implementation but ‘a kind of political ideal for a society as a whole.’ above n 7, 332. However, the same problem arises — it is difficult to distinguish Chesterman’s functionalists from the spectrum of values put forward by substantivists, all broadly directed to the achievement of liberal, free market democracy.

⁵³ P Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467, 467; C Sampford, ‘Reconceiving the Rule of Law for a Globalizing World’ in S Zifcak (ed), *Globalisation and the Rule of Law* (2005) 9, 14. Thin theorists include F A Hayek, *The Road to Serfdom* (1944); L Fuller, *The Morality of Law* (1964); R A Cass, ‘Judging: Norms and Incentives of Retrospective Decision-making’ (1995) 75 *Boston University Law Review* 954, 960. To these constraints may be added interpretative method: see further T Ginsburg and T Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (2008) on the deliberate choice of civil law, with its mechanical interpretative method and this ‘thin’ approach to the rule of law, as a means of constraining judge-made law: 19.

sufficiently certain to allow legal subjects to plan their lives in accordance with them.⁵⁴

Predictability in the formal rule of law requires publication and congruent interpretation of rules, and penalties for breaches, whether committed by individual citizens or by officials exercising state authority; or more broadly, a pre-agreed system of dispute resolution about the content and application of rules. Such dispute resolution is to be administered by impartial and independent tribunals, after the grant of procedural fairness and with the assistance of an independent legal profession.⁵⁵

Formalists at no point insist on any particular content of rules, although their institutional analysis seems largely descriptive of the Western legal tradition. They accept that a 'wicked legal system' may satisfy the rule of law,⁵⁶ but recognise that wicked laws and disregard of the formal rule of law often exist together.⁵⁷ This deliberate amorality and apoliticality claims advantages, including a 'unified focus' to identify and create the rule of law through the essential institutions of a procedurally constrained rule-maker and an independent judiciary.⁵⁸

Formalism, however, overlooks the distinction between law and the rule of law. As Nardin points out, its emphasis on rule-making, general application and dispute resolution procedure only restates the concept of law as authority. The rule of law, though, seeks to capture the authority of law *in society*.⁵⁹ The groundswell of public opinion against, and then overthrow of aspects of legal organisation in, the Soviet Union, South Africa and East Germany suggests an underlying popular desire for normative authority in law. Those situations helped prompt a new revolt against the idea that all certain and predictable legal systems were equally lawful, in favour of independent values such as justice.⁶⁰ The point underpins the famous exchange between H L A Hart and Lon Fuller as to the relationship between law

⁵⁴ Craig, *ibid* 469; Cass, *ibid* 960, for whom 'principled predictability' allows 'fair warning' of enforcement, leading to adjustment of behaviour and lowered decision costs.

⁵⁵ R S Summers, 'A Formal Theory of the Rule of Law' (1993) 6(2) *Ratio Juris* 127, 129. Tolbert and Solomon also argue that 'functioning courts and a judiciary system' are 'axiomatic' for the existence of the rule of law: above n 44, 45.

⁵⁶ See J Raz, 'The Rule of Law and its Virtue' (1977) 94 *Law Quarterly Review* 195.

⁵⁷ Summers, above n 55, 139. For example, extensive rule by executive fiat in Nazi Germany or in Ba'athist Iraq in the later years of each regime, rather than through the legislature.

⁵⁸ *Ibid* 135.

⁵⁹ Nardin, above n 6, 392. See also Craig, above n 53, 478, discussing Dworkin's theory of law.

⁶⁰ G P Fletcher, *Basic Concepts of Legal Thought* (1996) 38. Importantly, while in each case aspects of the legal organisation were rejected and considered void, others were upheld or continued, indicating the role of political shifts in the change.

and morality, in which Hart's positivist view of law as rules accepted the possibility of wicked law.⁶¹

Substantivists prefer Fuller's general approach. They accept formal procedural requirements but also demand the enactment of certain substantive rights; they argue that the existence of such rights precedes law, and therefore rules must express these moral and political rights if they are to be law at all.⁶² A leading proponent, Dworkin, demands positive recognition of individual rights, enforceable on individual request through 'familiar' judicial institutions. This rule of law, he argues, is 'the ideal of rule by an accurate public conception of individual rights.'⁶³ Aside from the moral articulation of justice, there is not a great deal of difference in the institutional focus of the two schools. Both insist that there be familiar legislation, courts and trial processes, differing primarily in the overt inclusion of rights-based values.

Further, the distinction between the two schools is not absolute: most theorists agree that views which are avowedly proceduralist are predicated on a substantive content as well, especially the idea of individual moral autonomy.⁶⁴ For example, there is some dispute as to whether the mutually essential institution of the independent court-based judiciary is a procedural or a substantive requirement. Even the view of the purest of rule of law formalists, who simply look for government 'bound by rules fixed and announced beforehand,'⁶⁵ can easily be translated into rights discourse, as a right not to be subject to penalty for an act not

⁶¹ H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593; L L Fuller, 'Positivism and Fidelity to Law — A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630.

⁶² Simsovic, above n 52, 752.

⁶³ R Dworkin, *A Matter of Principle* (1985) 11–12. John Rawls, also concerned with justice rather than the rule of law explicitly, favours certainty achieved through four principles: firstly, rules must be comprehensible and observable; secondly, determinacy requires a system of treating like cases alike (ie generality); thirdly, prospective application of criminal law; and the fourth, natural justice as 'as a necessary aspect of the rule of law,' since it serves to preserve the integrity of the judicial system. Only the fourth adds to formalism but Rawls defines natural justice to include an independent and impartial judiciary as well as open and fair trials: J Rawls, *A Theory of Justice* (1971) 236–39. Raz sought the same outcomes through 'principled faithful application of the law' by the judiciary to ensure coherence and to limit 'majoritarian democracy,' although his view of democracy and its impact on the rule of law differs sharply from the traditional view that the preservation of individual rights is the purpose of democracy: J Raz, *Ethics in the Public Domain; Essays on the Morality of Law and Politics* (1994) 373–5; and see Craig, above n 53, 484–5.

⁶⁴ Fallon considers this to be 'covert' inclusion of substantive elements: R H Fallon Jr, 'The Rule of Law' as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1, 54 (fn 260) and the references he cites.

⁶⁵ For example, A Scalia 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175; Raz, 'The Rule of Law and its Virtue' above n 56.

proscribed at the time or a right to do that which is not proscribed by rules. Yet rights are construed as substantive not procedural aspects of law.⁶⁶

However, if law must have a normative character, especially one which is values-based, it is difficult to see what the characteristics of the *rule of law* might be. Nardin points out that:

if the rule of law is the rule of good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph ... It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.⁶⁷

(b) A rule of law blueprint

The unresolved debate between formalists and substantivists has to some extent been displaced by the more recent development of a rule of law blueprint. The blueprint analysis originates with rule of law practitioners rather than theorists; those who seek to create it in troubled societies, particularly in association with armed intervention.⁶⁸ They attempt to put aside the traditional tensions over values in favour of an approach which identifies the precise ends which comprise the rule of law. The generally agreed ends are certain familiar institutions, including courts, police and an independent judiciary, which protect recognised individual rights — the ‘blueprint.’ With them are mixed public order elements which recall the dual emphasis in military doctrine on simultaneous security and justice sector reform.

Kleinfeld has defined the school most clearly to date, requiring:

1. government bound by law;
2. equality before the law;
3. law and order;
4. predictable, efficient justice; and
5. lack of state violation of human rights.⁶⁹

None of these ends are innovative in themselves; they draw on various aspects of formal and substantive theories, even though they are now defined as results or situations rather than values. Importantly, they are proposed to be universal and above cultural differences.⁷⁰ They reflect in much more specific terms the view of

⁶⁶ See further Craig’s discussion of whether the prohibition on arbitrariness is substantive (preserving fundamental rights of individual freedom) or procedural (prohibiting punishment without the colour of law): above n 53, 470–3.

⁶⁷ Raz, above n 63, 196. See also Chesterman, above n 7, 340–1.

⁶⁸ Including Stromseth et al, above n 9; R Kleinfeld, ‘Competing Definitions of the Rule of Law’ in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 31.

⁶⁹ Kleinfeld, *ibid* 36–46.

⁷⁰ *Ibid* 35.

Waldron. Although he also requires five characteristics of a system of law — courts, ‘general public norms,’ ‘positivity,’ ‘orientation to the public good,’ and ‘systematicity’ — his second and fourth elements grant a much greater level of values flexibility than Kleinfeld.⁷¹

Stromseth, Wippman and Brooke adopt a similar substantive but minimalist concept which includes familiar institutions but only the most universally recognised human rights.⁷² In an approach reflecting military doctrine, they argue that a rule of law state must control ‘the means of violence’ since insecurity and the rule of law are antithetical.⁷³ From there, the doctrinal conclusion that security and institutional rule of law reform must proceed in tandem follows naturally. There is an emergent thread in their work which seems to draw on the most recent COIN experience, that there is or ought to be a normative, subjective component to the rule of law — the ‘cultural commitment’ or COIN’s ‘culture of lawfulness’ — which sustains it. This seems at odds with the broader claim of a universal concept of the rule of law, but it can be reconciled if understood as a cultural commitment to the blueprint as given.

This is a different idea to an attempt to locate the rule of law in differing cultural landscapes. Instead, it appears that the ‘rule of law’ blueprint can only exist in liberal democratic (and thus largely Western) monocultures. Many ‘paths’ might be recognised but only if they all lead to the ‘same bottom line.’⁷⁴ Thus, cultural commitment is defined as acceptance of and commitment to the blueprint liberal-democratic institutions and values,⁷⁵ not cultural accommodation or allowance for cultural divergence from it. The blueprint approach to cultural commitment is therefore limited to the means by which a community can reach the rule of law ideal, which is singular and universal.

Importantly, Stromseth, Brooks and Wippman’s emphasis on recognisable institutions such as courts results from the pragmatic need for consistency with other nations in a globalised world. They suggest that dispute resolution need only be ‘consistent with rules and rights’ rather than necessarily compulsory court-based resolution.⁷⁶ This implies a critique of the idea that the rule of law itself requires

⁷¹ J Waldron, ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1, 20 et seq. He prefers to conceive the rule of law as a ‘political ideal’ constraining the exercise of political power to protect subjects and emphasising the importance of the ‘procedural and argumentative aspects of legal practice’ in addition to predictable rules: 5.

⁷² Stromseth et al, above n 9, 78.

⁷³ Ibid.

⁷⁴ J Norton Moore, ‘Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security and War Avoidance’ (1997) 37 *Virginia Journal of International Law* 811, 860. Stromseth et al are critical of the ‘lip service’ paid even to this approach by rule of law program ‘decision-makers’ in the field: above n 9, 75 (fn 56).

⁷⁵ See the discussion in Stromseth et al, above n 9, 11.

⁷⁶ Ibid 78–81. Durham largely agrees: H Durham, ‘Mercy and Justice in the Transition Period’ in W Maley, C Sampford and R Thakur (eds), *From Civil Strife to Civil*

traditional court-based dispute resolution, but their resolution is essentially pragmatic: it may not be required of theory, but the exigencies of a globalised system demand familiar institutions as a baseline for interaction with other states, persons and corporations.

The diverse threads of rule of law thinking from pure theorists, practitioners and military doctrinalists, have a central theme, and that is the criticality of rights-based institutional forms, especially recognisable courts, independent judges, a legal profession and (necessarily) a state enforcement agency or police force. There is a distinct emphasis on criminal justice and law enforcement, which ties in with security operations. The inclusion of values is at an objective level of internationally recognised human rights.

(c) An additional complexity: the rule of law blueprint as a means to other ends

In part, the emphasis on the normative good of the rule of law which inspires its advocates flows from the argument that it is a means to other goods, especially democracy and economic development.⁷⁷ Once a critical mass of blueprint rule of law institutions is established, a stable democratic state is supposedly the result.⁷⁸

This approach allows us to conceive of the rule of law as something wider than the legal system, emphasising not ‘law’ in the ‘rule of law,’ but ‘rule.’ It demands democratic, reason-based governance and it draws on certain empirical facts discovered about democratic systems: democracies ‘rarely, if ever, wage war against one another.’⁷⁹ The idea of ‘democratic peace’ has now moved from academic debate to US foreign policy, especially during the Clinton administration where it was described as its ‘central intellectual theme.’⁸⁰ Further, the UN in

Society: Civil and Military Responsibilities in Failed States (2003) 145, 147. As to commitment or local ‘buy-in,’ see Kelly, who is particularly focussed on what he calls the ‘public security function’ which includes the judiciary and police forces: M Kelly, ‘Military Force and Justice’ in W Maley, C Sampford and R Thakur (eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States* (2003) 229, 243. Plunkett emphasises courts more strongly: above n 44, 223.

⁷⁷ Chesterman, above n 7, 341–2. For example, development theory has ‘thickened’ the meaning of the rule of law by elaborating substantive goods: T C Heller, ‘An Immodest Postscript’ in E G Jensen and T C Heller (eds), *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003) 382, 382–3.

⁷⁸ Stromseth et al, above n 9, 62.

⁷⁹ The so-called ‘democratic peace phenomenon:’ Moore, above n 74, 822–3, who cites the independently empirical works of B Russett, *Grasping the Democratic Peace: Principles for a Cold War World* (1993); S Weart, *Peace Among Democratic and Oligarchic Republics* (1994); J L Ray, *Democracy and International Conflict: An Evaluation of the Democratic Peace Proposition* (1994; unpublished); R Rummel, *Power Kills, Absolute Power Kills Absolutely* (1991; unpublished); S Weart, *Never at War: Why Democracies Will Not Fight One Another* (1994; unpublished). Norton Moore notes at fn16 that, with two exceptions, ‘the work of all these scholars was partly supported by the US Institute of Peace.’

⁸⁰ Moore, *ibid* 825.

particular takes the view that the rule of law and ‘good governance’ produce sustainable development.⁸¹ This focuses the World Bank, International Monetary Fund and international aid donors on producing efficient economic outcomes through a predictable and economically liberal (procedurally) legal culture, in which obedience to laws is ingrained.⁸²

The result of the rule of law as an essential element of a free market economy and a liberal democratic state produces a summative theory of law and development, applied in the course of foreign aid as well as foreign intervention.⁸³ The difficulty with these approaches is that they promote liberal democratic and economic values as goals, not as constraints on government authority, particularly in US policy.⁸⁴ There can be little clarity about the rule of law when theory turns directly to the benefits which are supposed to accrue from it, whether they be democracy, human rights or economic arrangements.⁸⁵ Nor can there be clarity about the nature of the desired end-state when its qualities are asserted to be desirable⁸⁶ but not always much more, leaving only ‘provincial ideas’⁸⁷ which are claimed to be universal. It illustrates the problem in reconciling a results-oriented theory of the rule of law with the original conception of law as a constraint on the exercise of power.

The next section identifies the practical difficulties with the assertion of universality in rule of law theories of all kinds, even at the formal level of rights-based institutionalism. These include the immediate concerns of language and cultural divergence, but also inconsistencies in actual coverage under current

⁸¹ 2005 World Summit Outcome, GA Res 60/1, 16 September 2005, UN Doc. A/RES/60/1 [11].

⁸² However, Chesterman makes the point that organisations such as the World Bank and the International Monetary Fund are specifically prohibited ‘from referring to political processes as such, [so] ‘governance’ provides a convenient euphemism for exactly that:’ above n 7, 347. This view of the free market as the result of governance constrained by law is not without critics. Gray, eg, argues that ‘free markets are creatures of state power, and persist only so long as the state is able to prevent human needs for security and the control of economic risk from finding political expression.’ J Gray, *False Dawn: The Delusions of Global Capitalism* (1998) 17.

⁸³ It is this combination of efforts to use the institutional forms of the rule of law — constitutions, laws/codes, courts, judges and police — to encourage development in the Third World that dominated US foreign aid budgets from the 1970s onwards. Efforts began in Latin America, and after the end of the Cold War spread to the former Communist states in Europe. Their focus was ‘democratization and decentralization, on the elimination of state abuses ... [and] efforts to promote capitalism and market-oriented reforms.’ They primarily emphasised judicial training and the provision of American technical expertise to help nations ‘modernize’ their laws: Stromseth et al, above n 9, 61. See also Carothers, above n 1, 4.

⁸⁴ Nardin, above n 8, 389.

⁸⁵ Chesterman, above n 7, 360.

⁸⁶ Nardin, above n 8, 396; B Tamanaha, *On The Rule of Law: History, Politics, Theory* (2004) 13.

⁸⁷ Nardin, *ibid* 388–9.

human rights law. That is, since extant human rights law provides for derogation from rights to a fair trial before familiar judicial institutions in times of national emergency less than armed conflict,⁸⁸ there are important conceptual difficulties in arguing for a theory rights-based institutional reform to achieve the rule of law through military intervention.

III. The Problem of Universality in Theory and in Current Law

The claim to universality has its origins in Continental justice theory that there was only one ‘Right,’ in which individual choices were harmonised under a ‘universal law of freedom,’ and that the purpose of law was to realise it.⁸⁹ That is, this single concept of Right, or justice, substantively expressed the rule of law for all peoples. A superficial survey reveals significant difficulties with the universal approach. Each of the difficulties below warrants considerable discussion, but for the purposes of this paper can only be highlighted.

(a) Non-universal legal language and culture

Historically, comparative legal study has not been a focus of legal theory, which has drawn largely on Western experience,⁹⁰ so that the very idea of the rule of law is said to be ‘particular’ to the West.⁹¹ Even the phrase ‘rule of law’ does not readily translate into Arabic, the language of the Iraqi campaign.⁹² It is true that non-Western theories do not tend to emphasise it and that the language of rule of law discourse demonstrates a preference for an Anglo-Saxon, common law tradition. Fletcher’s analysis shows that the common law terms usually advanced as foundations of a rule of law system, in particular ‘due process,’ cannot be adequately rendered out of English. This has affected how successfully they have been adopted by other cultures, for example compared to German-language civil law.⁹³

The core difficulty is that many languages, but not English, have different words to represent rules enacted (‘law’) and a higher principle, which is binding because of its inherent soundness (‘Right’). Thus the very phrase ‘rule of law’ is potentially ambiguous in English, because it can address both actual laws and the

⁸⁸ For example, art 4, ICCPR.

⁸⁹ I Kant, *The Metaphysics of Morals* (M Gregor trans 1991) 56. Radbruch too places Right as the ideal goal of law: G Radbruch, *Rechtsphilosophie* (6th ed, 1963).

⁹⁰ M Khadduri, *The Islamic Law of Nations: Shaybānī’s Siyar* (1966), xii.

⁹¹ Simsovic, above n 52, 767.

⁹² It is rendered as *siyadat al-qanun*, which literally translated means ‘sovereignty of law,’ a concept closer to rule by law: Chesterman, above n 7, 339–40.

⁹³ Indeed, there is a ‘strong affinity’ between the broad concept of the common law and the English language: Fletcher, above n 60, 5. Fletcher also locates institutional deference ‘peculiarly’ within common law Anglo-American legal systems, because of their ‘complex structures of power.’ Continental legal systems struggle to make ‘an apt translation:’ 72–3.

concept of law.⁹⁴ This begins to suggest a link between the institutional features of the traditional rule of law and the capacity to express them in the local language.⁹⁵

Equally, culture and tradition shape the texture and complexity of law. Even where different domestic systems share the independent courts and judicial adjudicative process demanded by theorists as part of a universally applicable rule of law, their functions and relationship to the rule-maker remain contested across legal cultures. A leading example is the divergence between common law constitutionalism developed through judicial analysis,⁹⁶ and the civil law preference for a more defined state role in developing law through codified doctrine.⁹⁷

A second illustration, human rights, illuminates the explosive effect of culture on the allegedly universal rights-based rule of law. For example, Asian and Hebrew legal traditions are premised on the ‘commonality and cooperative nature of the legal experience,’ which prefers the greatest community benefit. By contrast, the ‘Western’ approach posits individuals in competition with each other for the maximisation of personal rights.⁹⁸ The debate on cultural relativism regarding separate rights, such as the right to life, adds another layer of complexity,⁹⁹ as do feminist and other critiques which challenge the context and underlying social dynamic of rights.¹⁰⁰ Tension can, of course, exist within cultures not just between them.¹⁰¹ Indeed, the results of this lack of a shared understanding as to content of rights are ‘very broad “margins of appreciation”’ in international debate about their implementation.¹⁰² Although there is universal commitment to the idea of rights,

⁹⁴ Fletcher, above n 60, 11–13.

⁹⁵ Fletcher rejects the proposition that ‘language dictates the horizon of thought’ and accepts only that there is ‘some not-fully understood connection between language and legal thought,’ so that concepts including the rule of law develop within the ‘linguistic terrain.’ *ibid* 12.

⁹⁶ For example, A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1st ed, 1885).

⁹⁷ Chesterman, above n 7, 336–7.

⁹⁸ Fletcher, above n 60, 38–40.

⁹⁹ M J Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001) 166. A useful analysis of the issues raised by relativist and universalist advocates, which rejects the extremes of both views, is M-B Dembour, ‘Following the Movement of a Pendulum: Between Universalism and Relativism’ in J K Cowan, M-B Dembour and R A Wilson (eds), *Culture and Rights: Anthropological Perspectives* (2001).

¹⁰⁰ H Charlesworth, ‘Whose Rule? Women and the international rule of law’ in S Zifcak (ed), *Globalisation and the Rule of Law* (2005) 83, 86.

¹⁰¹ For example, the difference in ancient China between the Confucian view that society be organised around *li*, or rules of propriety, and the Legalist preference for *fa*, or rules imposing a threat of sanction. The dispute persisted from the eighth to the third century BC: Chesterman, above n 7, 338.

¹⁰² See further Charlesworth, above n 100, 89.

there is not the certainty and predictability in the law applied which an international rights-based rule of law would demand.

Communities do not necessarily accept a need for the rule of law to be universal and general outside their own context. Indeed, there is evidence to suggest that the opposite may be true. Communities may be happy with a rights-based definition of the rule of law that is universal but is sufficiently general to permit a local gloss. During the ultimately unsuccessful international intervention in Somalia in the 1990s, ‘the de facto clan division and the re-appearance of tribalism had the unforeseen advantage of establishing a sense of trust between the population in one particular area and the people who would later serve as judges and police, because they were all of the same clan or subclan.’¹⁰³ Taken at its highest, this local refusal to trust in or want total cultural independence and objectivity when constructing the ‘independent rule of law-based judiciary’ has significant implications for the rule of law blueprint. Independence is a popular value only when it exists within a satisfactory cultural paradigm; independence from the cause is required, but not from society. For this reason, a project to develop a model transitional criminal code drawing on various legal systems for use in interventions¹⁰⁴ is unlikely to be any more successful at producing the rule of law than the importation of foreign laws wholesale.

When attention is turned to the method of rule of law intervention, military or otherwise, stark cultural difficulties continue to emerge. For example, critics of the law and development US aid program commencing in the 1960s objected to its ‘over-reliance’ on exporting systemic US legal concepts, including ‘strategic litigation and activist judges, that were incompatible with the target countries.’¹⁰⁵ Similarly, in the Iraqi city of Najaf in September 2003, the military governor from the US Marines ‘de-Ba’athified’ the local judiciary, and in the reappointment process sought to place a female judge on the bench, in recognition of equal rights of representation. He was forced to back down on the day of the appointment by the ‘turbulent protest, supported by many local women, who felt that the Americans were imposing their social values upon the Iraqis.’¹⁰⁶ The only legitimate, representative judiciary for them would be one representing their own social organisation and values, not culturally independent measures such as simple demography.¹⁰⁷

¹⁰³ M P Ganzglass, ‘Afterword: Rebuilding the Rule of Law in the Horn of Africa’ in W Maley, C Sampford and R Thakur (eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States* (2003) 340, 242. Ganzglass noted a similar phenomenon in the early days of the Kosovo intervention: 348–9.

¹⁰⁴ Project being undertaken by the University of Galway and the United States Institute of Peace, see Tolbert and Solomon, above n 46, 43; *Report of the Panel on United Nations Peace Operations*, 2000, UN Doc A/55/305 S/2000/809, [83] (hereinafter (Brahimi Report)).

¹⁰⁵ Chesterman, above n 7, 346.

¹⁰⁶ CLAMO, above n 43, 165, citing CLAMO, *Forged in the Fire: Legal Lessons Learned during Military Operations 1994-2006* (2006).

¹⁰⁷ This was Roberts’ conclusion in his comprehensive survey of the socio-cultural issues

More generally, the CPA's creation of the Central Criminal Court of Iraq with federal jurisdiction over major crimes,¹⁰⁸ inserting it into a traditionally regional-based criminal justice system,¹⁰⁹ was rejected by the Iraqi public under occupation. In a telling reflection on local 'cultural commitment,' they objected to its US backing, 'American-style justice,' and administration of CPA Orders instead of just Iraqi national law. This was notwithstanding local staffing and the imposition of international standards on the independence of the judiciary.¹¹⁰ At its most basic level, some Iraqi judges objected to the view that judicial reconstruction or training was required at all, especially from a foreign military occupant.¹¹¹ Western criticism of the measurable outcomes of the court was heavier again, addressing minimal case resolution rates, delays between detention and trial and, conversely, the rapid conduct of trials and sentencing once commenced.¹¹² Some of these criticisms were in fact about shortness of trials in the inquisitorial process generally, others explicable by the short Iraqi workday (9 am–2 pm)¹¹³ and daily

raised in Iraq when considering the place for demographically equal representation in the new judiciary, including the Sunni-Shi'ite power struggle and its historical explanation, the impact of sectarian bias, and the demand for self-determination: S Roberts, 'Socio-Religious Obstacles to Judicial Reconstruction in Post-Saddam Iraq' (2004) 33 *Hofstra Law Review* 367, 367–8, 388.

¹⁰⁸ s 18, CPA Order 13, above n 45.

¹⁰⁹ Criminal and civil *Nizamia* courts based on administrative districts replaced a Shariah court system in 1880. By the time Saddam Hussein took power, there were 18 districts, each with a separate court hierarchy from which appeals lay to the Court of Cassation: Chief Judge Medhat al-Mahmoud, above n 38, 7–8.

¹¹⁰ The CCCI bench was directed to act 'independently and impartially,' and without discrimination on the basis of 'race, nationality, ethnicity or religion and in accordance with their impartial assessment of the facts and their understanding of the law, without improper influence, direct or indirect, from any source,' and judges were barred from other paid employment or political positions: s 6(1–3), CPA Order 13, above n 45, s 8 provided for the disqualification of judges by the Administrator from particular matters in case of actual or apprehended breach of these requirements. Disqualification could be directed or at the judge's request to be excused, except that it was to be permission of the CPA Administrator for the duration of the occupation: s 8(4). For public perceptions of the CCCI in Karkh, see J Spinner, 'Iraq's New Forum of Justice Seems to Satisfy Few' *Washington Post* (4 August 2004), A12 <<http://www.washingtonpost.com/ac2/wpdyn/A378152004Aug3?language=printer>> and J Giordano, 'Trying Insurgents in Iraqi Courts Seen as Big Step in Rebuilding Legal System' *Stars and Stripes (Mideast edn)* (26 December 2004) <http://www.military.com/NewContent/0,13190,SS_122704_Court,00.html>.

¹¹¹ J Krane and D abu-Nasr, 'Iraq gets court reform; US soldier dies' *Times Leader* (17 June 2003) <<http://www.timesleader.com/mld/timesleader/6103225.htm>>, <http://www.redorbit.com/news/general/2838/iraq_gets_court_reform_us_soldier_dies/>.

¹¹² Reportedly, only 37 cases involving 55 defendants were finalised in 2003: American Forces Press Service, 'Iraq's Central Criminal Court Convicts Insurgents' (2 August 2004), <<http://www.defense.gov/news/newsarticle.aspx?id=25603>>.

¹¹³ J Gettleman, 'The Reach of War: The Law; Making Wheels of Justice Turn in a Chaotic Iraq' *New York Times* (1 August 2004) <<http://www.nytimes.com/2004/08/01/world/the-reach-of-war-the-law-making-wheels-of-justice-turn-in-a-chaotic-iraq.html>>.

religious obligations. The gap between cultural expectations of even the most basic rule of law institutional model indicates that the blueprint model, when applied through intervention, is unrealistic. Adding coercion to institutional intervention makes it even more so.

It is also significant that rule of law development theorists and doctrinalists emphasise constitutionalism, notwithstanding the absence of written, rights-based constitutions in States that would self-identify as proponents of the rule of law, such as the United Kingdom. Even the United States constitution, which unlike continental constitutions does refer to certain specific human rights such as ‘due process of law,’¹¹⁴ is silent on an explicit commitment to the rule of law. For example, Sitaraman describes constitutional design and COIN as simultaneous, ‘intricately interconnected and complementary,’ based on experience in Iraq and Afghanistan, even though the former was a ‘political-legal’ rather than a military task.¹¹⁵

The essence of Sitaraman’s approach is the Solonic need of the intervening counterinsurgent to ‘give a people under intervention the ‘best [constitution] they could receive’¹¹⁶ to end the insurgency. Although he recognises that the counterinsurgent is not necessarily a member of the society in question, Sitaraman nonetheless identifies them as a ‘powerful force’ through their capacity to influence participation in the design process, to ‘reshape power dynamics’ in society through military operations and to ‘shape’ institutions of ‘public power,’ which would seem to include courts.¹¹⁷ For example, the CPA attempted to ‘mollify’ Iraqi Shi’ite leader Ayatollah Ali al-Sistani in the Iraqi constitutional design process by striking the 15 November 2004, agreement for a directly elected constitutional convention, in lieu of its preference for a panel of experts to prepare a draft for referendum.¹¹⁸

Sitaraman cites this as an example of a counterinsurgent’s actual need to ‘work with other powerholders’ rather than entirely control the drafting process, but instead it tends to show that the counterinsurgent should not attempt to be involved in the development of permanent constitutions, other than by advice, if it hopes for public legitimacy. A useful comparison, as part of the very same process, is the CPA’s refusal to allow the Iraqi people to decide whether or not, or to what extent, the new constitution and judiciary would rely on Islamic law.¹¹⁹ It has been much

¹¹⁴ *United States Constitution* 5th Amendment:

An individual charged with a crime is entitled to due legal process, cannot be tried twice for the same offense, and cannot be compelled to testify against him — or herself. The government cannot seize private property without just compensation.

¹¹⁵ G Sitaraman, ‘Counterinsurgency and Constitutional Design’ (2008) 121 *Harvard Law Review* 1622, 1622 emphasis added.

¹¹⁶ Sitaraman, *ibid* 1625; Plutarch, *Plutarch’s Lives* (Dryden revised ed, 1970) 130.

¹¹⁷ *Ibid* 1626. In taking this view, he cites with approval, at 1625, the methods and rule of law mission identified by the US Army in Field Manual 3–24, above n 26.

¹¹⁸ *Ibid* 1627 and the references cited.

¹¹⁹ For example, Associated Press, ‘Bremer will reject Islam as source for law’ (16

criticised as a failure to recognise or acknowledge the values and concerns of the population.¹²⁰ It is a case of ‘should’ rather than Sitaraman’s ‘can’ for design control by the foreign military counterinsurgent based on allegedly universal models. Interestingly, where the counterinsurgent is *not* a foreign military occupant, as in Iraq and Afghanistan, Sitaraman allows that their own identity and ‘values’ will affect the ‘legitimacy’ and success of constitutional design as counterinsurgency.¹²¹

The problem of universality in rule of law theory has led at least one writer to assert that ‘a definition that is applicable and acceptable across cultures and political systems will necessarily be a formal one.’¹²² Even that is not supportable, however, given the core institutionalism, protecting procedural rights, with which formalism has been endowed. All that can be concluded is that it is fundamentally inconsistent and flawed to conceive of the rule of law as a universal end-state of Right which is independent of culture. Instead, it indicates that the universality and the good, if there is such, is properly in the process, or the relationship, of a community to law.

(b) The employment of rule of law rhetoric to other ends

Secondly, a blueprint analysis founded on a judiciary independent from a democratic legislature and executive, which protects individual rights, overlooks the empirical reality that judicial independence can be expressed in authoritarian as well as in democratic societies and independence alone cannot ‘produce effective checks on power.’¹²³ In a feature regularly observable in states of emergency and in authoritarian regimes, the fragmentation of the judiciary into regular and exceptional courts often actually reflects an increasing degree of independence in the regular courts.¹²⁴ Further, emphasising institutional independence overlooks the possible constraint of the judiciary through jurisdictional structure, the scope of

February 2004) <<http://www.msnbc.msn.com/id/4276149/>>.

¹²⁰ See Roberts, above n 107, 398–9.

¹²¹ Sitaraman, above n 115, 1623.

¹²² Chesterman, above n 7, 342.

¹²³ Ginsburg and Moustafa (eds), above n 53, 16. At 1 (fn 1), they acknowledge the contradiction between this criticism and the equally popular view that ‘judicial policy-making is antidemocratic.’ It follows, as case studies in their volume indicate, that formal independence as the rule of law cannot ‘ensure substantive notions of political liberalism,’ eg, L Hilbink, ‘Agents of Anti-Politics: Courts in Pinochet’s Chile’ 102; G Silverstein, ‘Singapore: The Exception that Proves Rules Matter’ 73.

¹²⁴ Ginsburg and Moustafa (eds), above n 53, 18. In authoritarian states, they identify five particularly curial functions:

(1) establish social control and sideline political opponents, (2) bolster a regime’s claim to ‘legal’ legitimacy, (3) strengthen administrative compliance within the state’s own bureaucratic machinery and solve coordination problems among competing factions within the regime, (4) facilitate trade and investment, and (5) implement controversial policies so as to allow political distance from core elements of the regime: 4.

review and standing, imposed by the (non-democratic) rule-maker.¹²⁵ Thus, while the rule of law blueprint pursues judicial independence as a measure leading to democracy, the link is not well demonstrated in reality.

Additionally, while democratic peace provides a basis for popular rule of law legitimacy, it too overlooks the employment of rule of law rhetoric in other contexts to other ends, which have little to do with democracy at all. Part of state and governmental ‘legitimacy’ is seen as the presence of independent judicial institutions,¹²⁶ perhaps because of the prevalence of international rule of rhetoric. These may include external acceptance as a participant in the international community.¹²⁷ This is apparent in peaceful, but authoritarian, regimes such as China, which has made the rule of law a ‘central component of its legitimation strategy.’¹²⁸ In several African states, Mexico and post-Nasser Egypt, authoritarian regimes provided access to courts ‘to better institutionalise rule and to strengthen discipline within their states’ burgeoning administrative hierarchies,’ including against corruption,¹²⁹ or in Turkey and Iran as a means of social control.¹³⁰ In other areas — and including democracies — the use of courts to make significant decisions can be used as strategic ‘delegation by office holders and strategic compliance by judges (with somewhat similar policy preferences) who are better insulated from the political repercussions of controversial rulings.’¹³¹

Importantly for the liberal-democratic blueprint of the rule of law, empirical analysis shows ‘no necessary connection between the empowerment of the courts and the ultimate liberalisation of the political system.’¹³² Some analysts have noted

¹²⁵ Ibid 19, references omitted.

¹²⁶ Ibid, arguing that courts may be used to ‘give the image, if not the full effect, of constraints on arbitrary rule.’ 5.

¹²⁷ For example, Ginsburg and Moustafa argue that this was an essential driver of the modernisation of Japan’s legal order in the late nineteenth century, in face of ‘the threat of Western colonialism,’ but that it lacked real internal social commitment: *ibid* 6.

¹²⁸ *Ibid* 3, citing the article in their edition by P Landry, ‘The Institutional Diffusion of Courts in China: Evidence from Survey Data’ 207. Landry himself demonstrates the significance of politics, including party membership, to practice in public institutions: *eg*, 209.

¹²⁹ *Ibid* 7–8, discussing the chapters of J Widner with D Scher, ‘Building Judicial Independence in Semi-Democratic Uganda and Zimbabwe’ 235; B Magaloni, ‘Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico’ 180; and T Moustafa, ‘Law and Resistance in Authoritarian States: The Judicialisation of Politics in Egypt’ 132. Chesterman also notes this as a consequence of intervention, in which interveners believe they are advancing rights and democracy, whereas local officials believe the interveners are augmenting (rather than restraining) central authority: *above n* 7, 340, references omitted.

¹³⁰ H Shambayati, ‘Courts in Semi-Democratic/Authoritarian Regimes: The Judicialisation of Turkish (and Iranian) Politics’ in Ginsburg and Moustafa (eds), *ibid* 283.

¹³¹ Ginsburg and Moustafa (eds), *ibid* 10.

¹³² H Root and K May, ‘Judicial Systems and Economic Development’ in Ginsburg and

a greater move towards rule of law rhetoric by regimes whose primary, substantive legitimising rhetoric, whether independence, wealth redistribution or other, has failed.¹³³ The effect of the rule of law institutional blueprint often has little to do with the ulterior purpose of the quest for legitimacy, questioning theories such as law and democracy. It must be concluded that democracies may rarely war with each other, but the rule of law blueprint does not of itself produce a democratic peace.

(c) Acceptable derogation from rights-based rule of law institutions in states of emergency

Thirdly, if rights-based institutions are universally applicable, and required for the rule of law, it is inconsistent to allow derogation from them. This is especially so where armed intervention to restore or establish ideal rule of law institutions is contemplated, as it was in Iraq through the Central Criminal Court. However, derogation from human rights in cases of national emergency has been described as ‘the cornerstone’ of the rights system.¹³⁴ It allows measures otherwise not permitted to restore order in ‘time of public emergency which threatens the life of the nation,’ provided the emergency is ‘officially proclaimed’¹³⁵ and exceptional.¹³⁶

Order in this context represents ‘the sum of rules which ensures the functioning of society or the set of fundamental principles on which society is founded. Respect

Moustafa (eds), *ibid* 304.

¹³³ For example, in Egypt the move to rule of law rhetoric by Anwar Sadat (1970–81) to ‘distance himself’ from the failure of the preceding Nasser regime (1954–70) to achieve revolutionary goals: Ginsburg and Moustafa (eds), *ibid* 11.

¹³⁴ J Oraá, ‘The Protection of Human Rights in Emergency Situations under Customary International Law’ in G Goodwin-Gill and S Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (1999) 413, 413. The principle of derogation in emergency is repeated in art 4, ICCPR; art 15, Convention on the Protection of Human Rights and Fundamental Freedoms (4 November 1950), ETS 5 (entered into force 3 September 1953), as amended (hereinafter ECHR); and art 27, American Convention on Human Rights (2 November 1969), 1144 UNTS 123, (entered into force 18 July 1978) (also known as the Pact of San José) (hereinafter ACHR). Oraá considers it to be of ‘general acceptance’ in international law, as custom (414). See also the Explanatory Paper prepared by L Despouy (Argentina), Special Rapporteur for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, 17 Jun 1985, UN Doc E/CN.4/Sub.2/1985/19 (hereinafter Despouy Report).

¹³⁵ Art 4, ICCPR. The Minimum Standards of Human Rights Norms in a State of Emergency adopted by the International Law Association at their 61st Conference, Paris, 26 Aug – 1 Sep 1984 (hereinafter Paris Minimum Standards), employ the same language in s A1(a), although it elaborated further in (b) that ‘an exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organized life of the community of which the state is composed.’ The Paris Minimum Standards are reproduced in S R Chowdhury, *Rule of Law in a State of Emergency* (1989).

¹³⁶ Section A(1)(b), Paris Minimum Standards.

for human rights is part of public order.’¹³⁷ The cause of the threat can be manifold. Although war is not referred to specifically in the key International Covenant on Civil and Political Rights — because the drafters were concerned about consistency with the object of the United Nations in preventing war¹³⁸ — this ‘most vivid paradigm of a threat to the life of a nation’ is included in the range of emergencies.¹³⁹ It has also been applied to internal disturbances, on a test of whether the ordinary functioning of the criminal justice system is ‘rendered wholly impossible,’¹⁴⁰ and to revolutions resulting in a fundamental change of national character.¹⁴¹ *Force majeure* was also in the mind of the drafters, but not circumstances of economic underdevelopment, which were subject to separate study by the United Nations.¹⁴²

International recommendations supported an active role for courts in reviewing emergency derogations,¹⁴³ but it is limited in practice. The unwillingness of common law courts, for example, to review national security matters robustly unless bad faith on the part of the executive is demonstrated, means Alexander recommends that they ‘ideally should not be involved’ at all¹⁴⁴ — better no review than a pretence of legality. He concludes that courts have an important role only against threats to the nation less than armed conflict, in which they ‘should insist

¹³⁷ Principle 22, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, UN Doc E/CN.4/1984/4 annex (hereinafter Siracusa Principles), defining ‘public order’ in the ICCPR.

¹³⁸ *Travaux préparatoires* to art 4, ICCPR: Annotations on the Text of the Draft International Covenants on Human Rights, 10 UN GAOR Annexes, Agenda Item 28 (Part II) 1955, UN Doc A/2929 [39].

¹³⁹ Chowdhury, above n 135, 23, and see Oraá, above n 134, 416. The Siracusa Principles seem to place internal conflict in a complex definition of ‘national security,’ which demands a threat of force to ‘the existence of the nation or its territorial integrity or political independence,’ but not ‘merely local or relatively isolated threats to law and order.’ Principles 29 and 30.

¹⁴⁰ *Lawless v Ireland* [1960-61] Eur Court HR (ser B) 82-83.

¹⁴¹ ‘The Greek Case’ (1969) 12 *Yearbook of the European Convention on Human Rights* 1; see Chowdhury, above n 135, 39.

¹⁴² This and armed conflict are discussed in the *travaux préparatoires* to art 4: N Questiaux, Study of the Implications for Human Rights of Recent Developments Concerning Situations known as States of Siege or Emergency, 27 July 1982, UN Doc E/CN.4/Sub.2/1982/15, [25]-[26] (hereinafter Questiaux Study); Chowdhury, above n 135, 15. Chowdhury considers that rights restrictions for economic or social development ‘might well be covered by limitations clauses permissible in normal times by the express terms of the ICCPR and need not at all’ necessarily rely on derogation under art 4.

¹⁴³ Despouy Report, above n 134, [2]-[3]; Oraá, above n 134, 424. This is consistent with Siracusa Principle 24, above n 137, that public order agencies be under judicial or legislative control, or that of ‘other competent independent bodies.’

¹⁴⁴ G Alexander, ‘The Illusory Protection of Human Rights by National Courts during Periods of Emergency’ (1984) 5 *Human Rights Journal* 1, 1. See also Chowdhury, above n 135, 59.

on the Rule of Law and resist the temptation to embellish legislative proscriptions.’¹⁴⁵ Where a country is in an institutional ‘state of flux,’ Lalive concedes that a ‘Western pattern of checks and balances’ which would provide a foundation for effective judicial review of emergency measures may not even be possible. He considers that that does ‘not per se affect the operation of the Rule of Law,’ which rather depends on the relative interest of the citizen and national security.¹⁴⁶

It is a very troubling result. If democratic rights protection through certain institutional forms represents the rule of law, then both the derogation of rights and the lack of its robust review (an expression of legal constraint on officials as a foundation of the rule of law) during national emergencies must amount to a derogation from the rule of law. Indeed, the lack of review in emergencies has been said to amount to government ‘by decree.’¹⁴⁷ However, if there *were* robust judicial review, then the attempt to cloak rights derogation in rule of law forms through judicial involvement is also colourable on a pure rights-based theory. It conveys a principle of legality, in which emergency measures are authorised by law and otherwise meet legal requirements of certainty and generality of application,¹⁴⁸ but does so at the expense of conceptual clarity for a universal rule of law system.

Practitioner theorists such as Stromseth and the ‘blueprint’ school overcome this difficulty in the only conceivable way — when advocating rule of law intervention, they advocate efforts directed to reforming rule of law institutions for ordinary situations, to procure a return to order and security which they see as coterminous with the rule of law. They do not advocate the deliberate usage by interveners of emergency measures in derogation of fundamental rights standards, but their pragmatic view accommodates it as an exceptional measure. The approach is illustrated clearly in the case of the right to a fair trial.

(d) Case study: derogability of the right to a fair trial

Although human rights instruments generally self-define ‘non-derogable rights’ within their own field of operation, there are only four human rights commonly considered non-derogable as *ius cogens* norms, and the right to a fair trial before a court is not among them. This is notwithstanding the relevance of some non-derogable rights to the rule of law blueprint, especially the right to be free from torture and other inhuman or degrading treatment or punishment and the principle of non-retroactivity of criminal laws.¹⁴⁹

¹⁴⁵ Alexander, *ibid* 64; Chowdhury, *ibid* 59.

¹⁴⁶ J-M Lalive, ‘Introduction’ in N S Marsh (ed), *The Rule of Law in a Free Society: A Report on the International Congress of Jurists, New Delhi, India, 1959* (1959), xii–xiii.

¹⁴⁷ Issue introduced by Judge H E Stevens (United States), at the International Congress of Jurists, Debate, 6 Jan 1959, 1500-1730; see further Marsh (ed), *ibid* 67.

¹⁴⁸ Siracusa Principles 15–17, above n 137.

¹⁴⁹ As to customary law, see Oraá, above n 134, 433; as to treaty law see J Oraá, *Human Rights in States of Emergency in International Law* (1992) 96, citing the ICCPR,

Similarly, while the eight non-derogable rights in the ICCPR touch on aspects of criminal justice,¹⁵⁰ rights to liberty and security of the person, including freedom from ‘arbitrary arrest or detention’ and procedural safeguards in case of arrest or detention are *not* identified in Article 4, ICCPR, as non-derogable rights.¹⁵¹ Above all, none of the provisions in Article 14 regarding a ‘fair and public hearing by a competent, independent and impartial tribunal established by law’ are non-derogable in emergencies. Even in a stable democratic society, the latter may be modified in the interests of ‘national security’ or ‘public order.’¹⁵² The Siracusa Principles add non-emergency reasons, including preserving the ‘fairness of the trial,’ to derogate from the right to a public trial.¹⁵³ The European

ECHR and ACHR. The other *ius cogens* rights are the right to life and the right to be free from slavery or servitude. Other international documents have proposed additional non-derogable rights but they have not yet crystallised as such. Meron notes that there is ‘no immediate prospect of consensus’ beyond this minimal list of four: ‘On a Hierarchy of International Human Rights’ (1986) 80 *American Journal of International Law* 1, 16. However, there is clearly a penumbra of uncertainty regarding interpretation here. For example, the American Law Institute posits that ‘prolonged arbitrary detention’ would also be ‘against *ius cogens* norms; however, if the conditions of the derogation clause are met in a state of emergency, the detention would presumably not be arbitrary.’ *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 174–5.

¹⁵⁰ Including procedural rights in case of the death penalty (art 6(4)), freedom from imprisonment as a debtor (art 11) and recognition as a legal person (art 16). There is effectively a ninth non-derogable right in the prohibition on derogating from other rights in a manner which is discriminatory for prohibited reasons, including race or gender (art 4). Since procedural non-discrimination between prosecutor and accused in criminal trials (*égalité des armes*) is said to be the first principle of a fair trial (‘Pataki v Austria No 596/59; Dunshirn v Austria No 789/60’ (1963) 6 *Yearbook of the European Convention on Human Rights* 714), there is undoubtedly some overlap in protection: Chowdhury, above n 135, 213. Similarly, freedom from torture overlaps with the procedural right to freedom from self-incrimination, because it prohibits the gaining of evidence through compulsion. Chowdhury considers this important in a state of emergency, in which it is often abused: above n 135, 217.

¹⁵¹ Arts 9–10. Nor are restrictions to freedom of movement, when authorised by law and directed to ‘national security [and] public order,’ *inter alia*, or expulsion of aliens without review or appeal: arts 12–13. Further, the question of derogability on freedom from arbitrary detention does not preclude administrative detention in situations of emergency, as was upheld, for example in *Liversidge v Anderson* [1942] AC 206.

¹⁵² Art 14(1), similarly the presumption of innocence (art 14(2)), procedural equality including avoidance of ‘undue delay’ (art 3), review on appeal (art 5) and protection from double jeopardy (art 7), ICCPR. This is demonstrated by the UN Special Rapporteur on extra-judicial, summary or arbitrary executions, who described how near permanent states of emergency in states such as Egypt resulted in the suspension of fair trial standards by military courts trying civilians, contrary to the ICCPR, including the lack of judicial independence and a right of appeal. The criticism was in the characterisation of the underlying national situation as an emergency. See B W Ndiaye, Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions, 19 December 1997, UN Doc.E/CN.4/1998/68/Add.1, [152]-[153].

¹⁵³ Siracusa Principle 36.

Convention on the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR), which also permits derogation,¹⁵⁴ justified it on the grounds that the ‘acts of violence which cause a public emergency, menace the personal security of other members of the community.’ Therefore, temporary suspension of individual rights, as authorised by many Continental constitutions, was permitted to restore security for all.¹⁵⁵

The ILA Conference of 1984 took a markedly different approach when it established the Paris Minimum Standards of Human Rights Norms in a State of Emergency, identifying sixteen rights as non-derogable, *including* the right to a fair trial and the right to remedy.¹⁵⁶ Although consistent with blueprint rule of law, the view has not in the previous 25 years crystallised into a new rule of custom establishing a non-derogable right to a fair trial in emergencies less than armed conflict. This minimalist approach to non-derogable rights has been criticised as excluding ‘indispensable’ protections for people most at risk in emergencies,¹⁵⁷ but the reality is that international law accepts that the institutional and procedural underpinnings of the rule of law with respect to individuals can be derogated from by the state in certain situations, without adequate review.

However, where the national emergency amounts to an armed conflict attracting the protections offered by the Geneva Conventions, common Article 3(1)(d) prohibits sentencing ‘without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized peoples.’¹⁵⁸ It has been subject to recent analysis in the US Supreme Court’s rejection of the form of military commissions to try detainees held at Guantanamo Bay, established by executive decree. The court held that:

Like the phrase ‘regularly constituted court,’ this phrase is not defined in the text of the Geneva Conventions. But it must be understood to incorporate at least the barest of those trial protections that have been recognized by customary international law ... [The] procedures adopted to try Hamdan deviate from those governing courts-martial in ways not justified by any ‘evident practical need,’ and for that reason, at least, fail to afford the requisite guarantees. We add only that, as noted in Part VI–A,

¹⁵⁴ Arts 5, 6 and 15, ECHR.

¹⁵⁵ *Lawless v Ireland*, above n 140, 125 per Professor Waldock.

¹⁵⁶ Arts 1–16, in which art 7 refers to a right to a fair trial and art 16 to a right to remedy. Siracusa Principle 70 also establishes not only a non-derogable right to a fair trial and freedom from arbitrary detention but identifies complex minimum standards amounting to it. They built on the recommendation of the International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (1983), which would allow only three types of emergency measures: suspension of the right to a public trial; ‘larger delay than normal in proceeding to trial,’ and some procedures relating to admission of testimony from witnesses not appearing at trial: 429.

¹⁵⁷ Oraá, above n 134, 434. He is also critical of the inclusion of some ‘not so indispensable’ rights as non-derogable in the ICCPR and ECHR.

¹⁵⁸ For example, Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 UNTS 287, (entered into force 21 October 1950) (hereinafter Geneva IV).

supra, various provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.¹⁵⁹

The minimum standards the US Supreme Court has identified, drawing on Article 75 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977,¹⁶⁰ and labelled as customary law, are remarkably similar to derogable Article 14 procedural protections. Consistently with the blueprint approach, it has

¹⁵⁹ *Hamdan v Rumsfeld* (2006) 548 US Rep 577, 70–1 per Stevens J, for the Court, noting that the requirements of common art 3 are ‘are general, crafted to accommodate a wide variety of legal systems.’

¹⁶⁰ (8 June 1977), 1125 UNTS 3 (entered into force 7 December 1978). Art 75(4) in particular provides that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

- (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
- (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
- (c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
- (d) anyone charged with an offence is presumed innocent until proved guilty according to law;
- (e) anyone charged with an offence shall have the right to be tried in his presence;
- (f) no one shall be compelled to testify against himself or to confess guilt;
- (g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
- (i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
- (j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

been argued that if these protections are indispensable in time of war, they must 'a fortiori be considered non-derogable in times of lesser threat.'¹⁶¹ Thus Chowdhury brings what he argues are non-derogable aspects of fair trial rights, which could never 'be justified on the principle of strict necessity,' under the aegis of common Article 3 'indispensable judicial guarantees.'¹⁶² Yet the Human Rights Commission confirms that 'strictly' proportional derogation from 'normal' Article 14, ICCPR, protections is permitted in circumstances not attracting higher protection under common Article 3.¹⁶³

That said, the suggestion that the US Supreme Court may have been willing to entertain divergence from their minimum trial standards, if justified by 'practical need,' presumably security, or legislative sanction, leaves little genuine difference between the Human Rights Committee's view of Article 14 as derogable in emergencies less than an international armed conflict and common Article 3(1)(d). Significantly, Justice Stevens reminded the executive that 'in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.'¹⁶⁴

Kinley has suggested 'in circumstances of extreme political, economic and social upheaval the contingencies of the rule of law may be of a different order.'¹⁶⁵ Extant international law supports this view of the rule of law as a concept which is to be understood differently *in extremis*, because it leaves a distinct gap in allowing derogation of fair trial rights in emergencies less than armed conflict. The US Supreme Court's comment that further exception, even under common Article 33(1)(d), cements it. It is clear that international law preferences public

¹⁶¹ J Arechega, 'Final Recapitulation' Inter-American Seminar on State Security, Human Rights and Humanitarian Law, San Jose, 1982; Chowdhury, above n 135, 211.

¹⁶² Chowdhury, *ibid* 210. He would also include them under 'other obligations under international law' in art 4, ICCPR, but, as discussed above, the general recognition of non-derogable rights in customary law is limited and does not expressly include fair trial rights.

¹⁶³ General Comment 13: Article 14, Twenty-first session, 1984 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 1994, UN Doc. HRI/GEN/1/Rev.1, 14, [4]. But compare General Comment Number 29: States of Emergency (Article 4), 31 August 2001, UN Doc CCPR/C/21/Rev.1/Ass.11 where the Human Rights Committee concluded that:

as certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected: [16].

¹⁶⁴ *Hamdan v Rumsfeld*, above n 159, 72.

¹⁶⁵ D Kinley, 'The Universalizing of Human Rights and Economic Globalization: What Roles for the Rule of Law?' in S Zifcak (ed), *Globalisation and the Rule of Law* (2005) 96, 108-9.

security over individual rights-based rule of law in periods of crisis, which must raise doubts about their association in military doctrine and rule of law theory, which pursue an ideal rule of law system through intervention.

Modirzadeh has provided a cogent criticism of the increasing favour for convergence between human rights law and humanitarian law in situations of armed conflict, although they were conceived in different circumstances and to different ends, not least of which is the level of civil order and governance in which they were originally expected to apply. She questions whether there is good to be gained from the desire for 'more human rights' on the battlefield, acknowledging that importing rights discourse is ineffective without 'local law and order,' under which citizens can exercise their expectation of enforcing claims against an intervener who abuses their rights.¹⁶⁶ That is, 'we all know at an intuitive level that an Iraqi in Iraq under occupation cannot possibly enjoy the same human rights as I can as an American citizen in the United States. Yet, there is no way (so far) to translate that basic commonsense idea in discussions of international legal application.'¹⁶⁷

The tension, as Teitel phrases it, is between the rule of law 'as backward looking and forward looking, as settled versus dynamic ... it serves merely to mediate the normative shifts in justice that characterise these extraordinary periods.'¹⁶⁸ Kinley goes further, to argue that even in societies *not* in 'hypertransition ... the rule of law is nevertheless always contingent on political circumstances,' describing it as a question only of 'degree.'¹⁶⁹ This is not the rule of law as popularly advocated, although it better accommodates the tensions about trial rights in states of emergency.

At heart is the characterisation of the rule of law. The doctrine and theories discussed to date remain predicated on the rule of law as a result (a good in itself) or a situation which produces a result (that result being the good). Because of this, the theories must focus on static elements of the rule of law which are capable of identification as results: courts, judiciaries, democratic parliaments, suitably certain and predictable laws, and human rights, which have not been subject to derogation. As results or situations cannot lend themselves to more than one definition, rule of law theorists must accept a theory of universality which has been shown to be culturally unsupportable without a non-existent core agreement about the nature of law, the nature of rule or governance, and the nature of the rule of law. The only coherent solution is an altogether different conception of the rule of law as a relationship, or social dialogue, between the subjects of law and the authority of law. Such a theory neither demands universal institutions nor universal values.

¹⁶⁶ Modirzadeh, above n 12, esp 370–73.

¹⁶⁷ Ibid 373.

¹⁶⁸ R Teitel, 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale Law Journal* 2011, 2016.

¹⁶⁹ Kinley above n 165, 108–9.

IV. The Rule of Law as a Negotiated Relationship between Subjects and Law

The rule of law as a relationship rather than a result is relatively new to international rule of law discourse. Its main proponent is Nardin, who advocates a definition of a 'specific kind of relationship, a relationship based on non-instrumental law.'¹⁷⁰ In this relationship normative non-instrumental rules emanate from law as *legitimate* authority to achieve the ends identified by the community of subjects.¹⁷¹ These rules set out the 'unalterable status of human personality that the moral relationship presupposes' which govern internal discourse about the variable content of instrumental rules.¹⁷²

The advocates of relationship theory are interested in the developing perception of the community of legal subjects of the legitimacy of their own legal system. The rule of law in this environment is neither universal nor stationary. It meets Koskenniemi's argument for a definition of law which preserves the moral content of legality and is therefore responsive to societal developments in ideas such as justice. This does not reduce it to a 'discursive idea of democracy' but accepts the rule of law as 'a distinct mode of association among persons whose status as human beings is a matter of 'nature' or 'reason' rather than 'convention' or 'decision.'¹⁷³ Thus the only universal requirement of the rule of law is the mutually accepted nature of the participants in it.

Understanding the rule of law as a relationship is consistent with much of current theory, except the overwhelming emphasis on universal rights-based institutional forms. For example, there is scope in formalist certainty and predictability of rules to acknowledge that rules certain on their face may be capable of different contexts and meanings, particularly over time.¹⁷⁴ Substantive values too may develop, so long as their application is on a universal human basis. Some formalists would even allow some 'virtues' of the formal rule of law to be set aside by the subject community to allow the achievement of other necessary ends.¹⁷⁵ Analysing Stromseth's argument, in which the institutional forms of the

¹⁷⁰ Nardin, above n 8, 395.

¹⁷¹ Ibid 394. Nollkaemper, reviewing the origin and case law of the International Criminal Tribunal for the former Yugoslavia, uses 'legitimacy' as a shorthand for 'the justification of the authority of the law' with both formal and substantive understandings: A Nollkaemper, 'The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia' in T Vandamme and J-H Reestman (eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems* (2001) 13. Glennon's view is that law is a 'limit on self-dealing,' in which consent to be bound is given on joining (or remaining) in the community of subjects. This consent is his legitimacy of law: above n 99, 146.

¹⁷² Nardin, *ibid*.

¹⁷³ Ibid 392, discussing M Koskenniemi, *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2001).

¹⁷⁴ Nardin, *ibid* 390.

¹⁷⁵ Including Craig, above n 53, 469.

rule of law which support peaceful democracy and development must be matched by a cultural commitment from the subject community to uphold the rules and institutions,¹⁷⁶ the latter is the rule of law relationship, the former merely its momentary form. It may be the most popular contemporary relationship but by no means the only possible manifestation. Therefore relationship approach is best seen as a rethinking of the concept of universality by applying it to process rather than results.

The risk of this theory is losing the rule of law in post-modern relativism, in which the only requirement to create a rule of law relationship is the existence of public discourse. The range of possible rule of law relationships is thus unlimited for Koskenniemi, who defines it negatively.¹⁷⁷ The proposed limit to indeterminacy is the underlying acceptance of human moral equality as subjects of law.¹⁷⁸ Therefore, while universally indeterminate, the rule of law has a determinate meaning within each society professing it, in the form of the characteristics of its independent rule of law relationship. Nardin, though, does not subscribe to the total indeterminacy of post-modern theory: he asserts that to create the rule of law, there must be law, and if law is entirely policy-based and indeterminate, then law ‘as a distinct mode of human relationship’ is erased.¹⁷⁹ Without it, a society will be excluded from the scope of rule of law communities.

The prerequisites of a rule of law relationship then are the acceptance of ‘permissible coercion’ amongst citizens and the existence of non-instrumental rules identifying laws which are predicated on an equal moral relationship between them.¹⁸⁰ The acceptance of human equality as the foundation of a future rule of law relationship is demonstrated in the calls of the community in the penal colony in New South Wales, then under military governance, for a ‘legislative assembly and trial by jury’ in 1819, putting aside the existing relationship of prisoners, guards and free settlers.¹⁸¹ The moral equality of legal subjects, however, is not fully described — for example, if a society asserts that men and women are formally equal but are different and ought therefore to be treated differently in

¹⁷⁶ Stromseth et al, above n 9, 4.

¹⁷⁷ Koskenniemi, above n 173, 507; and see Nardin, above n 8, 390.

¹⁷⁸ Nardin, *ibid* 391.

¹⁷⁹ *Ibid* 401.

¹⁸⁰ ‘It is important to note that these rule-of-law criteria are not themselves the outcome of an authoritative decision ... Unlike enacted law, they cannot be altered or annulled by authority.’ *ibid* 395. They are complemented by secondary, instrumental rules setting out procedural constraints on legal officials traditionally associated with the rule of law, including freedom from arbitrariness and the prohibition on secret or retrospective laws, which prevent officials acting outside the law: *ibid*.

¹⁸¹ See D Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (1991) 33, citing E S Morgan, *American Slavery, American Freedom* (1975) 20.

certain respects,¹⁸² it is not clear whether Nardin or Koskenniemi would accept this as a potential rule of law society. An example of how the internal debate might proceed when challenged is evident in the Najaf judicial appointment affair mentioned above, in which externally-imposed equal representation was rejected as a guiding principle for the local judiciary.

Regarding coercion, Nardin's underlying recognition of moral equality as the foundation of the rule of law state rejects the Weberian idea of the state as a coercive association in which the coercion is accepted as legitimate by its subjects.¹⁸³ He uses non-instrumental rules to distinguish between permissible coercion, which is essential to the rule of law relationship, and impermissible coercion, which is a feature of the authoritarian state.¹⁸⁴ The coercion debate defines the rule of law relationship in two ways: vertically, between the citizen and the legal authority, but also horizontally, between each member of the community as moral equals. Only the state professing both relationships is a rule of law state:

As members of that association — 'citizens' — they are associated not only with government but also with one another. The subjects of a managerial state, in contrast, are associated only with the manager.¹⁸⁵

When applied to military interveners, it is clear that they are not part of the local rule of law discourse because they exercise managerial coercion — there is no horizontal relationship on which to build a system.

(a) Applying the relationship theory of the rule of law to current international law

The contemporary international rule of law relationship centres on the coming together of 'sovereign territorial groups,'¹⁸⁶ each forming a domestic legal system, to form an international community subject only to the restrictions of international

¹⁸² Some religious laws posit such an approach on their face. The Old Testament begins with religious equality in Genesis 1:27 but describes different gender roles in the New Testament, eg, I Timothy 2:8–12 and I Peter 3:4–8. The Quran also reveals spiritual quality in 3:195, 4:124 and others, but differing gender roles, for example 4:34. This article does not attempt any interpretation of these religious passages beyond this observation.

¹⁸³ Nardin, above n 8, 393.

¹⁸⁴ Ibid 394.

¹⁸⁵ Ibid 393.

¹⁸⁶ Although beyond the scope of this paper, Anghie's research into the reflexive relationship between the concept of sovereignty and the practice of colonialism in the development of international law sheds considerable light on the employment of 'universal' concepts as entry requirements to the community of states: A Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1.

law.¹⁸⁷ Its founding principle is the sovereign equality of states derived from the moral equality of citizens.¹⁸⁸

Chesterman emphasises that the international legal order, where the role of state consent in law-making means there is a horizontal relationship between lawmakers and subjects, but no regulating vertical relationship, demands a functional approach based on formal minimalism. Functionalism means that ‘substantive political outcomes — democracy, promoting certain human rights, redistributive justice or laissez-faire capitalism, and so on’ are not necessary requirements of the rule of law.¹⁸⁹ The argument builds on the substantial criticism of the international rule of law relationship — that the formal equality of participants in international law, as a foundation of the rule of law relationship, is not reflected in actual arrangements. The voting arrangements of the United Nations Security Council, in which only five nations hold a permanent power of veto, is held out as evidence that some states ‘are more equal than others,’ particularly where Security Council Resolutions purport to express a quasi-legislative power.¹⁹⁰ This is not altogether surprising, given the Charter attempted to ‘replicate the existing power structure,’¹⁹¹ rather than constrain it, as the rule of law would require, or even represent law *as* power.

However, the suggestion that the General Assembly better expresses international democracy is also exploded by the realities of self-interested power politics. In the acceptance of sovereign equality, it ignores population, wealth, respect for community order or the well-being of a state’s own people.¹⁹² Chesterman doubts whether the UN, in fact or capacity, can embody the rule of law.¹⁹³ Indeed, the system of UN organisations, in which economic and human rights sub-agencies are restrained by the scope of their delegated authorities, distinguishes international relations from the ‘autonomous and complete’ domestic legal systems which are traditionally associated with the rule of law.¹⁹⁴

Additionally, equality of participation in the international system does not necessarily produce an international rule of law in which the law is applied equally to all. A strident criticism of recent times is that the enforcement of international law is anything but equal (which critics translate as consistent). For example, the Security Council’s exercise of Charter powers to maintain peace and security in the Middle East are alleged to be actually biased by the national interest of permanent

¹⁸⁷ Khadduri, above n 90, 1.

¹⁸⁸ Art 2(1), Charter of the United Nations (24 October 1945), 1 UNTS 41 (1 November 1945) (hereinafter UN Charter). An early exploration of the equality principle is in E de Vattel, *The Law of Nations or the Principles of Natural Law*, (C Fenwick trans, 1964) Book 2, lxiii.

¹⁸⁹ Chesterman, above n 7, 333 (references omitted).

¹⁹⁰ Chesterman, *ibid* 354. Glennon argues that it ingrains ‘self-dealing,’ contrary to a rule of law relationship: above n 99, 151-2.

¹⁹¹ Glennon, *ibid* 153.

¹⁹² *Ibid* 151.

¹⁹³ Chesterman, above n 7, 354.

¹⁹⁴ *Ibid* 355.

members.¹⁹⁵ This, it has been claimed, amounts to a ‘qualitatively different’ international law for Middle Eastern states.¹⁹⁶

While some aspects of this criticism are distinctive to the character and composition of the UN Security Council,¹⁹⁷ and post-war collective security arrangements,¹⁹⁸ it is indicative of a disjunct between the theory and practice of equality in the application of international law. In place of Nardin’s human equality as the foundation of the rule of law relationship, actual practice demonstrates a ‘hegemonial approach’ to the application of law, in which the relative power of the protagonist affects the obtaining of ‘legal approval’ for its actions.¹⁹⁹ This compounds the imperial effect of the international legal system on the rule of law relationship in individual communities, which is explored in the next section.

V. An Explanation of Persistence in Intervention: The Imperialist Agenda of the International Rule of Law

The standard by which current international law measures the rule of law is by human rights based democracy and recognisable judicial institutions, as above. It is the essence of Waldron’s demand for ‘general public norms’ to have a system of law, here human rights, which is to operate within the rule of law.²⁰⁰ The provisions of the Universal Declaration of Human Rights 1948 ‘broadly correspond’ to the fundamental principles of the rule of law agreed among theorists and doctrinalists, especially its judicial institutionalist focus.²⁰¹ It is, therefore, a universal and substantive view.²⁰² This is notwithstanding the formal derogability

¹⁹⁵ J Allain, *International Law in the Middle East: Closer to Power than Justice* (2004) 127.

¹⁹⁶ Ibid 161. Brownlie agrees in a strident criticism of the Security Council for selective and unprincipled exercise of legal authority in its response to Libya’s refusal to surrender the suspects in the case of the Lockerbie bombing: I Brownlie, *The Rule of Law in International Affairs* (1994) 224, considering SC Res 731 (1992).

¹⁹⁷ The composition and practice of the Security Council is currently and has long been subject to review and debate: most recently see J S Lund and D Safran-Hon, *Third Round of Intergovernmental Negotiations on UN Security Council Reform Conclude, 63rd Plenary Session of the UN General Assembly* (1-3 Sep 2009) <<http://www.centerforunreform.org/node/407>>. The session voted to continue discussions into the 64th Plenary Session.

¹⁹⁸ Glennon, above n 99, 153. Art 42 of the UN Charter centralises collective security responsibility in the Security Council, except for force used in self-defence pursuant to art 51, which is still to be reported to the Council.

¹⁹⁹ Brownlie, above n 196, 33. See also feminist critiques of domestic and international law, eg, Charlesworth, ‘Whose Rule?’ above n 100, 83–95.

²⁰⁰ Waldron described such norms as being identified ‘in the name of the whole society:’ above n 71, 24.

²⁰¹ Chesterman, above n 7, 358–9. Eg, the right to a form of trial in art 10 compared to the right to a fair trial in art 14, ICCPR.

²⁰² Tolbert and Solomon, above n 46, 32–3. But compare Chesterman, *ibid* 344, who distinguishes between the substantive values by including specific rights, and the manner in which he argues that the rule of law promotes rights generally.

of fair trial right outside the explicit context of armed conflicts attracting the protection of the Geneva Conventions.

However, the contemporary international community features states in a variety of circumstances, which have prompted intervention. To a greater or lesser extent all defy the precepts of rule of law from the international perspective. They are:²⁰³

1. 'disrupted' states, where open conflict does not affect international recognition of the state itself, such as Afghanistan since 1978 or Lebanon during its 1974-1989 civil war;
2. would-be states, for example now-recognised Bosnia and Herzegovina which was challenged by Serbia in the break-up of the former Yugoslavia, contested by neighbours so as to prevent their consolidation;
3. 'embryonic states' under contested occupation and facing pressure to permit self-determination, including East Timor and 'to some extent' Kashmir;
4. states subject to international control, whether by sanctions or intervention, for violations of international law, such as Iraq after 1990; and
5. states which would disintegrate but for military control, including Pakistan.²⁰⁴

Significantly, the causes of the disruption centre on the breakdown of the social order through sectarianism, 'ethnic antagonisms,' economic collapse, 'a specific legitimacy crisis,' or separatism.²⁰⁵ Recalling Rawls' linkage of the necessity for rules with the ordering of liberty, it is the breakdown of social order which is inextricably linked with the break-down of the rule of law relationship within a state.

The self-consciousness of international law to its own substantive, rights-based definition of the rule of law is evident in its refusal to accept the status quo of these disrupted states as a necessary or justified part of the international legal order. Human rights treaties make the rule of law a requirement for an internationally-recognised state; development agencies both national and international consider it 'essential for economic growth;' and 'more recently security actors, notably the UN Security Council, have promoted the rule of law as a form of conflict resolution.'²⁰⁶ Increasingly, the rule of law is being used obliquely (but rarely explicitly) as a justification for intervention, as part of a broader mission to restore

²⁰³ A Saikal, 'The Dimensions of State Disruption' in W Maley, C Sampford and R Thakur (eds), *From Civil Strife to Civil Society: Civil and Military Responsibilities in Failed States* (2007) 17, 18.

²⁰⁴ Ibid 18–20. These examples are among those provided by Saikal in his analysis.

²⁰⁵ Ibid 20–2.

²⁰⁶ Chesterman, above n 7, 343.

security, which to that extent is contrary to the general prohibition on the use of force in Article 2(4) of the UN Charter.²⁰⁷

The phrase ‘rule of law’ was first used operatively in Security Council Resolution 1040 (1996) for the Secretary-General’s work ‘to promote ‘national reconciliation, democracy, security and the rule of law in Burundi,’ although the ‘rule of law’ was rendered in French as ‘*le rétablissement de l’ordre*.’²⁰⁸ Since then, it has been called for most strongly in UN transitional administrations which, standing in the place of local authorities, import a blueprint approach to creating rule of law institutions, especially those dealing with judicial structures and law enforcement.²⁰⁹ Scholars conservatively argue that rights-based humanitarian intervention is evolving and that, by analogy with the Security Council finding of a threat to international peace and security in an overflow of refugees across borders, the lack of the internationally-recognised rule of law is a humanitarian and security concern which could potentially permit intervention of itself.²¹⁰ It has even been suggested that interveners’ efforts to create rights-based structures for a domestic rule of law can positively affect an intervention which might otherwise lack legitimacy in international law.²¹¹

However, where there is military, political or financial intervention by a foreign State²¹² or intervening force, the internal social dialogue as to the rule of law is disrupted, perpetuating the apparent need for intervention to resolve rule of law collapse. If the mandate for intervention comes from the UN, further difficulties arise because of the status of the UN as an intervener. When States intervene in other States, the universality of human rights law at least purports to impose a common standard which all interveners are bound by their own obligation to observe (if not necessarily enforce). The UN, on the other hand, is a non-State body which has increasingly ‘assumed State-like functions,’ including transitional administrations, while its obligations under human rights laws are unclear. There is

²⁰⁷ Other than in art 51 self-defence, and in sharp counterpoint to the declaration in art 55 that member states are to ‘promote and encourage respect for human rights and for fundamental freedoms:’ Stromseth et al, above n 9, 24.

²⁰⁸ Chesterman, above n 7, 348 (references omitted).

²⁰⁹ Tolbert and Solomon, above n 46, 42. Recent examples are the UN Transitional Authority in Cambodia, SC Res 745 (1992), UN Mission in Kosovo, SC Res 1244 (1999) and UN Transitional Authority in East Timor, SC Res 1272 (1999). See also Chesterman, *ibid* 348–9. The preponderance of institutionalism and criminal justice is demonstrated in the United Nations Basic Principles on the Independence of the Judiciary, GA Res 40/32 (1985) and 40/146 (1985).

²¹⁰ Stromseth and her colleagues, while not committing to a ‘clear or uncontested’ right of intervention, are able to point to a number of interventions during the 1990s, including NATO in Kosovo and Coalition intervention to protect Iraqi Kurds, concluding that at a minimum such interventions were ‘excusable breaches’ of the Charter rules: above n 9, 38 and see 3; also Chesterman, above n 7, 348.

²¹¹ Stromseth et al, *ibid* 51–2, as in Kosovo and Iraq in 2003. However, such efforts could not confer lawfulness on an intervention in breach of international law, unless there is a purely rule of law-based right of intervention.

²¹² Identified as a cause of state disruption: Saikal, above n 203, 22.

little judicial authority clarifying the point, or indeed any aspect of validity of Security Council action, although the International Court of Justice held by majority that its jurisdiction was not displaced by subsequent Security Council Resolutions in the *Lockerbie Case*.²¹³

Following the pattern established by earlier interventions in Somalia, Cambodia, East Timor and Kosovo, the case of Iraq and its new Central Criminal Court highlights the problematic assumptions made about the universal, democratic, institutional rule of law and its co-condition of public security.²¹⁴ However, the concept is doctrinally so ingrained that authorising Security Council Resolutions tend to provide only the briefest of warrants for rule of law activities.²¹⁵ This seems based on a doctrinal approach outlining a spectrum of intervention from diplomatic ‘peace-making;’²¹⁶ ‘peace-building’ which is a stability operation model in which ‘strengthening the rule of law,’ democracy and human rights²¹⁷ are seen as key elements in restoring peace; and at the end of the scale, ‘peace-keeping,’ a more active military model of post-conflict rebuilding.²¹⁸ In the result, the Security Council tends to grant authority for broad activities such as ‘all necessary measures’ to restore security, in which the rule of law is included because of its assumed doctrinal relationship to order.²¹⁹

It is concerning that international rule of law discourse, instead of conversing about the rule of law as an international mode of association, postulates it as ‘a *universal* mode of association,’ affecting domestic as well as international law.²²⁰ In some ways this can reflect tensions within multicultural or multiethnic states, in which there may be multiple ‘micro rule of law’ societies within a state, but the

²¹³ *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Preliminary Objections)* [1998] ICJ Rep 115 (Judgment of 27 February 1998). The case offers only modest support to judicial review of Security Council action.

²¹⁴ See, eg, Stromseth et al, above n 9; Kleinfeld, above n 68.

²¹⁵ Kelly argues that this is a consequence of the nature of the Resolution as a ‘brief warrant’ legitimising an intervention which is intended to be supplemented in the ordinary course by either the general body of international law (and Kelly identifies occupation law as the appropriate corpus of rules) or a ‘detailed framework agreement,’ presumably involving the host state: above n 76, 231, reference omitted. For example, the UN Transitional Authority in East Timor (UNTAET) was to exercise ‘all legislative and executive authority, including the administration of the judiciary.’ Art 1, SC Res 1272 (1999). However, it is suggested that it is the assertion of a universal understanding of, and desire for, the rule of law, which makes it apparently unnecessary to elaborate the character of activities that might be undertaken.

²¹⁶ Brahimi Report, above n 104, [11].

²¹⁷ *Ibid* [13]–[14]. An intervention may take different forms throughout its life as the situation develops, relying alternately on Chapters VI (non-coercive measures) or VII (coercive measures) of the UN Charter.

²¹⁸ *Ibid* [12].

²¹⁹ See, eg, SC Res 1546 (2004) in Iraq.

²²⁰ Nardin, above n 8, 401.

peacekeeping mission is seen as ‘harmonising’ them under the overarching system.²²¹ Thus ‘rule of law interventions’ are best understood as a self-conscious attempt by the international system to maintain its *own* universally applicable rights-based rule of law system, which cannot survive without the conceptually consistent rule of law, however formed, in its constituent parts.

That is the reason why international human rights law attempts to impose an external universality of principle; without it, international law is incapable of demonstrating an internal coherence of principle and the rule of law. In this sense, coherence requires the exclusion of non-conforming states as full and equal participants in the international sphere or intervention to correct non-compliant ideas. States which choose not to, or are unable to, comply with the international standard are subjected to pressure to reform their systems or otherwise treated as pariah states.

Intervention poses this conundrum for international law: the international rule of law cannot exist without a compatible domestic rule of law system in each of its constituent units because it posits a universal scheme of rights and sets out universally applicable institutional standards. It therefore authorises intervention to procure a domestic rule of law capable of supporting the rule of law internationally (rather than for the pure domestic good). It does so through interveners which generally are neither part of nor subject to the legal system in which they intervene. In Kosovo and East Timor, for example, UN forces exercised ‘all legislative and executive authority ... including the administration of the judiciary,’²²² but were themselves explicitly excluded from domestic jurisdiction.²²³

However, by intervening to create the rule of law, international law destroys it in the bud because the rule of law can only emerge internally in its subject community. In principle, ‘if the rule of law is a mode of association among free persons, natural or artificial, the rule of law among states is compatible with authoritarian or managerial rule within each state,’²²⁴ but the instrumental rules of international law are predicated on a public good which does not allow that. Even

²²¹ Plunkett, above n 44, 211–2. Demonstrating the importance of Plunkett’s harmonisation, the decision of the Pakistani government to allow such a ‘micro rule of law’ within its territory, by permitting the introduction of Shariah courts in the northern Swat Valley in April 2009 without appeal to the Pakistani High or Supreme Courts, was heavily criticised as fostering insecurity in Pakistan: eg, F Bokhari, ‘Judicial Independence for Swat Threatens Integrity of Pakistan’ *Jane’s Defence Weekly* (22 April 2009) 5. The need for consistency for security at domestic level reflects the contradictions of the international rule of law.

²²² Chesterman, above n 7, 349, referring to UN Mission in Kosovo (UNMIK) Regulation 1/1999: On the Authority of the Interim Administration in Kosovo, UNMIK/REG/1999/1 (entered into force 7 September 1999). Stromseth et al, above n 9, 4, make this point more generally, arguing that the credibility of the intervener depends on their own adherence to rule of law principles (which they conflate with human rights protection) during the intervention.

²²³ Chesterman, *ibid* 349.

²²⁴ Nardin, above n 8, 399.

the emphasis of Stromseth and her colleagues in describing the third feature of their ‘synergistic’ approach to rule of law efforts as the ‘deeply political’ nature of rule of law reform and the need to understand the interaction and effect of activities at all social levels for the projected society,²²⁵ does not resolve the fundamental contradiction of the international rule of law.

VI. Conclusion

The international system continues to adopt the fundamental equality of sovereignty among its constituent states, the inviolability of domestic affairs and ‘self determination among peoples’ as core principles.²²⁶ Additionally, the developmental model of the rule of law aims at institutional uniformity to assist in expanding free market democracy, and, since democracies rarely war with each other, international peace and security.²²⁷

It is an odd result that it effectively also demands institutional rights-based uniformity for the rule of law across states, without broad regard for historical, cultural or religious considerations. The emphasis on such uniformity in court structures, judicial process and the level of judicial independence, not only from the cause but from social or religious values, leads regularly to international pressure on non-conforming states on human rights grounds. Such pressure comes from aid donor states or states whose nationals may be under prosecution, but also from the general community. That there have been occasions of intervention by foreign states, albeit not unanimously approved,²²⁸ which have aimed to achieve this kind of uniform rule of law as part of their mission is even more odd.

The demand for universal consistency fails when the domestic rule of law is properly understood as the manner in which a society determines its own legal order.²²⁹ However, uniformity is the only thing that can give the *international* rule of law coherence — there can be no consistent expression of the rule of law in the international legal system if the system’s participants do not uniformly mirror the values of that system internally. Domestic realignment, possibly by coercion (through ‘humanitarian intervention’), must occur if the international rule of law is to remain coherent and legitimate itself. As the chief organisation for the international community, the UN has taken a lead role in managing this problem of coherence, notwithstanding its original structure and charter to regulate ‘the

²²⁵ Stromseth et al, above n 9, 81–3.

²²⁶ Arts 2(1, 2 and 7), UN Charter. See also Glennon, above n 99, 145.

²²⁷ Heller, above n 77, 384; see also Carothers, above n 1, 5; Charney, above n 9, 529.

²²⁸ Germany, for example, considers the development of the rule of law a purely internal affair, while the international community’s task in intervention is economic reconstruction: J Fischer, Minister for Foreign Affairs, Speech at the Afghanistan Support Group (2001), cited in CLAMO, above n 43, 45 (fn 44).

²²⁹ However, the link between democracy (rule of law) and peace is not well defined and there is little proof about ‘the independent or causal role of law in either sociological evolution or economic growth.’ Heller, above n 77, 386.

relationships *between* or *among* but not *within* states.²³⁰ Rule of law interventions at the international level are therefore best understood as structurally self-serving, rather than in support of an independent value of the rule of law.²³¹

Notwithstanding, blueprint theories of the rule of law and military doctrine continue to assert that the rule of law is expressed only in a rights-based criminal justice system based on familiar judicial structures.²³² In Kosovo and Iraq, for example, programs were introduced contemporaneously to ‘establish security and build governance structures that advance fundamental goals of self-determination and protection of human rights.’²³³ Similarly, the Brahimi Report’s ‘key recommendations’ for United Nations operations were for interveners to participate in short-term, high visibility local engagements, for example in rebuilding core infrastructure, to address the problem of former combatants, and to develop a ‘doctrinal shift in the use of civilian police, other rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments.’²³⁴

This can be compared with an explicit focus on order in occupation law and its limited concern with the rule of law as a uniform idea in practice.²³⁵ Humanitarian law in armed conflict recognises the primary importance of security as a *precondition* by allowing activities contrary to the rule of law to restore ‘public order’ and the necessary ‘administration of justice.’²³⁶ The practical effect of this is most evident in the remarkable success of Iraq’s Anbar Awakening, when Coalition support provided to local Sunni leaders to develop their own security and security forces led to successful civil reconstruction efforts. In fact, laws governing the conduct of intervention whether under occupation or authority of the UN Security Council do not themselves regulate rule of law institutionalism at all. The principle of derogability in human rights law, including of the right to a fair trial in times of national emergency (armed conflict as well as internal disorder),²³⁷

²³⁰ M Kelly, *Peace Operations: Tackling the Military, Legal and Policy Challenges* (1997), [112].

²³¹ Notwithstanding that intervening States may claim moral and ethical justification in situations where the abuse of human rights through torture, extra-judicial executions and genocide is egregious. See further Stromseth et al for a discussion on the intervener’s need to maintain ‘global credibility’ by engaging in rule of law reform: above n 9, 4.

²³² For example, Stromseth et al, *ibid* 4; Kleinfeld, above n 68, 31.

²³³ Stromseth et al, *ibid* 51–2.

²³⁴ Brahimi Report, above n 104, [47(b)], and see also [37] and [41]–[42].

²³⁵ Art 43, Annex to Convention IV Respecting the Laws and Customs of War on Land: Regulations Respecting the Laws and Customs of War on Land, above n 46; Art 64, Geneva IV.

²³⁶ It is described in, eg, Major N Smith and Colonel S Macfarland, ‘Anbar Awakens: The Tipping Point’ (2008) 5(2) *Australian Army Journal* 75.

²³⁷ For example, arts 4 and 14, ICCPR.

demonstrates a complementary result, recognising that in crises attracting military intervention, rights-based norms are *not* universal and are often not sustainable.

Once the rule of law is reconceptualised not as a universal system of rights-based institutionalism, but as a negotiated internal relationship between the subjects of the law, the failure of domestic legitimacy in rule of law operations, such as in Iraq, is explicable. Legitimacy comes through self-ordering; it requires more than locals ‘internalising’ or ‘buying into’ external reforms.²³⁸ Legitimacy as social acceptability represents a match between the concerns of the subject population and the system and rules they agree to institute in response. In Iraq, for example, the refusal of the occupying Coalition to allow the Iraqi people to decide whether or not, or to what extent, the new constitution and judiciary would rely on Islamic law was subject to significant criticism — legitimacy was not necessarily a result of secularism or objectivity (a rights-based ideology), but of closeness to the values and concerns of the population.²³⁹

An interesting case in progress is an aspect of the attempts at systemic judicial reform in Afghanistan. As the designated rule of law ‘lead nation,’ Italy’s efforts included a blueprint-style ‘streamlined’ interim criminal procedure code promulgated by Presidential decree in 2004, which was reportedly the ‘subject of some controversy, as it was prepared by Italian officials with help from U.S. military lawyers but relatively little input or support from the Afghan justice institutions, and was reportedly adopted under strong foreign political pressure.’²⁴⁰ These criticisms are reminiscent of the original failure of legitimacy of the Central Criminal Court of Iraq. The second priority of focus was extending formal court structures into regional areas where they were not functioning.²⁴¹

In fact, interviews with local experts and leaders revealed that formal justice had primarily penetrated regional centres where traditional, informal justice had broken down. In many villages, informal systems of dispute resolution and local governance through *shuras* and *jirgas* appeared to be still functional and

²³⁸ Plunkett is concerned with local ‘ownership’ through participation in reform: above n 44, 223. Stahn recommends ‘moderation’ in intervention to maximise the chance of internalisation: C Stahn, ‘Justice under Transitional Administration: Contours and Critique of a Paradigm’ (2005) 27 *Houston Journal of International Law* 311, 343. Measures to achieve this focus on matters such the promulgation of new codes in local languages: eg, SJA After Action Report, Tab A(1), quoted in Kelly, above n 230, [764].

²³⁹ Roberts, above n 107, 398–9. Anderson provides an interesting analysis of the legitimacy challenge posed by populist Islamic movements to secular, Western-style governments, when the former prove themselves ‘better organised, more efficient and less corrupt than the government administration’ and are able to ‘guarantee law and order.’ L Anderson, ‘Fulfilling Prophecies: State Policy and Islamic Radicalisation’ in J L Esposito (ed), *Political Islam: Revolution, Radicalism or Reform?* (1997) 17, 24.

²⁴⁰ L Miller and R Perito, *Establishing the Rule of Law in Afghanistan* (March 2004), 8, <<http://www.usip.org/files/resources/sr117.pdf>>.

²⁴¹ *Ibid.*

respected,²⁴² although subject to manipulation by local warlords. While the United States Institute of Peace notes, using a blueprint perspective, that they are ‘far from ideal,’ it concedes that they are generally ‘more legitimate’ and people choose them for dispute resolution in preference to formal courts.²⁴³ Recognising this, rule of law recommendations turned to fostering Afghan discussions on how the two can be linked into a comprehensive, locally-adapted scheme.²⁴⁴ In 2010, views seem to have advanced beyond the approach of COIN doctrine. That is, experience in Afghanistan, including the Marjah campaign, demonstrate that US Marines ‘are not able to hold [villages] and build government, infrastructure, and rule of law without competent and just Afghan officials in the lead.’²⁴⁵ It is a reassuring move towards appreciating the internal character of the rule of law as a relationship.

Domestic legitimacy is the essence of the few emerging criticisms of rule of law interventions. Efforts, particularly military efforts, to implement standard form ‘rule of law’ measures, risk ‘a destabilising imposition of legal norms,’ and:

a superficiality of externally imposed norms. While creating the illusion of progress, such structures have little or no grounding and hence little long term viability in the soil of sovereign stability. In essence, this would be a form of legal colonialism that could undermine international peace and security and actually be counterproductive in terms of societal stability.²⁴⁶

Commenting on the work to create the rule of law in newly independent Eritrea, Ganzglass notes with approval the control retained by the government of Eritrea over the process of developing and adopting substantive rules – foreign drafting

²⁴² Ibid.

²⁴³ United States Institute of Peace, Conference on the Relationship Between State and Non-State Justice Systems in Afghanistan (2006) <<http://www.usip.org/rule-law/conference-the-relationship-between-state-and-non-state-justice-systems-in-afghanistan>>.

²⁴⁴ Miller and Perito, above n 240, 10; Sitaraman also suggests that future constitutional reform could accommodate the *shura* concept, which is especially accessible for poor and illiterate Afghans: above n 115, 1638. Indeed, the United States Institute of Peace, among others, has a dedicated section considering relations between state and non-state justice systems in Afghanistan, including funding the Commission on Conflict Mediation program in Khost and Paktia provinces. Further details are available at <<http://www.usip.org/programs/projects/relations-between-state-and-non-state-justice-systems-afghanistan>>.

²⁴⁵ W B Taylor and J A Thier, *The Road to Successful Transition in Afghanistan: From Here to the December 2010 Review* (May 2010) <<http://www.usip.org/files/resources/PB%2030%20The%20Road%20to%20Successful%20Transition%20in%20Afghanistan.pdf>>.

²⁴⁶ M A Newton, ‘Harmony or Hegemony: The American Military Role in the Pursuit of Justice’ (2004) 19 *Connecticut Journal of International Law* 231, 232. Stromseth and her colleagues examine the theme of imperialism during 1990s interventions, observing a link between former colonial Western states, who denounce imperialism, conducting interventions in which they tend to remain as ‘de facto governments’ for years afterward, and the fact that most states intervened in (whether ‘failed’ like Sierra Leone, or ‘rogue’ like Iraq) have previously been under imperial rule: above n 9, 2.

assistance was sought but Eritrea controlled ‘process and content.’²⁴⁷ Advisor Ganzglass considered that it was the inclusion of ‘not only the legal community, but also representatives of the society to be governed by the laws,’ here Eritrean women, that ‘the draft truly became Eritrean law.’²⁴⁸ Significantly, in providing advice, the team of which Ganzglass was part drew on laws from eight different systems.²⁴⁹

However, that is not to say that no ‘rule of law’ role for interveners in recovering states remains, especially given the pressure for consistency and coherency in the hierarchical structure of international law. Interveners and the international community may, and perhaps should if expert, continue to be observers, trainers and facilitators in the rule of law discussion within the subject society. This may be part of a broader humanitarian assistance program dependent on the local needs, requests and desires. Brahimi noted in his report the role of ‘unnoticed’ diplomatic efforts towards conflict prevention and peacemaking as a one of the ‘three principal activities’ of UN peace operations;²⁵⁰ this is also the primary means of rule of law assistance although it is much less than active intervention.

More importantly, the security reforms so heavily emphasised in military doctrine, once disentangled from the notion of creating permanent institutional reforms in the justice sector, is an essential precondition to the domestic rule of law discussion. Without it, leaders may not meet, procedures and values may not be discussed and no progress can be made. Reverting to a security focus on public order to set the conditions for the rule of law, not to create it directly, is the future of military intervention and in fact best reflects the law applicable to intervention in emergencies.

Practitioners identify, unsurprisingly, practical aspects such as ‘funding and physical capability’ as essential to the efficacy of rule of law operations,²⁵¹ but this presupposes coherence in the idea and purpose of interventions in domestic legal systems with a rule of law purpose at all. Stromseth and her colleagues attribute ‘disappointing progress’ in military ‘rule of law’ interventions to create rights to three factors: the complexity of the mission, the typical ‘resource and bureaucratic constraints,’ but above all ‘*the failure of many policymakers to examine or fully understand the very concept of “the rule of law.”*’²⁵² Although adherents of the

²⁴⁷ Ganzglass above n 103, 345–6.

²⁴⁸ Ibid 347.

²⁴⁹ Singapore, Australia, Canada, Greece, Israel, Germany, Great Britain and Ethiopia: ibid 345–6.

²⁵⁰ Brahimi Report, above n 104, [10]. The other two are peace-keeping and peace-building.

²⁵¹ Kelly, *Peace Operations*, above n 230, [1039]. The Brahimi Report, ibid, described its ‘key conditions’ as ‘political support,’ which has legitimacy overtones, rapidity of deployment and ‘a sound peace-building strategy’ ([4]), which are still directed to the practicalities of intervention.

²⁵² Stromseth et al, above n 9, 69, emphasis original.

blueprint, institutionalist view, they are correct and highlight the fundamental problem of current rule of law discourse. Military 'rule of law operations,' of their nature, cannot achieve the rule of law by coercion at all, when it is properly defined.