

## Failed States and the Rule of Law

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*The last decade has seen an emerging consensus that the rule of law is critical in both domestic and international affairs. 'Failed' states generate important issues for both the rule of law and, importantly, for their intersection or interaction. A 'failed' state almost inevitably involves a breakdown of the domestic rule of law. When international intervention occurs, it raises concerns over substantive issues. Among these is the application of international law and international norms, including among other, the conventions and treaties, the responsibility to protect and protection of civilians. Where international missions seek to assist the people of 'failed' states in rebuilding their nations, establishing the rule of law is often the primary or initial pursuit. Any such international assistance/intervention is more effective if it is clearly subject to the rule of law and provides an exemplar/demonstration of how power should be exercised.*

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### PROLOGUE

The first time I spoke on intervention, sovereignty and the rule of law was as the final plenary speaker at the World Congress on Legal and Social Philosophy held in the World Trade Centre on 29 June 1999 where I was invited to address the final plenary on the topic: 'Sovereignty and Intervention.' It was a lively topic given the recent conclusion of the

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Kosovo war.<sup>1</sup> In that address, I argued that Western nations in general and the US in particular, had been prominent champions of the rule of law and other governance values at the domestic level (i.e. within sovereign states). I argued, however, that these very nations often failed to champion these same norms at the international level, or perhaps ignored them when it did not suit them.

I suggested that this was a serious mistake on both normative and self-interest grounds. I put the normative case quite simply: how could we seek to enforce international law if we were not bound by it? The self-interest argument was that if powerful Western states were not bound by international law, it would be hard to expect the active and effective cooperation of other countries in enforcing international agreements that protect our interests. I gave two examples of copyright and terrorism. The latter was not a matter of prescience for the 9/11 attacks on the WTC, but a retrospective reflection on earlier attempt against the hotel between the twin towers where we were then staying.

Having sought to make a contribution to debates about the role of the international rule of law in the initiation of international missions, I flew back to Canberra to speak at a conference on the role of the domestic rule of law within international missions. The conference, 'From Civil Strife to Civil Society' was part of a project on 'preserving and restoring the rule of law'. That project was a collaborative effort with the Australian Defence Force. My partners were Lt. Gen. John Sanderson, former UN force commander in Cambodia and Major Dr. Mike Kelly (the Australian JAG officer whose views on civil military peace operations have been highly influential).<sup>2</sup> We had just prepared the training materials for the unarmed police who were going to monitor the East Timor ballot. Australian and American military and police held many interesting, private discussions, about how they could handle a post ballot intervention if called on to do so.

Mike's view was that international missions should subject themselves to the rule of law and would be more effective for having done so. He came to this conclusion in reaction to the wildly divergent results of Australian and American approaches to peace making/enforcement/keeping demonstrated in Baidoa and Mogadishu – as well as the partial success, and significant failures, in the Cambodian mission.

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1 Later published as "Sovereignty and Intervention" in Campbell and Leiser (eds.) *Human Rights in Theory and Practice*, Ashgate, London, 2001

2 Mike was later promoted to full colonel, elected to Australia's most famously marginal seat and became Parliamentary Secretary for Defense.

There was a prevailing view that the timeline following intervention should conform to the following sequence: that military forces establish an acceptable level of security, a constituent assembly drafts a constitution, establishes elections, and ultimately, promotes the rule of law, democratic governance and protects human rights, among others.

Mike thought that the rule of law had to start when the first ‘blue helmet,’ (i.e. UN peace-keeper) steps from the helicopter, and not after the first elected president takes office. He had a Hayekian justification for the rule of law in peace missions. Mike argued that if you state clearly, firmly, convincingly and well in advance how you will use force, then others adapt their behaviour to avoid punishment. The rules were very clear to Somali warlords, the Khmer Rouge and the Indonesian backed militia in East Timor. If you follow the rules, you have nothing to fear. Those rules should be clearly stated, communicated, and explained. But they will be enforced.

One anecdote illustrates this approach. During the Cambodian peace keeping mission, Lt. Gen. Sanderson was patiently talking to some Khmer Rouge commanders who wanted to occupy a village that was outside the territory they allotted to them under the international agreement which the Khmer Rouge had signed and Sanderson was committed to enforce. After a few exchanges in which Sanderson reiterated the fact that the Khmer Rouge were not entitled to enter the village, and the latter insisted that they nonetheless would, the Khmer Rouge said that they were entering the village whatever Sanderson said. Sanderson maintained the same calm, polite manner and simply stated: “well that is a pity, because if you go into the village, you are all going to die.”

This means that armed groups know where they stand. The ordinary civilians also know where they stand and can get on with their lives, confidently producing, trading and consuming, which allows the economy to recover. It also means that the members of the peace mission provide an exemplar of how the rule of law can operate for those who are trying to assist local institutions establish the rule of law. If Western military and police units are not exemplary, they will make Westerners appear total hypocritical and will probably render ineffective any subsequent work to establish the rule of law.<sup>3</sup>

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<sup>3</sup> We must always recognise that the powerless notice hypocrisy by the powerful even if their powerlessness constrains them from telling us.

## INTRODUCTION

This article makes a few points about the rule of law, so-called ‘failed states’ and the importance of the former in addressing the problems of the latter. Where the rule of law is concerned I will be making two distinctions. The first is between domestic and international rule of law and the second, and just as important, is defining the discussion of intervention and governance, is the distinction between so-call ‘thick and thin’ concepts. With respect to ‘failed states’, I will suggest real caution about the term and how much can be achieved in international missions to assist states to which that adjective is applied.

## THE RULE OF LAW

The last decade has seen growing agreement that the rule of law is critical in both domestic and international affairs. ‘Failed’ states generate important issues for both kinds of the rule of law and, more importantly, for their intersection and interaction. A ‘failed’ state almost inevitably involves a breakdown of the domestic rule of law. International action raises issues of international law and international norms (including the Responsibility to Protect and Protection of Civilians). Where international assistance missions seek to assist the peoples of ‘failed’ states out of their mire, assistance in rebuilding the rule of law is a prime candidate for assistance. Any such International assistance/intervention is more effective if it is clearly subject to the rule of law and provides an exemplar/demonstration of how power should be exercised.

During the last decade, the concept of the ‘rule of law within sovereign states,’ that is to say the ‘domestic’ rule of law has been pressed by the West and the international rule of law has been pressed by ‘the rest’. The former concern, or protecting domestic rule of law, has been principally driven by a desire to prevent corruption, while the latter; the protection of international law principally occupies those concerned that interventions, and other missions involving the deployment of troops, be governed by international law.

At the 2005 United Nations World Summit, member states managed to unanimously agree to a ‘compromise’ – to do both. The Summit recognised the need for ‘universal adherence to and implementation of the rule of law at both the national and international levels’. While this consensus was reached more as a matter of compromise than principle, it is absolutely right and provides a very important base on which to build. But the west should not be reticent in arguing for both forms of the Rule of Law and

should be proud of its long tradition of doing so. To this end, I offer the reader a quotation:

*“The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The cost will be a great deal of hard work, both in and out of government particularly in the universities of the world. Plainly one foundation stone of this structure is the International Court of Justice ... [and] the obligatory jurisdiction of that Court. ... One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But ... if an international controversy leads to armed conflict, everyone loses.”<sup>4</sup>*

One of the potential problems facing this otherwise welcomed consensus is that the term ‘rule of law’ is subject to a range of interpretations, depending on the observer’s perspective and his or her appreciation of the different dimensions or nuances of individual comprehension that are additionally affected by context as well as theory. Even within the United Nations (UN), the variety of interpretations is considerable and these are most notably influenced by the perceived missions of various UN agencies.

### MULTIPLE MEANINGS

Domestically, the rule of law is a majestic phrase with largely reinforcing and supportive meanings. In many instances it is alternatively characterised as both a fundamental value, and as an ideal. It is an ethic for lawyers and officials, as well as the basic principles of constitutionalism along with a set of institutions that supports implementation and attainment. While these multiple meanings and dimensions may occasionally confuse, they are generally congruent and mutually supportive in that the partial achievement of one supports the fuller achievement of all.

This phenomenon reflects the multifaceted nature of the rule of law. However, it is important to keep the meanings and dimensions distinct to avoid confusion. I should hasten to add that the differences of meaning do not seem to be essentially cultural. We carried out a project funded by the Open Society Institute comparing governance values in Western, Christian-secular nations, and Islamic countries through six three day dialogues on governance values involving scholars and practitioners of both backgrounds.

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<sup>4</sup> The source of the quote is provided in the conclusion of this article

We concluded that there was no fundamental difference between or among these two cultures where congruent, though not necessarily identical, meanings of law were concerned. However, there are differences within cultures which address emphasis, perspective and position. Liberal Muslims and liberal Westerners have a great deal in common. While fundamentalist Muslims and fundamentalist Christians share more in common than either dare admit, most, if not all, cultures have rule of law traditions, however these are named. Many or most have contradictory traditions. Western and Islamic concepts of rule of law are essentially identical, which is not surprising given their common, Old Testament, or Talmudic roots.

### THE 'DOMESTIC' RULE OF LAW: THE RULE OF LAW WITHIN SOVEREIGN STATES

#### *A. Thick and Thin Theories*

One of the biggest points of differences between supporters of the rule of law is essentially concerns one of classification – what is included within the rule of law and what is grouped with different governance values. Some of the most popular definitions of the 'rule of law' mix an expression of an ideal or value with the institutional prerequisites for the achievement of that ideal. Developing ideas are found in the writings of F.A. Hayek, Lon Fuller and others. Joseph Raz listed eight basic elements of the rule of law: (1) laws should be prospective, open and clear; (2) laws should be relatively stable; (3) law making should be guided by open, stable, clear and general rules; (4) independence of the judiciary must be guaranteed; (5) principles of natural justice should be observed; (6) courts should have review powers (of the exercise of power by others); (7) courts should be easily accessible; (8) discretion of crime-policing agencies should not be perverted.<sup>5</sup> An overlapping principle is that sanctions (especially involving the use of force) should only be applied to others according to clear rules publicised in advance.

I have characterised Raz's eight principals as a 'thin' theory of the rule of law. It stands in contrast with 'thick' theories of law propounded by those seeking to incorporate within the 'rule of law,' other governance values, specifically virtues concerning the content and provenance of law, which is more aptly stated as the concern for human rights and democracy.

Those who adhere to 'thin' theories are, generally speaking, just as supportive of democracy and human rights, as proponents of 'thick'

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<sup>5</sup> Raz, J. *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979

theories of the rule of law proponents, but thin theorists prefer to keep those ‘governance values’ or ‘virtues of law’<sup>6</sup> distinct. Thin theorists recognise that governance values can sometimes come into conflict, and further they are rarely introduced at the same time (the rule of law generally coming first). Thin theories and their proponents also recognise that it may be possible to secure agreement to the rule of law before agreement can be reached on democracy, where details such as how it is to be interpreted and institutionally implemented or what rights are to be incorporated into the content of law. All of these demand prolonged reflection, consensus and implementation.

However, lists of ‘virtues’ of law do not reflect the degree to which they are embedded in the state and its institutions. Where the rule of law is relatively well embedded in a state, it does so in a number of mutually reinforcing ways. I have called these the ‘dimensions’ of the Rule of Law operating as:

- a. A fundamental Governance Value
- b. A basic Constitutional Principle.
- c. An Ethic for Officials – i.e. officials should be bound by the law and can only derive their power and authority from law. All such power is held in trust to be used only to the extent permitted and for the purposes authorised.
- d. A set of institutions – independent legislatures and courts, an independent bar etc.
- e. The core of nascent Integrity Systems.

Within sovereign states, each of these dimensions is mutually supportive.

### *B. The Rule of Law as a fundamental Governance Value*

The rule of law is now seen as one of the fundamental values underlying modern ‘liberal democratic’ states – along with human rights, democracy, citizenship and the famous trinity of *liberté, égalité, fraternité*. This was not always so. The Treaty of Westphalia was, in many senses, a tyrants’ charter – made largely by and for the absolutist rulers of the day. It recognised a set of formally independent and equal states whose sovereigns were recognised on the basis of their ability to effectively control the territory of a state. Brutal enforcement of their rule was proof of sovereignty rather than a disqualification for it. Internally, absolute rule was frequently justified as the only way of avoiding the chaotic state of nature described by Thomas

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<sup>6</sup> Raz, loc cit.

Hobbes in which the life of man would be ‘nasty brutish and short.’ Once life and civil peace were secure, more was demanded of those states by *philosophes*, lawyers, and revolutionaries who came to view themselves as citizens in whose interests sovereigns should protect according to the afore-mentioned ‘liberal’ values. As they sought and gained concessions, the post-Westphalian state was gradually civilised by the institutionalisation of those values. The rule of law was the first of these values and many states were substantially *rechstaats* long before they saw even a modicum of democracy or human rights. The rule of law is not only the longest standing of enlightenment values; it is generally the least controversial.

### *C. The Rule of Law as a basic Constitutional Principle*

The rule of law underlies and is supported by basic principles such as constitutional rule and the separation of powers. However, it does not require formal or written documentation and the concept of rule of law clearly pre-dates such instruments. What it does require is a separation of judicial power from legislative and executive power. Moreover it requires that judicial powers determine what texts are recognised as laws, how they are interpreted and to whom they apply.

### *D. The Rule of Law as an Ethic for Officials (of state and other organisations) exercising power*

The rule of law is primarily addressed to lawyers and officials rather than citizen obedience.<sup>7</sup> The rule of law is the central ethical principle for judges and the legal profession, more generally. But it is also central to most officials including civil servants, the military and elected officials. All such power is held in trust to be used only to the extent permitted – and for those purposes authorised. The domestic rule of law was built by the ethics of lawyers, soldiers, politicians and dedicated non-government organisations from the *philosophes*, to unions, to the modern NGOs.

This is particularly true in relation to the use of force – and why acceptance of the rule of law is a critical element in the ethics/honour of the military – and those who deploy the military. Note that these norms of behaviour

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<sup>7</sup> The UNSG’s definition of the rule of law includes the general acceptance of, and compliance with, the law. This is not a common approach to the rule of law with good reason. Individuals may obey for a variety of reasons. However, although ordinary criminal law applies, or should apply, to all, there are a number of laws which are addressed to officials. For example what their power is and the purposes for which it is entrusted to them. Civil disobedience is appropriate for individuals within a society under the rule of law but rarely, if ever, for officials.

concern not only officials of the state, but those who enjoy, other forms of authority. Despite the Weberian notion that the state has a monopoly of violence, even legitimate violence, from the 17<sup>th</sup> century onwards, the rule of law was as much about controlling the use of force by the local barons, and bands of mercenaries, as royal officials. Now we should look at other sources of power – corporations, warlords and private military companies – and seek to ensure that their exercise of power is subject to the rule of law.

#### *E. The Rule of Law as a set of institutions*

Those who value the rule of law recognise that it can never operate effectively as a purely normative phenomenon, be it value, ethic or principle. Rather than existing in the abstract, it requires institutions to make it effective. Accordingly, the rule of law may be partially defined in terms of common institutional supports for the rule of law, such as legislatures, courts, police, corrections, independent bar and NGOs. Not all those institutions are institutions of the state – traditionally lawyers and the church helped make law – now it is lawyers, NGOs and corporations.

#### *F. The Rule of Law and nascent Integrity Systems*

Since the late 1990s, it has become increasingly accepted that the way to avoid corruption and other abuses of power require an ‘integrity system,’ comprised of a set of norms (formal and informal), institutions and practices that serve to promote integrity (or ‘good governance’) and which inhibit corruption. All effective integrity systems involve some basic institutional arrangements associated with the rule of law, especially courts and a legal profession not beholden or indebted to the powerful interests. This is essential as they review the actions of powerful institutions, determining whether or not they have exceeded their authority, or are potentially abusing their power. These institutions are the oldest and longest standing elements of the integrity systems of Western states. They are supported by newer institutions of democratic governance including parliaments, parliamentary committees and agencies which provide oversight such as ombudsman, auditors-general, anti-corruption commissions, media and NGO watchdogs. All of these make rule of law mechanisms more effective. Elements of integrity systems also play a crucial role in the protection of civilians so that we can see that the overlapping sets of institutions, norms and practices provides for good governance, the rule of law and civilian protection. Integrity systems are far less developed in international affairs

and, naturally, in the countries in which peace missions occur. They face obstacles that led some to doubt the possibility of an international rule of law or international law itself. However, legal institutions have often existed and were often most effective long before democratic institutions were formed, becoming the heart of the integrity system.

### *G. Case studies*

We are often asked for case studies for effective governance reform. Some of the most interesting case studies can be found in the emergence of the rule of law and other governance values within Western countries. We see that the process is not pretty, it is not quick, it involved compromises – some of which worked, some of which did not and that it might not be obvious for years which it was. Sometimes the ‘bad guys’ stayed in power – they were called ‘kings’. Sometimes power holders were executed. Rather than promoting the rule of law, this method of securing transitional justice that led to chaos. Analysing these historical case studies reveals that the rule of law emerges when those in power, who may have been part of the problem, were willing to be part of the solution. The same that was true then, is true now, rule of law only functions where stakeholders are willing to compromise and check their authority.

Past experience and case studies offer some hope. The development of the rule of law generally takes a long time – but huge strides can be made quite quickly when the alignment of political will and public outrage focus on governance.

## THE INTERNATIONAL RULE OF LAW

Whether, and to what extent, experience of the rule of law at the domestic level applies to building the international rule of law is a big question which we are addressing in a large project in conjunction with the UN Rule of Law Unit, the UNU and the Centre of International Governance Innovation. While this is not the place to provide a full report of the work in this project, a few points might be usefully made at this stage. At the international level, there are strong arguments for keeping to a ‘thin’ theory of the rule of law and treating democracy and human rights as other values. The application of ‘democracy’ to international affairs is particularly problematic. Though even in resisting this effort to describe democracy in terms of international norms, the reluctance stems more from a debate regarding classification and tactics than a fundamental difference in values. However, as in the early development of domestic law, it may only be

possible to secure widespread agreement on how to formulate or what constitutes international rule of law if it is possible to postpone other political processes. These may include delaying the democratisation of international institutions and implementing universal human rights once the first battle, the campaign to implement international rule of law, has been won.

Other concepts derived from domestic law, as well as their meanings and dimensions may be extended to the international rule of law, though they may realise only limited success when compared to those enjoyed by established democracies. This does not detract from their usefulness, as partial success may indicate where additional progress towards an international rule of law might be made. I have discussed these at length elsewhere but will highlight two here.

#### *A. Ethics for officials*

As seen above, the domestic rule of law is built into the ethics of key officials of sovereign states operating under the rule of law – not just judges, prosecutors and lawyers but soldiers, civil servants and elected officials. Many the key actors within international institutions are committed to international law but codes of ethics and/or codes of conduct for international officials are relatively rare and, if present, recent. For example the Burgh House principles for international judges are less than six years old. Many international officials are imbued with ethical principles from their home states which emphasise the domestic rule of law but which say little about the international rule of law, especially where loyalty to the domestic sovereign supersedes most other considerations. However, as I have argued elsewhere, international lawyers and soldiers engaged in UN missions should be in the forefront of developing and promulgating codes of ethics governing their behaviour with respect to international and domestic applications of the rule of law.<sup>8</sup>

Lawyers have attempted to develop voluntary international codes of ethics. One recent effort, finalised on 10 October 2008, involved the joint efforts of the International Bar Association's Anti-Money Laundering Legislation Implementation Group, in consultation with members of the American Bar Association and the Council of Bars and Law Societies of Europe. The draft issued by the international anti-money laundering group set out voluntary guidelines for those in the legal profession who will one day monitor the international money laundering processes and training for

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<sup>8</sup> Sampford, Charles. 'Professions without Borders', public lecture at Brisbane (Australia) in August 2009 and Waterloo (Canada) in October 2009

lawyers. The International Bar Association has a two page ‘International Code of Ethics’<sup>9</sup> and the *Union Internationale des Avocats* have developed the “Turin Principles for the Legal Profession in the 21<sup>st</sup> Century” (2002). The only area with developed codes that are authorised, and which are at least theoretically enforced are those promulgated by the International Criminal Court as well as various ad hoc criminal tribunals for the Rwanda, Sierra Leone and the Former Yugoslavia.

During 2008, two more ambitious projects commenced. One was led by Philippe Sands and supported by the NYU/UCL Project on International Courts and Tribunals (PICT).<sup>10</sup> It aimed to develop a code of ethics for lawyers engaged in the practice of international law, and its first meeting was held in London on June 12 2009 with subsequent meetings in Geneva and Utrecht before it presented its conclusions to the International Law Association for endorsement in the Hague on August 19 2010.<sup>11</sup> The other project, entitled Building the Rule of Law in International Affairs, led by Professors Thakur, Chesterman and myself supported by IEGE, the Centre for International Governance Innovation (CIGI) and the United Nations University (UNU) is funded by an Australian Research Council Linkage grant. Its first workshop was held on 19–20 October 2009 and it examined ethical supports for building the rule of law in international affairs. The two projects are collaborative, with the leaders of each project being invited to the workshops run by the other. I worked as a member of the drafting team for the PICT project.

### *B. Institutions*

The largest problems for the international rule of law lie in the lack of institutions that create, interpret and enforce international law. This lack of effective institutionalisation inhibits the development of the rule of law in its other dimensions. The lack of a legislature is not a fundamental problem for the rule of law. It makes change difficult but all that is needed is a set of clearly agreed sources, the means by which those sources generate authoritative legal texts, and a hierarchy of sources in cases of conflict.

There is a court, the International Court of Justice (ICJ) which can provide authoritative interpretations of those texts and of any conflicts between them. The ICJ is harder to stack than any national appellate court. The

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<sup>9</sup> First adopted in 1956, last amended in 1988

<sup>10</sup> See [www.pict.org](http://www.pict.org)

<sup>11</sup> The meeting was attended by Profs Philippe Sands, Laurence de Chazournes (co-chairs), Judge Jean-Pierre Cot, Lord Jonathan Mance, Alexis Martinez, Judge Thomas Mensah, Prof Charles Sampford and Professor Alfred H Soons

problem is the lack of compulsory jurisdiction and the limited number of cases that can therefore be heard before it. This makes it much harder for the law to give clear guidance to those who want to be bound. However, Cassese suggests that the relative weakness of central global institutions means that other institutions and practices may take on a greater role – including self-regulation and standard setting by various non-state actors, including members of the civil society, business and legal communities.

This comment about the potential institutional supports for the international rule of law reminds us that domestic rule of law is not just about state institutions. States were never ‘the only game in town’ or the lone resource where the protection of civilians or internal affairs are concerned.

### CAUTIONS ABOUT THE TERM ‘FAILED STATE’

Various definitions are thrown around when attempting to describe what constitutes a ‘failed state’. The Carnegie Endowment for Peace offers the simplest definition. It is the loss of control of its territory or loss of the monopoly on the legitimate use of force. The United Kingdom’s Department for International Development defines failed states as “governments that cannot or will not deliver core functions to the majority of its people, including the poor.” It adds:

*“The most important functions of the state for poverty reduction are territorial control, safety and security, capacity to manage public resources, delivery of basic services, and the ability to protect and support the ways in which the poorest people sustain themselves.”<sup>12</sup>*

The US think tank the ‘Fund for Peace’ (USFP) offers five attributes of a failed state:

- a. Lack of physical control of territory;
- b. Loss of monopoly on the legitimate use of physical force;
- c. Erosion of legitimate authority to make collective decisions;
- d. An inability to provide reasonable public services;
- e. An inability to interact with other states as a full member of the international community.

It uses twelve indicators in compiling its annual ranking for degrees of failure.

#### 1. Demographic pressures

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<sup>12</sup> ‘Why we need to work more effectively in fragile states’, DFID 2005

2. Forced uprooting of large communities as a result of random or targeted violence and/or repression
3. Legacy of vengeance-seeking group grievance
4. Chronic and sustained human flight
5. Uneven economic development along group lines
6. Sharp and/or severe economic decline
7. Criminalisation of the state
8. Progressive deterioration of public services
9. Widespread violation of human rights
10. Security apparatus as 'state within a state'
11. Rise of factionalised elites
12. Intervention of other states or external factors

The problem with all these definitions is that 'failure' depends on what counts as success. If someone is to say that a state (or a student) has 'failed', it invites the essential question: 'failed at what?' In response to these attributes and indicators, the head of state in many states now and in history would merely say: 'I did not fail. I was just not sitting *that* exam.' Indeed, as we will see, many of the criteria for a 'failed state' are either goals that the governments of states set themselves or the known consequences of such policies. Some of those goals are the means by which governments have traditionally sought to secure their sovereignty.

Many of the indicators of being a failed state involve actions that should be condemned. I do not have any problems saying that those actions are ethically unacceptable and condemning those who deliberately, recklessly or even negligently produce the facts underlying the indicator. Some of those actions are contrary to the Rome Statute and I would like all states to sign up to that Statute so that their leaders are prosecuted (just as I would like the international community to broaden international law and for nations to ratify and implement that law). But these desires for a change to the content and/or institutional implementation of international law do not necessarily mean that the entity whose leaders are committing is not a *de jure* or *de facto* state.

#### ATTRIBUTES OF A FAILED STATE

Of the five attributes identified by USFP, the first, lack of physical control of territory is one that every state would seek to avoid. However, I do not see how the Dutch or Poles in WW II would be called failed states despite this.

The governments of many states are not particularly worried about the legitimacy of their rule and hence are not aiming for (b) or (c) as stated. They just want to be obeyed or at least not overthrown.

Reliance on Weber is particularly problematic. Weber's statement about states having a monopoly of legitimate force is either trivially true by definition (the only legitimate force is that exercised by the state) or plainly false. More fundamentally, no state expects a monopoly on the legitimate use of force. In feudal states, the local barons organised and deployed force in a system that was built in to the oaths they gave to him and the guarantees of soldiers for the sovereign's wars. Such states could be very strong (as was England at the time of Henry V) and the risk posed to kings by their barons was less than that posed to modern heads of state by the standing armies that are a key part of modern states. Furthermore, all states permit self-defence and some support or even promote private arsenals and some might see this as guaranteed and intended by the US Bill of Rights.

For some states now and possibly a majority of 17<sup>th</sup> and 18<sup>th</sup> century states, attribute (d), the provision of reasonable public services was not really on their agenda.

Finally, some states faced with the choice of doing what they want within their borders and being accepted as a member of the international community, attribute (e), would choose the former. Many entities that would be considered states do not and have not been accorded full membership of the international community and its prime organs. The United Nations initially required all members to declare war on Germany – initially leaving several states out of that international community. The United Nations denied membership to 'the former Yugoslavia' which was clearly a functioning state and the Federal Republic of Germany was not admitted to the UN until 1973. Similarly, the UN initially refused to recognise the People's Republic of China, and then refused to recognise Taiwan. In 1965-6, Indonesia withdrew from the United Nations – exercising a deliberate preference not to meet attribute (e) even when it was perfectly entitled to do so.

#### INDICATORS OF A FAILED STATE

The USFP indicators of failed states are even more likely to reflect deliberate state policies. The USFP are set out in text and include comments in italics.

1. Demographic pressures – including the pressures deriving from high population density relative to food supply and other life-sustaining resources. The pressure from a population’s settlement patterns and physical settings, including border disputes, ownership or occupancy of land, access to transportation outlets, control of religious or historical sites, and proximity to environmental hazards.

*Many states have sought to grow their population despite the kinds of problems outlined.*

2. Forced uprooting of large communities as a result of random or targeted violence and/or repression: forced uprooting of large communities as a result of random or targeted violence and/or repression, causing food shortages, disease, lack of clean water, land competition, and turmoil that can spiral into larger humanitarian and security problems, both within and between countries.

*Such forced uprooting can be state policy, whether pursued to get rid of ethnic groups they do not like or to foster solidarity among the rest by defining an out group as ‘other.’ I have no problem condemning such states and the application of whatever International Law is available. But it does not mean that they are ‘failed states’. The most recent example was so fiendishly successful that it required most of the rest of the world to bring it down.*

3. Legacy of vengeance-seeking group grievance: based on recent or past injustices, which could date back to centuries. Including atrocities committed with impunity against communal groups and/or specific groups singled out by state authorities, or by dominant groups, for persecution or repression. Institutionalised political exclusion. Public scapegoating of groups believed to have acquired wealth, status or power as evidenced in the emergence of “hate” radio, pamphleteering and stereotypical or nationalistic political rhetoric.

*Again, most of these activities have been pursued as the way to build solidarity by excluding, persecuting and looting of the excluded group. Even where the state is not pursuing such policies, it is not uncommon to allow groups to fight it out in a ‘divide and rule’. For most of the first two centuries of the United States’ history, Indians and Black Americans were excluded.*

4. Chronic and sustained human flight: both the “brain drain” of professionals, intellectuals and political dissidents and voluntary emigration of “the middle class.” Growth of exile/expat communities are also used as part of this indicator.

*A brain drain may occur at the instigation of the state (as in the emigration of Jewish groups at various times in history). Brain drains may occur because of the deliberate policy of some of the countries which benefit as in the Western recruitment of health professionals from the developing world.*

5. Uneven economic development along group lines: determined by group-based inequality, or perceived inequality, in education, jobs, and economic status. Also measured by group-based poverty levels, infant mortality rates and education levels.

*The first democracy held this view about slaves. The proudest democracy of all practiced this for two hundred years and many democracies have featured this kind of uneven development where group based inequality is rife and government policy reinforces that inequality.*

6. Sharp and/or severe economic decline: measured by a progressive economic decline of the society as a whole (using: per capita income, GNP, debt, child mortality rates, poverty levels, business failures). A sudden drop in commodity prices, trade revenue, foreign investment or debt payments. Collapse or devaluation of the national currency and a growth of hidden economies, including the drug trade, smuggling, and capital flight. Failure of the state to pay salaries of government employees and armed forces or to meet other financial obligations to its citizens, such as pension payments.

*Many countries want to increase debt and may be more than happy to allow an increased number of business failures. Few would want to see the other indicators rise but are prepared to do so in furtherance of state policy. North Korea is clearly prepared to accept a major economic decline in order to preserve its regime. Burma seemed in the same position for years until the Chinese became economic and political allies. Some countries have preferred autarchy. Some (e.g. Nazi Germany and Franco's Spain) argued that it was better than a more open market, especially after the economic bloodletting in the competitive devaluations and punitive tariffs of the early 1930s. Autarchy lost the academic argument and, more importantly the economic growth war. However, it is significant that Francoist Spain stuck to autarchy. It should be noted that there are elements of the autarchic arguments in EU and Japanese approach to supporting their local agricultures to guard against famine.*

7. Criminalisation of the state: endemic corruption or profiteering by ruling elites and resistance to transparency, accountability and political representation.

*For some this is the whole point of state power. There was an old jurisprudential question: 'what is the difference between the state and a group of armed robbers?' The one essential difference is that the state claims sovereign legitimacy and is accorded it by the rest of the international community. There are more subtle differences in what states generally do with the money demanded and the extent to which there was prior agreement to the taxes imposed. Most sovereign states will rank higher on these performance indicators but not all. The mafia (even one excludes the elements of the Italian State it appears to have captured) would probably score better than Ivory Coast, Liberia and North Korea. The mythical Robin Hood would have been well up the scale.*

8. Progressive deterioration of public services: a disappearance of basic state functions that serve the people, including failure to protect citizens from terrorism and violence and to provide essential services, such as health, education, sanitation, public transportation. Also, using the state apparatus for agencies that serve the ruling elites, such as the security forces, presidential staff, central bank, diplomatic service, customs and collection agencies.

*However, many states do not much care. For many justifiably unpopular governments, suppressing the public rather than servicing seems a better investment of limited funds and more likely to secure the results they want. They may well cite de Tocqueville that the moment of greatest weakness for an autocrat is when he starts to loosen the reins of power. They might also recognise that their states are not set up to distribute services, that they would not do it well and that the public might not thank them. The public might consider that the government was delivering, too late and too little, what was theirs from the public assets that were theirs. In any case, the opportunities for looting are much reduced.*

9. Widespread violation of human rights: an emergence of authoritarian, dictatorial or military rule in which constitutional and democratic institutions and processes are suspended or manipulated. Outbreaks of politically inspired (as opposed to criminal) violence against innocent civilians. A rising number of political prisoners or dissidents who are denied due process consistent with international norms and practices. Any widespread abuse of legal, political and social rights, including those of individuals, groups or cultural institutions (e.g., harassment of the press, politicisation of the judiciary, internal use of military for political ends, public repression of political opponents, religious or cultural persecution).

*These are all policies of which all right thinking people should disapprove. However, these actions were traditionally the way that governments sought and retained power – and was the demonstration of the ‘prior successful use of force’ which demonstrated that their regime was ‘by and large effective’ or an ‘independent political community’ (see below). As before, this is not a failed state but a typical Westphalian state from the 17th to the 20th century.*

10. Security apparatus as ‘state within a state’: an emergence of elite or praetorian guards that operate with impunity. Emergence of state-sponsored or state-supported private militias that terrorise political opponents, suspected “enemies,” or civilians seen to be sympathetic to the opposition. An “army within an army” that serves the interests of the dominant military or political clique. Emergence of rival militias, guerrilla forces or private armies in an armed struggle or protracted violent campaigns against state security forces.

*Once again these are techniques for seizing and securing power and have been practiced by many entities that were clearly states according to international law and international usage.*

11. Rise of factionalised elites: Use of aggressive nationalistic rhetoric by ruling elites, especially destructive forms of communal irredentism (e.g., “Greater Serbia”) or communal solidarity (e.g., “ethnic cleansing”, “defending the faith”).

*Again, such deplorable behaviour is frequently pursued as deliberate, and sometimes successful, policy.*

12. Intervention of other states or external factors: military or Para-military engagement in the internal affairs of the state at risk by outside armies, states, identity groups or entities that affect the internal balance of power or resolution of the conflict. Intervention by donors, especially if there is a tendency towards over-dependence on foreign aid or peacekeeping missions.

*These interventions may weaken states but the weakening is an effect rather than a cause of intervention. Aid and peacekeeping missions can undermine a state but I hope that, at least in some cases, the opposite result is achieved.*

The recurring theme in the above discussion is what counts as success/failure and who is setting the exam – the sovereign, the citizen or outsider defenders of one of them. This reflects the incomplete shift in sovereign legitimacy from ‘efficacy’ (or, as I prefer to call it, ‘the prior successful use of force’) to the consent then, choice of the governed.

## TWO DIFFERENT CRITERIA FOR SOVEREIGN LEGITIMACY

In 1648, legitimacy in both the theory and practice of domestic and international law was based on the effectiveness of the sovereign's rule. Effective rule was generally secured by (a) the violent overthrow of the previous sovereign and (b) a willingness to suppress any who disagreed with the new order, using a degree of brutality that severely discouraged future disagreement. Hence many of the activities that appear to be attributed to failed states were the means by which sovereignty was asserted within states, and accepted outside of them. This is why I still call the Treaty of Westphalia a tyrant's charter.<sup>13</sup>

The enlightenment governance values demanded in the eighteenth century and partly secured by the democratic revolutions that started towards the end of that century fundamentally challenged the basis of sovereign legitimacy. Although the rule of law was among the first and subsequently least controversial tenets, other values including democracy, citizenship, liberty, and equality were contested. These values led to a 'Feuerbachian' reversal of the way rulers and ruled related to each other.<sup>14</sup> Before the enlightenment 'subjects' had to demonstrate their allegiance to their 'sovereign.' But enlightenment philosophers proclaimed that 'governments' had to justify their existence to 'citizens' who chose them. Once the reversal of the relationship occurred, it was difficult to return to the previous way of looking at things.<sup>15</sup>

This is what led to the new basis of sovereign legitimacy in the domestic law and political theory of democracies – the acquiescence, then consent, then the active choice of the governed. As such it was the people who ultimately 'set the exam/defined the parameters.'

International law, however, has continued to recognise states and governments on the basis of who exercises effective political control over discrete territories. Even when a democratically elected government is overturned by a *coup d'état*, the ambassadors of the new regime are accredited by foreign powers<sup>16</sup> and are allowed to take that country's

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13 Even though the first article of the treaty recognised the partially democratic and generally decent United Dutch Provinces

14 Feuerbach pondered the relationship between God and Man. Christians imagine that God created man in his own image. Feuerbach suggested that it was at least as likely that Man created God in his own image

15 This is what I have called the 'great leap forward' of the enlightenment. I choose those words because of the greater commitment to states that claimed to rule for their people and the killing and dying that leaders of such states could require.

16 It will all depend on whether China becomes a democracy before it becomes the most powerful economy. If we have, by then, built a rules-based international system based on respect for human rights, democracy and the rule of law, China will then take its place within that system. More recently, the rise of India and Brazil indicate a more multi-polar world so that we will not have to wait for the United States to resume its former leadership role in developing that system.

seat at the United Nations and other international forums. This glaring inconsistency has caused considerable tension and great soul-searching within democratic states.

When a small number of sovereign states started on the democratic path in the seventeenth and eighteenth centuries, this inconsistency was to the benefit of the emerging democracies as they benefitted from international recognition of their successful use of force against former autocrats and did not the monarchist preferences of the vast majority of states to be imposed on them.<sup>17</sup> However, as democracies increased in number to become the majority of states, with a significant majority of people and the bulk of the international economy, the tension has increased.<sup>18</sup> When I first pointed out this tension,<sup>19</sup> I suggested that it would not last – making what I called a ‘rash prediction’ that, within 50 years the prior successful use of force will be as contemptible a claim to recognition in international law as it is within the domestic constitutional law of existing democracies. At the time, international lawyers told me that this was the utmost foolishness. Just over ten years later I repeated the ‘rash prediction’ in my address to the final plenary of at the 1999 World Congress of Legal and Social Philosophy conference. That time there was general agreement but some criticism for thinking that it would take so long. My initial response was to say that history is a long game and there may be many setbacks –

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17 Democrats were only too aware that the French Revolution and the revolutions of 1848 were defeated by autocrats allied to the regimes which the new democracies had ousted. One of the most remarkable of these reactions was the successful attempt of the young Emperor Franz Josef to use non-Germans to drive out the liberal constitutionalists who had sought to offer him the crown of a constitutional pan-German monarchy.

18 The glaring inconsistency between the bases of constitutional legitimacy in domestic and international law has been sustained by a number of factors:

- a. The idea that international law is a law for all states, of which not all are democracies.
- b. Cultural relativist notions that different cultures have different approaches to governance
- c. The understanding that it is necessary to ‘do business’ in both commercial and political terms with a particular territory and that the only way to do this is through the group which exercises effective power in that territory.
- d. The idea that there is no alternative to political authority based on the prior successful use of force in a state where there has never been a democratic government which can speak for the people. Even where a democratic government is ousted, it may not be able to retain the integrity of its representative principles for long (as it becomes difficult to collect all elected representatives in one place and it is impossible to conduct new elections).
- e. Nations will rarely intervene solely for the benefit of the citizens of another nation state. They will only do so if it is in their interests. The danger is that nations will intervene to further their interests on the pretext of helping the citizens of the target state, but their ‘assistance’ will actually work to the detriment of those citizens – something we have seen from the wars of religion to the invasion of Iraq. The limited number of exceptions to this sorry history and the great need of some citizens for protection from their domestic oppressors provide powerful reasons for getting the norms and the international architecture right.

19 “Dare to Call it Treason: a law in context approach to defeating coups d’Etats” delivered at the Australian Law and Society Conference, Melbourne, December 1988 and then in the World Congress of Legal and Social Philosophy, Edinburgh, August 1989 an edited version of which was published as “Coups d’Etat and Law” in Attwooll, E. (ed.) *Shaping Revolution* Aberdeen University Press, Aberdeen, 1991, 161

though I relented in the version of the paper published in 2001, suggesting that it might be 20 years. Of course, it is not a prediction as a call to action as it will not happen if we do not make it happen. Setbacks over the last decade reduce the probability and mean that more concerted action will be necessary.

However, while this tension and inconsistency remain, some governments will continue to engage in some of the traditional and brutal means of securing power that are categorised as indicators of state failure. In doing so, they will continue to be recognised by the international community and succeed in their own terms.

### AVOIDING A PASS/FAIL DICHOTOMY

The USFP's approach is to use indicators to rank states on the degree of failure. However, the use of the term 'failed state' in this construction suggests an 'all-or-nothing' approach. Given the complexity of states, and their relative weakness or strength, there must be a new way to describe aberrant state behaviour.

State institutions can be more or less effective. But they are rarely completely ineffective. There is 'never nothing.' Furthermore, even in the most well managed states, few public goods are provided by the state alone – including security, health, and education. When citizens enjoy a degree of security, it is not purely because of the actions of the state. While the formal security forces and state institutions (such as courts and prisons) play an important role, important contributions frequently come from tribe and kinship groups, neighbours, social norms and physical factors such as having locks on doors. I call these 'civilian protection systems.'<sup>20</sup> Where state institutions are weak or 'feral' (in sense that they cease to protect civilians but threaten their security), the non-state elements take on a greater role. Where there is a breakdown in security, it is not that all state and non-state elements of civilian protection systems disappear but that gaps have developed in the civilian protection system. If international action to assist is taken, it should not involve providing protection for all civilians by itself but to fill the gaps in the civilian protection system with the assistance of member states, UN agencies, local civil society

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20 Protection of Civilians and the Rule of Law, Challenges of Peacekeeping Forum, Canberra, April 29, 2010. I draw an analogy to 'integrity systems' on which I have written at some length (most recently "From National Integrity Systems to Global Integrity Systems: Governance for Sustainable Globalisation" in Homel, Lewis and Ransley, *The Fitzgerald Legacy: reforming public life in Australia and beyond* Academic Press, 2010).

actors, NGOs, and the Red Cross/Red Crescent. This approach makes the mission more manageable and focused and avoids the huge transition problem of doing everything to doing nothing.

However, if it is thought that the state has failed or that security and service delivery have completely broken down it might seem as if the job of any peace-making, peace enforcing, peace building or peacekeeping is to step in and provide the missing state, the missing security or the missing services. This makes the problem seem much greater and the exit much more problematic. It means that the international community has to do the whole job. Unfortunately, once we are doing the whole job it is hard to know how to stop. A different approach recognises that security and services are provided by a range of actors whose actions are generally mutually reinforcing rather than conflicting. Most of those actors will still be there. What we need to do is to identify the holes in the system, seek to plug those gaps and then assist local actors to fill those gaps. This idea is encapsulated in R2P (which insists on assistance before protection) and with the current approach to the 'Protection of Civilians' in the African Union.

Another consequence of the failed state imagery is that if the state has failed, it seems that the international community should replace it. Once that decision is taken, you might as well replace it with a democratic, rights respecting set of new institutions. If the old authoritarian institutions have broken down, then the only source of legitimacy is the people. They can, at last, set and mark exams.

However, if existing institutions and organisational power bases remain, then they will almost certainly have to be part of the institutional make up during the international assistance mission and after it leaves. The international assistance mission can influence the way existing state and non-state institutions operate and interact with others but it cannot wish them away. This actually reflects what happens in societies unaided. There is a gradual change from one kind of state to another with major advance made while authoritarian rulers are weak, ineffective or confused. At such times, popular movements can seize control and start the process of building their own democracies. However, international assistance missions must be careful not to hope for too much. I have long argued that 'democracy cannot be given, it must always be taken.'<sup>21</sup> Other democracies can assist and support the takers (including protecting them from various threats to democracy) but they cannot be the prime movers.

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21 This was the view I put to the Council on Foreign Relations 'Task Force on Threats to Democracy' co-chaired by Bronislaw Geremek and Madeleine Albright of which I was a member and a major contributor. It contributed its final report to the Community of Democracies in December 2002.

## RULE OF LAW AND FAILED STATES

As already argued, the rule of law was the first governance value imposed on the authoritarian states which emerged as a result of the treaty of Westphalia in the seventeenth century. Accordingly, it is not only theoretical possible but historically common to have sovereign states without the rule of law and the decline, failure or absence of the rule of law does not mean that the state has failed.

Nonetheless, the rule of law makes states more effective. As Raz points out, the Rule of Law makes good and bad laws effective,<sup>22</sup> so it is not clear that it is an unalloyed good.<sup>23</sup> It makes the rule of law effective for both Hayekian reasons (if individuals know how force will be exercised, they can 'get out of its way' and modify their behaviour on the basis of a clear indication of how force will be used) and Weberian (with laws indicate what is legitimate force and what is not).

On the other hand, it is difficult to imagine a truly failed state with the rule of law. One could imagine a state with very little power but what power it has is subject to the rule of law. However, this is not particularly likely.

For me, the most interesting issues arise in international assistance missions (the generic term I use for various kinds of protection and peace missions) which attempt to restore security and assist a people engage in state building. The Rule of Law may be important before the mission in that breach of the rule of law may be a prime reason for the mission. The Constitutive Act of the African Union commits states to constitutional change and authorises the African Union to intervene to reverse *coups d'état* (Article 4). It is interesting that the continent most blighted by coups has finally taken this radical step and provided a legal basis for pro-democratic intervention. In this the international community is behind despite the Haiti intervention in 1994 that is so far a one-off rather than a precedent. The general approach suggested<sup>24</sup> is for the international body with 'right authority' (e.g. the African Union or the United Nations) to say: 'we take your constitution seriously even if you do not' and act on that conclusion from continuing to allow the democratically elected government to sit in the UN, staff its embassies and to deny to the junta the right to borrow on sovereign credit – with sanctions and military action a likely unnecessary backstop to the above.

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22 Raz, J. *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979

23 Thomson, E.P. *Whigs and Hunters: The Origin of the Black Act*, London: Penguin, 1990

24 The basis for international aid to a democratic government which has been purportedly ousted by a coup is discussed at length my background paper for the Albright-Geremek report published as Sampford and Palmer 'International Responses' in Morton H. Halperin and Mirna Galic, Eds., *Protecting Democracy: International Responses*, Lexington Books, 2005.

However, the greatest importance and relevance to international assistance missions is that such missions should seek to build/rebuild the rule of law and exemplify adherence to both the domestic and international rule of law. This will make such assistance missions more effective as well as more principled.

## CONCLUSION

The alliance between the United States and Australia was not forged in response to ‘failed states’ but states that were rather too successful in a very traditional way. Both countries committed to an international rules-based system in which the Kellogg-Briand pact was built into the UN Charter. The statesman whom I quoted at the start of his paper was intimately involved in the events that forged the alliance. He was not a lawyer but a soldier who commanded the United Nations forces (as they were then public described) in the most intense campaign ever led by an American – the invasion of Western Europe. General Dwight D. Eisenhower spoke those words as President in 1959.<sup>25</sup> At that time, he was urging other nations to accept the compulsory jurisdiction of the ICJ, as the United States had done so for over thirteen years<sup>26</sup> and was to do so for another twenty-five years.<sup>27</sup>

I would like to see the last twenty-four years as an aberration – just as Australia’s tardiness to sign should be seen as an earlier aberration. Australia did not accept that compulsory jurisdiction until March 13 1975. So it has not yet reached the thirty-nine years of recognition by the United States. I know that the American Bar Association has repeatedly argued that this aberration to America’s commitment to the international rule of law be terminated internationally.

In recent years, Australian has joined the United States, not so much to defend against overly strong states but to assist the peoples of sovereign states whose problem is weakness, inability and unwillingness to protect its citizens. I would generally avoid the term ‘failed state’ – not to ignore the plight of those peoples – but to recognise that we need to assist them and any of the institutions designed to protect them that are still functioning, or potentially functioning. In doing so, we should recognise that establishing

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25 D. Eisenhower (1959) *Remarks Upon Receiving an Honorary Degree of Doctor of Laws at Delhi University* December 11, 1959 <<http://www.eisenhowermemorial.org/speeches/1959>>. Those who are surprised by the source of the quote should recall that President Eisenhower, a soldier turned politician used federal troops to protect a black student in Little Rock and warned of the military industrial complex. In Delhi, the old warrior who had masterminded the 6 June Normandy landings, made his eloquent plea for law not war.

26 Since August 1, 1946

27 Termination took effect on 7 April 1986

the rule of law is as vital in such weak states as it is central to the functioning of effective states like our own. Our own actions in dealing with those states, and in our actions within them, should similarly reflect the singular importance of the rule of law – not just to the profession of law but also the profession of soldiers and those whose dual professions can make common cause as President Eisenhower once did.

#### APPENDIX: RULE OF LAW RECOMMENDATIONS TO INTERNATIONAL MISSIONS IN ‘FAILED STATES’:

##### ADVICE AND ASSISTANCE TO THE HOST GOVERNMENT

The mission will naturally seek to advise and assist the host country to strengthen the rule of law in its territory, especially those rules of law institutions of most relevance to the protection of civilians.

Accordingly, International Assistance Missions should offer advice on:

- Rule of law principles and to administer them.

The mission should promote:

- The Rule of law as governance value and basic constitutional principle.
- The Rule of law as ethic for key officials involved in the protection of civilians.

It should develop:

- A set of institutions that support rule of law.
- National Integrity systems – especially the legal elements that support the civilian protection system.

The rule of law must not be just the subject of the mission, but must be central to the assistance mission itself. If you believe in the rule of law, you have to practice enforcing it, as well as preaching its merits. The mission is there to practice the rule of law in its domestic and international forms.

##### BUILDING IN THE ‘DOMESTIC’ RULE OF LAW

- Standard rule of law principles of the kind outlined in the ‘thin theory’ should be built in to the mission:
  - rules under which missions operate should be prospective, open and clear;

- these rules should be relatively stable;
  - rule-making by the mission should be also be open, stable, clear and general rules;
  - action by the mission must be subject to independent judicial bodies, themselves accessible and subject to review;
  - the mission should observe principles of natural justice and policing; prosecutions should not be one-sided;
  - sanctions, especially the use of force, should only be applied according to clear rules publicised in advance.
- The rule of law in both domestic and international forms should be a fundamental governance value of the mission itself. The mission should have clear (or ‘right’) authority.<sup>28</sup> This can be provided in a number of ways.
  - *Agreement by Host country:* The authority for most international missions generally comes from the host country. Such domestic law is important for the authorisation, limitation and governance of the mission – as well as providing the substantive laws which should generally rule. In the rare cases where authority is not given by host country, it must be given under a means recognised by international law and validated either by a body established by a treaty or by an international court.
  - *Decision under a Treaty:* Decisions with clear authority can be provided by the United Nations Security Council (UNSC), the General Assembly (through the ‘Uniting for Peace’ provisions) or a body established by a treaty which the host country has signed (as in the case of the African Union). This applies to the original authority for the mission itself. However, it should be clear that the Mission has clear continuing authority. (The use of force in a potentially stale mandate – as in Iraq in the late 1990s is not desirable.)
  - *Decision by a court – the ‘sue me’ alternative:* A final method is one that I highlighted in my 1999 New York address. It responded to those countries who took part in the 1999 Kosovo intervention who argue that they would not take the matter to the UNSC because of a predicted Russian and/or Chinese veto<sup>29</sup> but that the intervention was valid under international

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28 Or ‘right authority’ as the International Commission on Intervention and State Sovereignty called in when they proposed the ‘Responsibility to Protect’ – abbreviated by some texting enthusiast to ‘R2P’

29 This claim was somewhat dubious. It is the US, not Russia or China that is the most frequent user of the veto. The problem with inaction in Rwanda was not any potential UNSC veto but the resistance of the US. James Rubin (Albright’s press officer) has confirmed that, at Rambouillet, the Serbs were prepared to sign provisions that were almost identical to the UNSC resolution eventually passed. The problem at Rambouillet was that the US incorporated a number of demands to ensure that the KLA signed and the Serbs did not – including the right to go anywhere in Serbia, arrest anyone they wanted and to hold a referendum on independence for Kosovo. These were inserted in the Rambouillet accords but were deleted in order to get a UNSC resolution.

law. At the time, there was widely believed to be an emerging norm of international humanitarian intervention.<sup>30</sup> While few would consider that it was broad enough to justify the Kosovo campaign, if another Rwanda occurred, I would be surprised if the International Court of Justice (ICJ) would rule against it. Accordingly, I argued that, if NATO thought their war was legal they should not have sought to block the ICJ hearing the case but should embrace it – accepting the compulsory jurisdiction of the ICJ in any armed actions they took part in providing the other side also accepted the compulsory jurisdiction of the ICJ on all other matters of international law. If it was legal NATO had nothing to fear. The fact that they blocked the suit from Serbia rather belied their claims to legality (as did the actual legal advice they received as revealed to me in 1999 by the NATO JAG officer who drafted the advice and by James Rubin in 2001 in the *Financial Times*). Now that the Rome Statute has defined and activated the crime of aggression, it might be sensible to allow the ICJ the opportunity to decide if a war is legal at or before its commencement rather than have the ICC determine it as a criminal matter years later. (While the United States is not currently a signatory, most ‘coalitions of the willing’ will include signatories, leaving the judgement of the world dependent on a court case against an allied head of government in which the United States would not be able to run its own argument.)

- That authority and the actions officials take under the mission should be subject to ‘independent adjudication’ by the ICJ and International Criminal Court (ICC). Even if a country does not sign up to compulsory jurisdiction, it should accept their jurisdiction to allow independent adjudication of the legality of their actions in the relevant mission. I know that this is unlikely now but good international citizens should have nothing to fear and their actions will be more effective. While the need for this is acute if the host country does not authorise the mission, it should be standard fare and I hope to live to see the day when it is.
- The mission’s dealings with the host country must be subject to international law.
- The mandate (which provides the effective “constitutional” basis for the mission) should include the rule of law as a basic principle.

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30 One of the very interesting questions generated by the rise of the alternative, and superior, concept of the ‘Responsibility to Protect’ is whether it can build on the legal support emerging from the international norm of the right to humanitarian intervention. I would be inclined to answer in the positive. It is not uncommon for case law to develop but be stunted by problems with the evolving norms and for a new doctrine to address those problems and allow the norm to develop in another way.

- The rule of law should be a core part of the ethic of every group of officials within the mission – including military, police and civilian components from all countries contributing to the mission.
- The conduct of police and military forces during the mission and compliance with relevant human rights norms.
- The various institutional components of the mission should mutually support each other in respecting and furthering the rule of law within their mission – and recognise the relationship between the rule of law and protection of civilians.
- Trials of those accused of perpetrating the violence against which the civilians had to be protected should be initiated by truly independent prosecutors before truly independent tribunals. Where these are not before permanent tribunals, the funding and selection should not be from either belligerents or peace keepers.
- Peacekeepers should never be drawn from the ranks of belligerent parties.

These issues apply to missions authorised under UNSC approval, regional (e.g. African Union (AU) approval, mixed missions and in cases of bilateral agreements between a host state and one that provides assistance.