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# INVOKING THE RULE OF LAW IN POST-CONFLICT REBUILDING: A CRITICAL EXAMINATION

BALAKRISHNAN RAJAGOPAL\*

## INTRODUCTION

Establishing the rule of law is increasingly seen as the panacea for all the problems that afflict many non-Western countries, particularly in post-conflict settings.<sup>1</sup> Development experts

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1. This belief is evidenced in a plethora of official reports, articles and books in recent years. See, e.g., The Secretary-General, *Report of the Secretary-General: In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶¶ 133-39, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005) [hereinafter *In Larger Freedom*]; High-level Panel on Threats, Challenges & Change, Dec. 2, 2004, *A More Secure World: Our Shared Responsibility*, ¶¶ 145-48, U.N. Doc. A/59/565 [hereinafter *A More Secure World*]; The Secretary-General, *Report of the Secretary-General: Road Map Towards the Implementation of the United Nations Millennium Declaration*, ¶¶ 14-32, delivered to the General Assembly, U.N. Doc. A/56/326 (Sept. 6, 2001); The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶¶ 2-4, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Transitional Justice*]; THOMAS CAROTHERS, *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006) [hereinafter *PROMOTING THE RULE OF LAW*]; JANE STROMSETH ET AL., *CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* (2006); BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006) [hereinafter *MEANS TO AN END*]; BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004) [hereinafter *ON THE RULE OF LAW*]; AGNÈS HURWITZ & KAYSIE STUDDARD, *INT'L PEACE ACAD., RULE OF LAW PROGRAMS IN PEACE OPERATIONS 3* (2005), available at [http://www.ipacademy.org/pdfs/IPA\\_E\\_REPORT\\_RULE\\_OF\\_LAW.pdf](http://www.ipacademy.org/pdfs/IPA_E_REPORT_RULE_OF_LAW.pdf); Kirsti Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* (Soc. Dev. Dep't of the World Bank, Social Development Paper No. 37, 2006). For a general overview of rule of law in post-conflict settings, see David Tolbert with Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*,

prescribe it as the surest shortcut to market-led growth; human rights groups advocate the rule of law as the best defense against human rights abuses; and, in the area of peace and security, the rule of law is considered the surest guarantee against the reemergence of conflicts and the basis for rebuilding post-conflict societies. Indeed, the rule of law has occupied this central position at least since the early 1990s, as Thomas Carothers recognized in a well-known article on the revival of the rule of law some years ago.<sup>2</sup> Therefore, in a very direct sense, the rule of law has come to be considered the common element that development experts, security analysts, and human rights activists agree upon, and as the mechanism that links these disparate areas. Constitution making is also seen as a cornerstone of rule of law activities in post-conflict settings,<sup>3</sup> but this Article focuses more on the diverse policy background against which legal reform is sought to be carried out and justified in “everyday” politics, and much less on constitution making, as such.

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19 HARV. HUM. RTS. J. 29 (2006). “Transitional justice” is an allied strand of literature that covers a substantial amount of the ground covered by rule of law literature. See, e.g., RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* (Neil J. Kritz ed., 1995).

2. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 95-106 (1998) (discussing why the rule of law is receiving a lot of recent attention, and that it is not a new idea); see also THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 157-206 (1999).

3. See, for example, the contributions of Vicki Jackson and Jane Stromseth in this volume. Vicki Jackson, *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, 49 WM. & MARY L. REV. 1249 (2008); Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443 (2008). The most extensive and thoughtful literature on constitution making and its impact on rule of law has emerged from the experience of East and Central Europe after the fall of the Berlin Wall and the break-up of the former Soviet Union, which, in turn, led to the formation of many new countries with their own constitutions and courts. See generally Antal Örkeny & Kim Lane Scheppele, *Rules of Law: The Complexity of Legality in Hungary*, in *THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE* 55 (Martin Krygier & Adam Czarnota eds., 1999); see also generally *THE RULE OF LAW IN CENTRAL EUROPE: THE RECONSTRUCTION OF LEGALITY, CONSTITUTIONALISM AND CIVIL SOCIETY IN THE POST-COMMUNIST COUNTRIES* (Jiri Pribán & James Young eds., 1999); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* (2000); Kim Lane Scheppele, *Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe*, 154 U. PA. L. REV. 1757 (2006).

This Article argues that this newfound fascination with the rule of law is misplaced. Underlying this “linkage” idea is a desire to escape from politics by imagining the rule of law as technical, legal, and apolitical. In other words, there is a tendency to think that failures of development, threats to security, and human rights violations could all be avoided or managed by a resort to law. This Article traces the characteristics of this idea and the different strands of policy and disciplinary discourses that have led to this conclusion, and argues that there is, in fact, a need to retain politics at the center of the discussions of development, human rights, and security. In addition, it argues that the invocation of the rule of law hides many contradictions among the different policy agendas themselves, such as between development and human rights or between security and human rights, that cannot be fully resolved by invoking the rule of law as a mantra. It is far more important to inquire into the real consequences of these agendas on ordinary people. Focusing attention on the rule of law as a broad, if not lofty, concept diverts attention from the coherence, effectiveness, and legitimacy of specific policies that are pursued to ensure security, promote development, or protect human rights. The rule of law agenda threatens to obfuscate the real tradeoffs that need to be made in order to achieve these worthy goals. These tradeoffs are real, partly due to the contradictions of socioeconomic development and political necessities in post-conflict settings and partly due to the contradictions between powerful third-party external actors with their own agendas and expert discourses who seek to intervene during “constitutional moments”<sup>4</sup> of post-conflict reconstruction in the Third World.

The post-Cold War “consensus” on the rule of law must be seen against the background of two well-known, macro-level developments. First, an increasing number of intra-state conflicts around the world have led to concerns of state failure, prompting new generations of peace operations sanctioned by the United Nations (UN) Security Council,<sup>5</sup> as well as situations of classic military occupations, such as the ongoing situation in Iraq. Second, the

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4. See generally Jackson, *supra* note 3.

5. See *Transitional Justice*, *supra* note 1, ¶¶ 11-12.

structurally violent and divisive nature of neoliberal development interventions has resulted in human rights violations and other social costs through such devices as the privatization of key national industries that increase unemployment, speculative bubbles in international finance transactions that have massive impacts on real estate and housing markets, mass population displacement and urban migration, the elimination of subsidies for food and services, and the introduction of user fees for infrastructure.<sup>6</sup> Against this background, the relationship between the disparate agendas of development, security, and human rights cannot be underestimated, and the invocation of the rule of law will not substitute for an honest evaluation of the costs and benefits of different policies, norms, and institutions.

This Article proceeds as follows: Part I traces the historical origins of the links among security, development, and human rights discourses since World War II and identifies some recurring themes, despite real differences among them. Part I also points out the ways in which the lines among these discourses began blurring since the 1970s and during the post-Cold War period, especially in the context of peace operations. Part II discusses the convergence between the human rights and rule of law discourses in the post-Cold War period, but also points out the continuing differences between the two. Part III examines the meaning of the rule of law in the context of development and finds that the rule of law is no substitute for human rights. Part III also questions whether the rule of law is even a key requirement for successful economic growth. Part IV examines the meaning of the rule of law in the context of security and finds that reliance on this concept cannot hide the more fundamental question of legitimacy in the post-9/11 world. In the field of security, it would not be prudent to lessen the reliance on the discourse of human rights for the fuzzier discourse on the rule of law. The Conclusion then offers some reflections on the lessons that have been learned about how best to capture the synergy that may exist between different fields of international

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6. See CTR. FOR GOOD GOVERNANCE, A COMPREHENSIVE GUIDE FOR SOCIAL IMPACT ASSESSMENT (2006), available at <http://unpan1.un.org/intradoc/groups/public/documents/CGG/UNPAN026197.pdf>.

interventions in the security, development, and human rights policy domains.

### I. SECURITY, DEVELOPMENT, AND HUMAN RIGHTS: ORIGINS AND NATURE OF THEIR RELATIONSHIP

The discourses of security, development, and human rights have diverse origins, but multiple, often unrecognized, intersections. Briefly put, the discourse of security emerged from the realist critiques of international relations.<sup>7</sup> Influenced by scholars such as Hans Morgenthau, it was primarily conceived in statist terms and was focused on managing the conflicts that arose between nation-states.<sup>8</sup> This notion of security was predominant during the Cold War, when threats to the inter-state system were perceived to be severe.<sup>9</sup> The security studies scholarship of this period was correspondingly dominated by political scientists who began by acknowledging the centrality of the doctrine of national security.<sup>10</sup>

The discourse of development, which has been much contested since its emergence in the 1940s, had its origin in colonial rule, development economics, and political development theory; it focused on the economic growth of “new” nation-states after decolonization.<sup>11</sup> Largely utilitarian in its calculus, the discipline of development tended to focus on measurement of aggregate indices of welfare, drawing on national income estimates from the 1940s.<sup>12</sup>

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7. See HANS J. MORGENTHAU & KENNETH W. THOMPSON, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 3-17 (6th ed. 1985).

8. See *id.* at 451-57.

9. See JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* 92 (2005); Robert Jervis, *Was the Cold War a Security Dilemma?*, 3 *J. COLD WAR STUD.* 36, 59 (2001).

10. See, e.g., RICHARD A. MATTHEW & LEAH FRASER, *GLOBAL ENVTL. CHANGE & HUMAN SEC. PROGRAM OFFICE, UNIV. OF CAL. IRVINE, GLOBAL ENVIRONMENTAL CHANGE AND HUMAN SECURITY: CONCEPTUAL AND THEORETICAL ISSUES* 5 (2002), available at <http://www.gechs.uci.edu/gechsprdrfinal.pdf>.

11. See ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* 22 (1994); WOLFGANG SACHS, *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER* (1992). See generally HA-JOON CHANG, *KICKING AWAY THE LADDER: DEVELOPMENT STRATEGY IN HISTORICAL PERSPECTIVE* (2002).

12. See ESCOBAR, *supra* note 11, at 23-24; BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* 108 (2003).

As can be readily seen, the discourses on security and development were natural allies. Both discourses relied heavily on the notion of the territorial nation-state and drew their force from their ability to supply content to aspects of nationalism, both territorial and developmental. The welfare of individuals, or of sub-state entities, did not figure prominently in the study of either security or development.<sup>13</sup> In addition, the two discourses were also linked from the beginning for different reasons. Development interventions tended to be seen by Western leaders as one of the best tools available to fight the communist menace, offering incentives for restive rural peasant populations not to rebel, while cementing the patron-client relationships between friendly regimes in power and their key domestic constituencies.<sup>14</sup> As U.S. Secretary of State John Foster Dulles stated in 1956, "We are in a contest in the field of economic development of underdeveloped countries .... Defeat ... could be as disastrous as defeat in the armaments race."<sup>15</sup> When radical communist movements swept to power in several Third World states during the 1950s, the response by the West was swift; the iron fist of repression and foreign intervention was brought down heavily on these countries, while the velvet glove of development was applied to pacify the restive rural masses.<sup>16</sup> For example, these events forced the demotion of Latin America by the United States to an "underdeveloped area," from its pre-war status as a region with a range of "developing" economies, in order to justify its foreign assistance and, therefore, security rationale.<sup>17</sup> Indeed, the different paradigm shifts in development discourse—for example, from growth with redistribution to poverty alleviation and basic needs in the 1970s—were explicable by the proxy wars in the Third World between the Cold War blocs.<sup>18</sup> The "war on poverty" an-

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13. See generally Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982) (discussing the evolution of protecting individual rights under international human rights law).

14. See GADDIS, *supra* note 9, at 95-98.

15. *Transcript of Dulles News Conference on Economic Contest with Soviet Union*, N.Y. TIMES, Jan. 12, 1956, at 10.

16. See ODD ARNE WESTAD, *THE GLOBAL COLD WAR: THIRD WORLD INTERVENTIONS AND THE MAKING OF OUR TIMES* 111-12, 119 (2005).

17. 1 DEVESH KAPUR, JOHN P. LEWIS & RICHARD WEBB, *THE WORLD BANK: ITS FIRST HALF CENTURY* 143 (1997).

18. For a discussion, see *id.* at 215-68.

nounced by Robert McNamara at the World Bank in 1973 had a distinct security rationale to it.<sup>19</sup> Political development theorists provided theoretical support for this by justifying the importance of political stability and repression for economic growth to prevent the countries concerned from falling to the communists.<sup>20</sup> This focus on the linkage between security and development continues to this day, as demonstrated by the emphasis on development in the most recently published U.S. National Security Strategy, released in 2002, though with a focus on “failing” states and “the embittered few” rather than the communists.<sup>21</sup> Thus, the language has changed, but not the rationale.

The emergence of the human rights discourse did not fundamentally threaten this symbiotic relationship, at least not at first. Conceived as a set of state obligations towards citizens, the human rights system fit easily into the nation-state focused world of security and development.<sup>22</sup> The system of human rights did not pose any radical challenges to the state-centric world order, such as by pushing for extra-national obligations of states or obligations of non-state actors, and reaffirmed the same goals that development and security regimes set for themselves.<sup>23</sup> To the extent that there appeared to be any contradictions, human rights law provided for exemptions within the terms of the treaties themselves. For example, the law itself allowed violations, where needed, to preserve political stability through the concept of public emergency laid down under Article 4 of the International Covenant on Civil and Political Rights (ICCPR).<sup>24</sup> Economic and social rights were conceived of in promotional terms under the International Covenant on Economic, Social and Cultural Rights (ICESCR), which did not seriously threaten the dominant role of the state in the economy by imposing legal limits on the state’s ability to guide economic

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19. *See id.* at 219-23.

20. *See* SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 374-78 (1968).

21. THE WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1* (2002) [hereinafter *NATIONAL SECURITY STRATEGY*], available at <http://www.whitehouse.gov/nsc/nss.pdf>.

22. *See* Sohn, *supra* note 13, at 9.

23. *See id.*

24. International Covenant on Civil and Political Rights, art. 4, Mar. 23, 1976, 999 U.N.T.S. 171 [hereinafter *ICCPR*].



development.<sup>25</sup> Many states in the West, especially European nations and the newly independent Third World countries, widely subscribed to this position during the 1960s.<sup>26</sup> Given the largely voluntarist premises of international human rights law,<sup>27</sup> states could choose to undertake limited obligations that they were comfortable with. Despite this compatibility, the human rights discourse remained largely isolated from the discourses of security and development until the 1970s and was largely dominated by lawyers.<sup>28</sup>

Significant changes since the 1970s began blurring the lines among the discourses of development, security, and human rights. The story of the relationship between development and human rights is well-chronicled elsewhere,<sup>29</sup> but the following key developments in that relationship should be noted:

- The expansion of the notion of development to include human development measures at the level of the family and the household, chiefly evidenced through UNDP reports;<sup>30</sup>
- The emergence of the language of social progress and development from the Declaration of Tehran (1967) and culminating in the U.N. General Assembly Resolution on Right to Development in 1986. This move followed two decades of attempts by Third World countries to elevate development as an international legal norm that would impose legal obligations on rich countries, both to abstain from intervening in Third World developmental strategies, such as the pursuit of an industrial policy, and to provide more development assistance;<sup>31</sup>

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25. See International Covenant on Economic, Social and Cultural Rights art. 6, Jan. 3, 1976, 993 U.N.T.S. 3 [hereinafter ICESCR].

26. Farroukh Jhabvala, *On Human Rights and the Socio-Economic Context*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW* 296 (Frederick Snyder & Surakiart Sathirathai eds., 1987).

27. See, e.g., The Third Comm., *Report of the Third Committee on Human Rights Questions: Human Rights Questions, Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedom*, ¶¶ 4-15, U.N. Doc. A/56/583/Add.2 (Dec. 11, 2001) (prepared by Juraj Priputen).

28. RAJAGOPAL, *supra* note 12, at 216-18.

29. See, e.g., *id.* at 171-232.

30. See *id.* at 222-24.

31. See *id.* at 216-22.

- The emergence of the governance agenda in development policy since the late 1980s, focusing attention on governmental failures as the reason behind developmental failures. Arising from the experience of Sub-Saharan Africa, this move saw the failure of development as the result of the absence of adequate institutions, both political and economic. At issue was the lack of transparency and accountability of government. This contrasted with the early explanations for the failure of development, which had focused on the absence of the right capital and prices and the absence of an appropriate policy framework for economic growth. This new focus on governance—or good governance in the literature of the World Bank—neatly coincided with the rise of the institutionalist turn in development economics, which came to see the legal frameworks of property and contracts as the source of economic growth. This newfound interest in institutions and legal norms had the effect of bringing human rights, which also focused primarily on legal reform, closer to development;<sup>32</sup>
- The emergence of rights-based approaches to development since the 1990s in multilateral and bilateral development agencies, combined with a new interest in economic, social, and cultural rights. The move towards a rights-based approach was driven by a paradigm shift within development that began to see development itself as freedom, while retaining a belief that such a new paradigm could lead to changes at the project level, where development is “delivered” to its beneficiaries. The new interest in economic and social rights was driven in large part by the constitutionalization and judicialization of these rights, as part of a wave of democratic transitions and constitution making across the world;<sup>33</sup>
- High-profile global campaigns involving civil society actors in various countries around the issues of displacement and damage to the environment in countries like Brazil and

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32. See *id.* at 218, 224-25; KAPUR ET AL., *supra* note 17, at 532-33.

33. See RAJAGOPAL, *supra* note 12, at 217-32.

India, which led, in turn, to the adoption of better standards by the World Bank on internal displacement and respect for indigenous peoples' rights during the 1980s and to the establishment of the World Bank Inspection Panel in the early 1990s. These mobilizations, which were simultaneously global and local, provided the political background to the move to bring human rights and development closer.<sup>34</sup>

The discourse of security, too, began to change. First, it was expanded to include understandings of environmental security, focusing attention on environmental damage as the cause and consequence of violent conflicts, including conflicts relating to natural resources.<sup>35</sup> The traditional notion of security was also increasingly challenged by new notions of human security, which emphasized the security of human beings over states.<sup>36</sup> Second, the notion of international security was expanded to include intra-state conflicts, which were proliferating rapidly after the end of the Cold War.<sup>37</sup> As the Report of the International Commission on Intervention and State Sovereignty noted, the changing nature of armed conflict in the world was reflected by the fact that 90 percent of people killed in armed conflicts in the late twentieth century were civilians, whereas it had been only one out of ten at the beginning of the twentieth century.<sup>38</sup> Third, the source of threats to world order had also been seen to change from classic state-based threats to non-state threats, including terrorism, drug trafficking, and transnational organized crime.<sup>39</sup> This expanded understanding of

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34. See *id.* at 245-63.

35. There is a very rich and complex literature on environmental security. A good source is the Environmental Change and Security Program at the Woodrow Wilson Center for International Scholars, [http://www.wilsoncenter.org/index.cfm?fuseaction=topics.home&topic\\_id=1413](http://www.wilsoncenter.org/index.cfm?fuseaction=topics.home&topic_id=1413) (last visited Feb. 18, 2008). For two recent samples of the literature, see ENVIRONMENTAL PEACEMAKING (Ken Conca & Geoffrey D. Dabelko eds., 2002) and VIOLENT ENVIRONMENTS (Nancy Lee Peluso & Michael Watts eds., 2001).

36. See, e.g., OSITA AGBU, WEST AFRICA'S TROUBLE SPOTS AND THE IMPERATIVE FOR PEACE-BUILDING 3-5 (2006).

37. Andrea Strimling, *The Federal Mediation and Conciliation Service: A Partner in International Conflict Prevention*, 2 PEPP. DISP. RESOL. L.J. 417, 419 (2002).

38. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY: THE RESPONSIBILITY TO PROTECT 13 (2001).

39. See generally RAPHAEL PERL, CONG. RESEARCH SERV., TERRORISM AND NATIONAL SECURITY: ISSUES AND TRENDS (Dec. 21, 2004), available at <http://www.fas.org/irp/crs/>

security shared many common elements with the most evolved thinking in development, which together indicated that the older consensus on the development-security linkage had broken down and been replaced with a new one, which had human rights at its core.

This was problematic, however. The language of human rights had since then been appropriated as part of numerous peoples' struggles around the world, and it could not so readily be deployed as a tool of governance in the fields of development or security.<sup>40</sup> In other words, development and security experts were working with relatively conflict-free notions of human rights that could be used to program activities in their respective fields, and this proved to be a problem. For every attempt to engage in "rights talk" by a development agency, a local actor such as a non-governmental organization (NGO) or a social movement would offer an oppositional reading of rights.<sup>41</sup> Rights discourse is, in fact, constantly appropriated for oppositional struggles,<sup>42</sup> which makes it a particularly difficult device for governance strategies. For example, the World Commission on Dams attempted to build a new set of prescriptions for better dam building based on a human rights-influenced "rights and risks" approach.<sup>43</sup> For large dam-building states like India and China, this attempt to use human rights as a basis of governance proved to be too discomfiting and they ended up rejecting the report of the Commission.<sup>44</sup> However, for the NGOs and social movements of the people displaced by dams, the "rights and risks"

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IB10119.pdf (examining international terrorism and the U.S. policy response); JOHN R. WAGLEY, CONG. RESEARCH SERV., TRANSNATIONAL ORGANIZED CRIME: PRINCIPAL THREATS AND U.S. RESPONSES (Mar. 20, 2006), available at <http://www.fas.org/sgp/crs/natsec/RL33335.pdf> (examining the growing threat of transnational organized crime to national and global security).

40. See Dustin N. Sharp, *Prosecutions, Development, and Justice: The Trial of Hissein Habré*, 16 HARV. HUM. RTS. J. 147, 161-65 (2003) (discussing the differences between human rights and development discourses).

41. See Henry J. Steiner, *The University's Critical Role in the Human Rights Movement*, 15 HARV. HUM. RTS. J. 317, 319 (2002); Joel P. Trachtman, *Welcome to Cosmopolis, World of Boundless Opportunity*, 39 CORNELL INT'L L.J. 779, 787 (2006).

42. See, e.g., Steiner, *supra* note 41, at 319.

43. WORLD COMM'N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 197-211 (2000), available at <http://www.dams.org/docs/report/wcdch7.pdf> [hereinafter DAMS AND DEVELOPMENT].

44. See RAJAGOPAL, *supra* note 12, at 219.

approach provided a minimal political safeguard that their interests would be taken into account.<sup>45</sup> This counter-hegemonic function of rights, as it has been called elsewhere,<sup>46</sup> proved sufficiently problematic for the fields of development and security. Thus, the links with the human rights discourse may, as a result, be in the process of being replaced with another, more malleable, discourse on the rule of law, as will be elaborated below. The relationship between development, security, and human rights had become confusingly self-referential and circular, each discourse pointing to the other as either the precondition for its own success or the reason for its failure. Notions such as human development and human security also muddied the waters by often equating their meaning to the full achievement of human rights, without being clear about how each is distinct.<sup>47</sup>

For now, it should be noted that the new post-Cold War consensus on development, security, and human rights could be said to have the following characteristics. First, there has been a move away from the nation-state as the focus of development towards the individuals and various subgroups (women, children, small farmers, etc.) living within it. Second, state failure is regarded as responsible for common and grave challenges in the fields of security, development, and human rights and, therefore, saving "failed states" is seen as a priority for the international community. Third, there has been a corresponding redefinition of sovereignty from that of a right of a state to exclusive domestic control, to a responsibility of a state to protect its citizens. Finally, there is now a focus on the rule of law as the tool that will help achieve the goals of development, security, and human rights.

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45. DAMS AND DEVELOPMENT, *supra* note 43, at 207.

46. See RAJAGOPAL, *supra* note 12 at 245-58; see also Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 *THIRD WORLD Q.*, 767, 767 (2006).

47. See, e.g., COMM'N ON HUMAN SEC., HUMAN SECURITY NOW 11-12 (2003) [hereinafter HUMAN SECURITY NOW]; U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 2000, at 127 (2000).

## II. HUMAN RIGHTS AND THE RULE OF LAW: CONCEPTUAL CONVERGENCE OR DIVERGENCE?

The new focus on human rights in the fields of development and security was proving to be rather uncertain for the reasons I advanced above, including the open-ended nature of human rights and their use by opposing actors, the persisting tensions and tradeoffs between the goals of development, security, and human rights, and the circular, self-referential nature of the convergence between the three discourses. While it was clear that development needed to transform itself from macro-level aggregates of human welfare, computed according to a utilitarian calculus, to focus on individuals, voice, and accountability, the language of human rights was proving to be highly contentious as a means towards that end. Similarly, while it was clear that traditional state-based notions of security were unhelpful, the notion of human security was proving difficult to realize, partly because it did not seem to have an agreed upon core of meaning and often simply came to mean a respect for human rights.

The rule of law came to be seen, in many ways, as a convenient substitute for human rights. Unlike human rights, the rule of law does not promise the achievement of any substantive social, political, or cultural goal. It is much more empty of content and capable of being interpreted in many diverse, sometimes contradictory, ways. The human rights discourse is a discourse of social transformation, and even emancipation, whereas the rule of law discourse does not have that ambition and may be seen as inherently conservative. This is largely, but not only, due to the association of the rule of law with a culture of law and order of the state, whereas the human rights discourse has conventionally been seen as articulating the entitlements of individuals and groups to be free from violence of various types.<sup>48</sup> Especially in its non-legal forms, the human rights discourse is a powerful tool for social change

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48. See, e.g., PROMOTING THE RULE OF LAW, *supra* note 1, at 130 (discussing an instrumental understanding of the rule of law); Sharp, *supra* note 40, at 61-65 (discussing the differences between human rights and development discourse).

due to its normative commitment.<sup>49</sup> By contrast, the rule of law discourse is far more compatible with the discourse of development, which retained its aversion to normative talk due to its roots in economics.<sup>50</sup> Besides, since the 1980s, an important part of the development discourse had come to emphasize the importance of institutions, including legal norms, for achieving economic growth.<sup>51</sup> Known as the “new institutionalists,” these economic historians and rational choice institutionalists increasingly pointed to the importance of property rights, contract rights, and an independent and impartial judiciary for achieving economic growth.<sup>52</sup> This had a major impact on development policy<sup>53</sup> and practice and led to an exponential increase in the resources available for rule of law programming. More importantly, the role of legal norms and institutions, both formal and informal, became much more central to the development discourse,<sup>54</sup> and the rule of law became almost a “trope” for the many different things that the new institutionalists thought law could do to foster development. The rule of law discourse was also much more compatible with this strand of development theory, with its more neutral focus on formal realizability, the supremacy of law, and the emphasis on process.<sup>55</sup> Despite the seminal work of Amartya Sen<sup>56</sup> and the significant efforts to mainstream it within the development discourse,<sup>57</sup> the

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49. See RAJAGOPAL, *supra* note 12, at 230.

50. See *id.*

51. See DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 107-40 (1990).

52. See *id.* at 138-40; THE WORLD BANK, WORLD DEVELOPMENT REPORT 2002: BUILDING INSTITUTIONS FOR MARKETS 4-5 (2002) [hereinafter BUILDING INSTITUTIONS]; Christopher Clague et al., *Institutions and Economic Performance: Property Rights and Contract Enforcement*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS DEVELOPED AND POST-SOCIALIST COUNTRIES 68-70 (Christopher Clague ed., 1997).

53. See, e.g., HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 62-66 (2000); BUILDING INSTITUTIONS, *supra* note 52, at 99-100.

54. See, e.g., ON THE RULE OF LAW, *supra* note 1, at 1-3.

55. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 795-97 (1989) (arguing that traditional rule of law theory rests on the concept of formal realizability, which should be changed).

56. See, e.g., AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

57. For a discussion, see RAJAGOPAL, *supra* note 12, at 216-32.

human rights discourse has never been obviously compatible with conventional development approaches.

Yet, in recent years the rule of law and human rights have been used in conjunction, as if they were inseparable.<sup>58</sup> Alternatively, an expanded understanding of the rule of law is also being used which encompasses some notions of “rights” or “justice.”<sup>59</sup> Throughout the 1990s, one could see this tendency in the field of security, especially in the area of peacebuilding.<sup>60</sup> In the development realm, this expanded approach to the rule of law could be seen in the rhetoric of the World Bank. In a 2002 policy document, it states that “the rule of law prevails where (i) the government itself is bound by the law, (ii) every person in society is treated equally under the law, (iii) the human dignity of each individual is recognized and protected by law, and (iv) justice is accessible to all.”<sup>61</sup>

However, this ostensible convergence between the rule of law and human rights is more apparent than real. Historically, the connection between the human rights discourse and the rule of law was relatively tenuous. Despite the reference to the rule of law in the preamble of the Universal Declaration of Human Rights (UDHR),<sup>62</sup> the relationship between the rule of law and human rights has been unclear and is, in fact, one of the least analyzed from a theoretical perspective. In fact, the notion of the rule of law was fundamentally challenged after the experience of the Nazi regime, which was, after all, a regime based on a fairly scrupulous commitment to legal rules and administrative regulations.<sup>63</sup> Despite the seminal German contribution to the rule of law since the nineteenth

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58. See, e.g., Jackson Maogato & Benedict Sheehy, *Torturing the Rule of Law: USA and the Post 9-11 Legal World*, 21 ST. JOHN'S J. LEGAL COMMENT. 689, 689-91 (2007).

59. See, e.g., Tolbert, *supra* note 1, at 32, 42, 51.

60. See generally The Secretary-General, *Report of the Panel on United Nations Peace Keeping Operations, delivered to the Security Council and the General Assembly*, U.N. Doc. A/55/305-5/2000/809 (Aug. 21, 2004); BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE: 1995* (2d ed. 1995).

61. THE WORLD BANK, *LEGAL AND JUDICIAL REFORM: OBSERVATIONS, EXPERIENCES, AND APPROACH OF THE LEGAL VICE PRESIDENCY 1* (2002).

62. “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...” Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

63. ON THE RULE OF LAW, *supra* note 1, at 108.



century, including through the concept of *Rechtstaat*,<sup>64</sup> the idea that the rule of law could prevent barbarities was discredited after the Nazi experience. The human rights discourse in fact reflects this ambivalence. The UDHR itself invokes the rule of law only as a defensive mechanism against self-help and mob justice, but not as a precondition or necessity for the realization of human rights.<sup>65</sup> There is, in fact, no general right of access to, or enjoyment of, the rule of law in international human rights law. The human rights covenants do not require that human rights should, under all circumstances, be guaranteed only through law, but only that law is one of many other “measures” that may be necessary to realize rights.<sup>66</sup> At the core of this debate is a larger jurisprudential question, which has divided scholars since the Nazi atrocities, as to whether the rule of law has a moral core or not.<sup>67</sup> Given this complex history and the ambivalence of human rights instruments, it is not accurate to speak, as many often do, of the rule of law and human rights as synonymous concepts.

In the end, despite some convergences, the rule of law remains sufficiently distinctive from human rights, conceptually and practically. The human rights discourse remains a language of counter-hegemonic resistance, or even social emancipation, easily appropriated by myriad forms of popular struggles around the world, or a language of hegemony and discipline, a façade that hides the agendas of powerful elites. The rule of law discourse has neither such linkage with popular politics, nor sufficient distance from the agendas of the powerful. The centrality of the rule of law in the 1990s has more to do with a focus on security issues in peace agreements and the development discourse’s new emphasis on institutions, rather than to its convergence with human rights.

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64. For a discussion of the concept of *Rechtstaat*, see FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 193-204 (1960).

65. UDHR, *supra* note 62, pmbl.

66. ICCPR, *supra* note 24, art. 2; ICESCR, *supra* note 25, art. 2 (referring to “legislative or other measures”).

67. See, e.g., ON THE RULE OF LAW, *supra* note 1, at 81.

## III. RULE OF LAW AND DEVELOPMENT: PROBLEMS OF COHERENCE

The idea that law matters for economic performance has been around for a long time. At least since the late nineteenth century, and certainly since Max Weber, the German contribution to this idea has been central.<sup>68</sup> Weber stressed that the rise of modern capitalism was intimately linked to the rise of a particular form of law that he called “formal rationality.”<sup>69</sup> He discussed this notion of ideal-type formal rationality in the context of his well-known discussion about the bureaucracy.<sup>70</sup> This Weberian insight lies at the core of today’s prescriptions for rule of law reforms as the prerequisite for economic development. Whatever the rule of law may have meant in German legal thought or in Weber’s writings, that concept has come to mean something much narrower and more technical in the economic discourse emanating from development institutions, such as the World Bank,<sup>71</sup> as well as in the influential writings of Hernando De Soto.<sup>72</sup> Under this much narrower definition, the rule of law has come to mean simply those institutions that are important for the creation and operation of an ideal-type free market *and nothing more*. Prescriptively, this means that rule of law rhetoric in economic development usually focuses on the creation of “clear” property and contract rights,<sup>73</sup> on formal law and formalization of informal or social norms,<sup>74</sup> and on the centrality of the judiciary as a dispute resolution mechanism which will apply rules mechanically and without discretion, creating predictability for economic actors.<sup>75</sup> It is not concerned with the distributional

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68. David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720, 720-21, 752.

69. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIETY* 655-58, 1209-10 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968).

70. *See id.* at 217-23.

71. THE WORLD BANK, *WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET* 87-97 (1996) [hereinafter *FROM PLAN TO MARKET*]. For a more recent and nuanced example that shows the influence of the new institutional economics literature, see *BUILDING INSTITUTIONS*, *supra* note 52, at 3-4.

72. *See generally* DE SOTO, *supra* note 53.

73. *See* *FROM PLAN TO MARKET*, *supra* note 71, at 87-90.

74. *See* DE SOTO, *supra* note 53, at 174-78; *BUILDING INSTITUTIONS*, *supra* note 52, at 171.

75. *See* *BUILDING INSTITUTIONS*, *supra* note 52, at 117-19. For an example of the interest

outcomes of the market itself, which it leaves to other domains, such as politics, to be dealt with. The rule of law then becomes, as David Kennedy has noted, a substitute for development rather than a means leading to it.<sup>76</sup> Nor is it concerned with the idea that the rule of law might mean something more than a tool kit for marketization.<sup>77</sup> I would suggest that this definition of the rule of law in the context of development raises serious problems of coherence and may hide contradictions between development and security or human rights agendas themselves.

This could be illustrated by taking the dominant prescriptive strands of development policy on the rule of law. First, the emphasis on “clear” property and contract rights sounds intuitively good. But this easy consensus hides the discomfiting fact that “clear” property rights—in the sense of clear rights to exclude for example—may not be needed for fast economic development. The economic record of China is certainly not attributable to “clear” property rights, and yet, it is hailed as an economic miracle due to its record-setting rates of growth.<sup>78</sup> At the micro level, there is increasing evidence that vigorous markets in areas like housing and land are possible even in the absence of clear, rigid, and formal property rights.<sup>79</sup> Indeed, creating too many clear and rigid property rights may even impede the growth of markets, especially in contexts of economic transition.<sup>80</sup> Also, the emphasis on “clear” property rights hides the question of distributional consequences—in other words, who should benefit or lose from the new and “clear” property rights. From a security and human rights perspective,

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among economists about the role of courts, see, for example, Simeon Djankov et al., *Courts*, 118 Q. J. ECON. 453, 454-57 (2003).

76. See DAVID KENNEDY, *The Rule of Law as a Strategy for Economic Development*, in *THE DARK SIDES OF VIRTUE* 151-53 (2004).

77. See *id.* at 155.

78. See Harry Williams, *Property Rights and Legal Reform in Township and Village Enterprises in China*, 1 ASIAN-PAC. L. & POL'Y J. 227, 239-40 (2001).

79. See generally Omar Razzaz, *Land Disputes in the Absence of Ownership Rights: Insights from Jordan*, in *ILLEGAL CITIES: LAW AND URBAN CHANGE IN DEVELOPING COUNTRIES* (Edesio Fernandes & Ann Varley eds., 1998); Mona Fawaz, *Strategizing for Housing: An Investigation of the Production and Regulation of Low-Income Housing in the Suburbs of Beirut* (unpublished dissertation, Massachusetts Institute of Technology) (on file with author).

80. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 622-23 (1998).

these are key questions. A property rights regime that ends up concentrating land or other productive assets in the hands of a minority, especially if that minority is from a different ethnic, racial, or religious group, may very well alter the character of the state itself and lead to violent responses or discriminatory policies.<sup>81</sup> In a post-conflict situation, a rigid approach to property rights may also end up preventing a new government from pursuing effective policies for reconciliation and even reparation through effective land reform, as happened in South Africa.<sup>82</sup>

A response to this critique may be that development institutions, such as the World Bank, are prevented from prescribing policies that touch upon political considerations,<sup>83</sup> and that distributional questions are the domain of domestic politics. Such a response would not be convincing in the final analysis for at least two reasons. First, in legal literature, questions of distribution have been long recognized as central to the efficient—and not just fair—operation of a market economy in the West.<sup>84</sup> This makes questions of distribution intrinsically important for achieving effective pro-growth policies, and not merely as an afterthought or charity. Second, external actors, including development actors, cannot take the position that they are not responsible for the social impacts of market-related policies such as the push for “clear”

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81. For a provocative argument that such violent responses have happened with alarming regularity when free market policies have been simultaneously introduced with democratization as joint recipes for political and economic transition, see AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 259-61 (2003).

82. For an early warning, see S.B.O. GUTTO, *PROPERTY AND LAND REFORM: CONSTITUTIONAL AND JURISPRUDENTIAL PERSPECTIVES* (1995).

83. This argument has been a standard response by the World Bank's legal counsel over several decades, based on the prohibition contained in Article 4 of its Articles of Agreement. See International Bank for Reconstruction and Development Articles of Agreement art. 4, § 10, Feb. 16, 1989. But the World Bank is increasingly adopting frameworks of analysis that openly acknowledge and advocate political and institutional changes as key prerequisites of reform in many areas. For example, the World Bank has advocated a significant role of the state to secure socially desirable land use, especially in post-conflict settings. See KLAUS DEININGER, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION* 178-84 (2003). It is not clear if this new turn to politics means that the World Bank has abandoned strict compliance with Article 4 of its Articles of Agreement, or whether it is simply a sign of plural voices within a large and complex bureaucracy.

84. See, e.g., Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 *IOWA L. REV.* 1319, 1320-21 (1987).

property rights, if such policies undermine security or human rights. Rwanda and the Balkans, for example, are well-known examples where unwise macroeconomic policies significantly contributed to ethnic violence and state failure.<sup>85</sup> This raises important questions about the accountability and responsibility of external actors for their policies within developing countries or countries in so-called transition.

A second prescriptive strand of rule of law strategies in development policy focuses on formal rules as the core of the rule of law.<sup>86</sup> Despite the obvious appeal of thinking of formal rules as superior to informal rules—they are written, known in advance, capable of being understood more precisely, and therefore lead to greater predictability in economic exchanges, etc.—the formalization focus seems misplaced or ideological for several reasons. First, it has long been recognized in legal thought, at least since the legal realist school of the early twentieth century, that the legal system is not a complete regime of formal norms, but allows the interplay of informal norms in ordering social relations including in the economic sphere.<sup>87</sup> In private law adjudication of torts, contracts, and property, this phenomenon is rampant and manifests itself in many ways, including through the distinction between rules and standards.<sup>88</sup> Given this, the advocacy of a purely formal law approach has a kind of Alice-in-Wonderland feel to it. Second, the advocacy of formal law implicitly—and often explicitly—equates informality with illegality, and advocates the replacement of illegal, informal norms with formal, legal norms, a line of argument famously popularized by Hernando De Soto.<sup>89</sup> This argument completely overlooks a very rich literature on informal norms and institutions in socio-legal studies and legal anthropology on legal

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85. See Regine Andersen, *How Multilateral Development Assistance Triggered the Conflict in Rwanda*, 21 *THIRD WORLD Q.* 441, 445-47 (2000); Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 *HARV. INT'L L.J.* 443, 451-52 (1997).

86. See *ON THE RULE OF LAW*, *supra* note 1, at 119.

87. *Id.* at 77-79.

88. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1705-10 (1976). This distinction is also recognized by legal scholars writing in different legal traditions including law and economics. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 *STAN. L. REV.* 577, 592-93 (1988).

89. DE SOTO, *supra* note 53, at 161-71.

pluralism, which has long documented the coexistence of multiple legal and normative orders in which the statist, formal legal order is only one of many.<sup>90</sup> In addition, more recent research has also begun to make problematic the neat distinction between the state/law/formal versus non-state/illegal/informal dichotomy.<sup>91</sup> Instead, this literature has posited that legal and illegal norms and institutions are often deeply intertwined with each other, in a process wherein one could see the state as very much involved in the production of illegality while illegal norms and processes shape the very structures of the state itself.<sup>92</sup> This focus on what has been called the "empirical state," a view that attempts to see states "'from below' and 'from within' as much as 'from above,'"<sup>93</sup> makes problematic the typical understanding of the illegal and informal as deviant behaviors that will eventually be replaced by state law, while avoiding the romanticism of informal legal orders that are sometimes typical of the legal pluralism literature.

The third strand of rule of law strategies in development policy focuses on the judiciary and imagines adjudication as a mechanical exercise wherein typical bureaucratic discretion is eliminated. In this approach the rule of law is idealized as a relief from rent-seeking activities of the executive or the interest-group balancing of the legislative branches.<sup>94</sup> It also pictures the judiciary purely as a dispute resolution mechanism, although, in reality, perhaps only in commercial cases.<sup>95</sup> This image of the judiciary dominates much of the current literature, for example in law and economics.<sup>96</sup> This

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90. See, e.g., Lauren Benton, *Beyond Legal Pluralism: Towards a New Approach to Law in the Informal Sector*, 3 SOC. & LEGAL STUD. 223, 223-42 (1994); Boaventura De Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagada*, 12 LAW & SOC'Y REV. 5, 89-90 (1977); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC. REV. 869, 872-74 (1988); Razzaz, *supra* note 79, at 85.

91. See Edesio Fernandes & Ann Varley, *Law, the City and Citizenship in Developing Countries: An Introduction*, in *ILLEGAL CITIES*, *supra* note 79, at 3-5; Josiah McC. Heyman & Alan Smart, *States and Illegal Practices: An Overview*, in *STATES AND ILLEGAL PRACTICES* 11-17 (1999).

92. See Heyman & Smart, *supra* note 91, at 14-15.

93. See *id.* at 15.

94. See Richard Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 1-11 (1998).

95. See *id.* at 1-2.

96. See generally *id.* (discussing the legal reforms necessary for a modern nation to prosper economically).

emphasis on the mechanical nature of judicial processes also often leads to the advocacy of simple formal norms, resting on the idea that complex norms may call for complex judicial techniques such as interest balancing or efficiency analysis that judges in poor countries may lack the competency to perform.<sup>97</sup> The mechanical nature of adjudication has little to do with the nature of the legal system itself—for example, common law or civil law—which may in fact differ less than is commonly assumed.<sup>98</sup> Many of these beliefs seem to overlook elementary lessons of legal thought while sometimes asserting highly contradictory ideas. The mechanical image of the judge certainly cannot be squared with the knowledge, shared by almost all legal thinkers, that rules are always incomplete, inconsistent, and ambiguous, and that the role of the judge is to resolve this through a process of interpretation. Legal realists argued that the law-politics distinction gets blurred in this process of interpretation, while the critical legal theorists have argued that judicial reasoning may show a bias or ideology that may systematically lead to domination by elites.<sup>99</sup> Liberals like Ronald Dworkin see judicial interpretation as leading to the introduction of principles to fill gaps and resolve conflicts between the rules themselves.<sup>100</sup> Early American legal thinkers from Karl Llewellyn to Oliver Wendell Holmes, who espoused the sociological jurisprudence method, would not have shared this mechanical view of the judge's role.<sup>101</sup> Even modern law and economics could be said to share a very pragmatic orientation to adjudication, in its call to judges to look outside the law—though only to economics—to find solutions to legal problems.<sup>102</sup> In fact, emerging literature in economics is itself beginning to cast doubts on whether the introduction of formal norms and a mechanical judiciary is actually leading to economically efficient outcomes.<sup>103</sup>

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97. *Id.* at 4-5.

98. See Martin Shapiro, *The Success of Judicial Review, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193 (Sally J. Kenney et al. eds., 1999).

99. See DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: (FIN DE SIÈCLE)* 228-30 (1997).

100. See RONALD DWORKIN, *LAW'S EMPIRE* 56 (1986). Admittedly this interpretation is aimed to produce what Dworkin calls "coherence."

101. See KENNEDY, *supra* note 99, at 82.

102. See RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 387-88 (1990).

103. See Djankov et al., *supra* note 75, at 453-511.

It is clear that this idealized—and ideologized—image of the rule of law does not lead to development, even if narrowly conceived as economic growth. But it has problematic implications for human rights and security as well. A narrow conception of the judge, for example, often leads to arguments by scholars like Richard Posner that human rights laws should not be introduced in developing countries if economic growth is to be favored.<sup>104</sup> Indeed, a call for the rule of law in the context of plural legal orders is often a call for the assertion of the superiority of state law over non-state law, through the coercive power of the state to achieve particular outcomes that favor some. This can be seen in the advocacy to override customary property rights with “registered land titles” in countries like Kenya, for example,<sup>105</sup> which may create problems from a security or human rights perspective in post-conflict or transitional contexts. Finally, as I have argued above<sup>106</sup> and elsewhere,<sup>107</sup> the human rights discourse has a political and counter-hegemonic function that makes it much more critical than the development discourse. The rule of law discourse will not easily replace it for this very reason. Thus, the call for the rule of law discourse is a call to use state law to prefer some methods and consequences relating to development, human rights, and security, and must not be interpreted as a call to respect human rights. Rather, there needs to be a more critical evaluation of the uses of the rule of law in particular contexts.

#### IV. RULE OF LAW AND SECURITY: PROBLEMS OF LEGITIMACY

As was explained earlier, the concept of international security has fundamentally changed in recent years: the former state-based, territorial notion of security has now been supplanted by a more comprehensive notion of security.<sup>108</sup> The 2004 report of the High Level Panel on Threats, Challenges and Change, created by the

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104. See Posner, *supra* note 94, at 3.

105. For a detailed analysis, see Joel M. Ngugi, *Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration*, 25 MICH. J. INT'L L. 467, 490-95 (2004).

106. See *supra* Part I.

107. See RAJAGOPAL, *supra* note 12, at 245-53.

108. See *supra* Part I.



U.N. Secretary-General, describes this as follows: “Any event or process that leads to large-scale death or lessening of life chances and undermines States as the basic unit of the international system is a threat to international security.”<sup>109</sup> It then goes on to include six clusters of threats within this definition: environmental and social threats including poverty, infectious disease, and environmental degradation; inter-state conflict; internal conflict, including civil war, genocide, and other large-scale atrocities; nuclear, radiological, chemical, and biological weapons; terrorism; and transnational organized crime.<sup>110</sup> With this holistic approach, the report joins a chorus of calls to expand the narrow definition of state security to include environmental security and human security.<sup>111</sup> Indeed, the National Security Strategy of the United States makes this linkage between poverty and security quite clear and asserts that poverty can make weak states vulnerable to terrorist networks and drug cartels within its borders.<sup>112</sup> With this move, poverty itself becomes a security threat, so that the means of responding to it become more militarized. Poverty alleviation—through the Millennium Development Goals, for example—becomes a means of addressing a security threat, as opposed to a set of tools that are required either because of moral duties towards the poor or because of a broad-based economic development strategy.<sup>113</sup> *Ergo*, a logical conclusion from this new approach would be that military interventions to secure development goals or to deal with environmental catastrophes would be legitimate and perhaps even lawful. This is not a fanciful line of thinking: one could recall the important, perhaps unwitting, role that the UNDP’s Arab Human Development Report played in supporting the neoconservative argument for the Iraq war, by pointing to the role of gender inequality and poverty in Arab

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109. *A More Secure World*, *supra* note 1, at 25.

110. *Id.*

111. HUMAN SECURITY NOW, *supra* note 47, at 4.

112. See NATIONAL SECURITY STRATEGY, *supra* note 21.

113. Indeed, this could be said to be one of the weaknesses of the U.N. report on the Millennium Development Goals, to the extent that the report advocates what could be termed as a “Washington Consensus Plus” approach to poverty alleviation rather than encouraging plural paths of economic development. See MILLENNIUM PROJECT, REPORT TO THE U.N. SECRETARY-GENERAL, INVESTING IN DEVELOPMENT: PRACTICAL PLANS TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS 8-10 (2005).

“backwardness.”<sup>114</sup> The timing of that report did not hurt the broad U.S. agenda of modernizing the Middle East by force. Rather, it helped generate a hegemonic consensus that forcible intervention was for the good of the Arab people. Of course, human rights-based arguments have been used many times by hegemonic states to justify their interventions, in the form of the doctrine of humanitarian intervention.<sup>115</sup> Human rights groups such as Human Rights Watch were similarly inadvertent allies of the Iraq war effort by refusing to evaluate the legality of the war effort itself, while highlighting the terrible human rights record of the Iraqi regime,<sup>116</sup> thereby bolstering the argument of the war hawks that the use of force was justified against the Baghdad dictator. Similarly, the aftermath of the Asian tsunami in early 2005 saw a tremendous level of military intervention and jockeying between states that were eager to show how capable their respective military forces were in responding to natural disasters.<sup>117</sup> This “securitization of everything” is in this sense not new, though it is the first time that a U.N.-appointed panel is endorsing such a broad definition. What does one make of this move, and how is this related to the rule of law?

One could begin by noting that the term “rule of law” is not used in the High Level Panel report itself. The sections which seem most pertinent to the issue in the report concern Parts 3 and 4, which deal, inter alia, with the role of the Security Council.<sup>118</sup> Here, the report firmly supports the view that the Security Council must be the sole authority to authorize the use of force, in cases which fall outside the purview of Article 51 of the U.N. Charter.<sup>119</sup> This

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114. U.N. DEV. PROGRAMME, ARAB HUMAN DEVELOPMENT REPORT (2002). For a commentary, see Thomas L. Friedman, Op-Ed., *The Arabs at the Crossroads*, N.Y. TIMES, July 3, 2002, at A23.

115. See, e.g., FERNANDO TESON, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 175-79 (1997).

116. See, e.g., Justice For Iraq: A Human Rights Watch Policy Paper (Human Rights Watch, 2002), available at <http://www.hrw.org/backgrounder/mena/iraq1217bg.htm>.

117. One writer referred to this as “competitive compassion” between aid-giving nations. See P.S. Suryanarayana, *International Solidarity*, FRONTLINE, Jan. 15, 2005, available at <http://www.hinduonnet.com/fline/fl2202/stories/20050128006312400.htm>.

118. See *A More Secure World*, supra note 1, at 59-92.

119. See U.N. Charter art. 51, para. 1 (describing the meaning of and process for the exercise of the right of self-defense for nation-states).

commitment to multilateralism is coupled with an acknowledgement that the Council needs to be reformed, and with two proposed models for change in the membership of the Council.<sup>120</sup> While this commitment to seek structural change in the way the current international order is managed is to be welcomed, the report is silent on the question of the Council's compliance with international law, and only refers to the Council's lack of accountability through the rather weak call for "civil society engagement."<sup>121</sup> Similarly, though the report recognizes that the "war on terrorism" within many countries has itself emerged as a major threat to human rights and the rule of law,<sup>122</sup> it offers no concrete recommendations for making the war on terrorism conform to human rights or the rule of law. The Secretary-General's own report, which builds on the High Level Panel report, continues in the same vein, by failing to address the Security Council's own history of noncompliance with human rights standards, or about the problematic aspects of the "war on terror."<sup>123</sup> The Security Council's record since the end of the Cold War has raised problematic questions about its commitment to human rights, ranging from policy failures—such as the failure to take action in specific human rights crises<sup>124</sup>—to active collaborations in human rights violations by imposing economic sanctions that lead to large numbers of deaths, providing the cover of legitimacy to wars of aggression. The key problem here arises from the fact that the Secretary-General uses the term "rule of law" to mean many things, including multilateralism, a commitment to the U.N. Charter, and human rights principles. While this maximalist approach to the meaning of rule of law may be, and indeed is, laudable, the Security Council will find it almost impossible to comply with such an expanded notion of the rule of law in its own actions, at least as judged by its past record. In addition, the implications of a broad approach to defining security are not readily apparent, especially relating to the role of the Security Council. Would the Council be expected to act under Chapter VII of the U.N.

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120. See *A More Secure World*, *supra* note 1, at 79-81.

121. See *id.* at 83.

122. *Id.* at 48.

123. See *In Larger Freedom*, *supra* note 1.

124. See *infra* note 128 and accompanying text.

Charter to end massive human insecurity of any kind, including those caused by poverty or natural disasters? That seems unlikely and even unwise, as it would multiply the grounds—and pretexts—for use of force in international relations at a time of hegemonic relations between states.

These two related failures—the failure to critically focus on the Security Council and the failure to critically evaluate the “war against terrorism”—are in fact very much interrelated. They undermine the whole attempt to articulate a broad notion of security as it raises concerns that an unaccountable Security Council, even if it is expanded numerically, may turn out to flout human rights and the rule of law in the name of responding to myriad non-traditional threats. It also raises important questions of legitimacy of Security Council actions under Chapters VI and/or VII of the U.N. Charter to pursue rule of law programs in peace operations, when the Council itself overlooks the rule of law in its own functioning. The U.N. Secretary General in fact sees this connection quite clearly. In his speech at the opening of the 59th session of the General Assembly in 2004, Kofi Annan stated: “Those who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it.”<sup>125</sup> He further added that “[e]very nation that proclaims the rule of law at home must respect it abroad; and every nation that insists on it abroad must enforce it at home.”<sup>126</sup> These Delphic pronouncements point to an important truth: that the absence of the rule of law—however one may define it—in domestic contexts has to be linked with the absence of the rule of law at the international level. This absence of the rule of law is not merely evidenced by the more obvious example of the U.S. decision to side-step the Security Council in its war against Iraq. More problematically, it relates to the actions of the Security Council itself as it authorizes what many consider to be arbitrary, if not unlawful actions through its counter-terrorism committee, created under Security Council Resolution 1373.<sup>127</sup> Many of its actions arguably flout basic protections ex

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125. Press Release, The Secretary-General, Rule of Law at Risk Around the World, Says Secretary-General in Address to General Assembly, U.N. Doc. SG/SM/9491 (Sept. 21, 2004).

126. *Id.*

127. *See, e.g.*, HUMAN RIGHTS WATCH, HEAR NO EVIL, SEE NO EVIL: THE U.N. SECURITY

tended under human rights treaties and available under customary international law, such as the presumption of innocence, the right to confront one's accusers, and even the right to a remedy, which are not automatically available under the Council's procedures. The perceived absence of the rule of law—especially in its expanded meaning that includes human rights—in the actions of the Security Council makes it more difficult to advance those notions within domestic contexts, especially through peace operations authorized by the Council itself. This “legitimacy deficit” is compounded by a gathering sense that for all the talk about “comprehensive security” in the High Level Panel report, it remains overwhelmingly focused on the idea that the proper response to terrorism consists of rebuilding and strengthening so-called weak or failed states.<sup>128</sup> In this new world of strong states, softer goals such as development, environmental protection, and human rights are likely to take a backseat, while nation-building strategies are likely to focus on the imposition of order from the outside,<sup>129</sup> evoking concerns about the return of formal colonialism. Such an externally driven approach is unlikely to elicit much concern for the rule of law, however narrowly or broadly it is defined. These concerns, which matter for the legitimacy of the rule of law in the domain of security, need to be addressed much more robustly.

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COUNCIL'S APPROACH TO HUMAN RIGHTS VIOLATIONS IN THE GLOBAL COUNTER-TERRORISM EFFORT 4-7 (2004). For a review of some of the problems of legitimacy and the level of contention at the Security Council, see generally José E. Alvarez, *The Security Council's War on Terrorism: Problems and Policy Options*, in JUDICIAL REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES (Erika de Wet & André Nollkaemper eds., 2003); Edward Luck, *Tackling Terrorism*, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY 85, 93-98 (David M. Malone ed., 2004).

128. This is not surprising since the discourse of failed or weak states had already emerged as part of the mainstream policy and legal discourse in the 1990s and the link between weak states and U.S. national security had been well recognized. For a critical review of the failed states idea, see generally Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L L. & POL'Y 903 (1997). On weak states and U.S. national security, see generally JEREMY WEINSTEIN ET AL., CTR. FOR GLOBAL DEV., ON THE BRINK: WEAK STATES AND US NATIONAL SECURITY (June 8, 2004), available at [http://www.cgdev.org/doc/books/weakstates/Full\\_Report.pdf](http://www.cgdev.org/doc/books/weakstates/Full_Report.pdf).

129. See NECLA TSCHIRGI, INT'L PEACE ACAD., POST-CONFLICT PEACEBUILDING REVISITED: ACHIEVEMENTS, LIMITATIONS, CHALLENGES 16-18 (Oct. 7, 2004), available at [http://www.ipacademy.org/pdfs/POST\\_CONFLICT\\_PEACEBUILDING.pdf](http://www.ipacademy.org/pdfs/POST_CONFLICT_PEACEBUILDING.pdf).

## CONCLUSION

The discourses of security, development, and human rights have gradually merged. The key challenges to security are now seen to come not from invading armadas of strong states but from well-organized groups of transnationally linked terrorists who operate in “failed” or weak states that are unable or unwilling to stop them. Security is also now more broadly conceived to mean human and state security. Development challenges are currently thought to arise from the absence of viable state institutions including a judiciary and formal laws that protect property and contracts. Human rights challenges are also increasingly seen as particularly acute in situations where states have failed or are too weak to stop massive abuses. There is, in other words, a consensus that state failure or failure of governance is the root of all the problems in these disparate areas of security, development, and human rights. This consensus has in turn led to a focus on the rule of law as a way of rebuilding or strengthening the state. But using the rule of law as a way to build up states will not resolve the tensions between the disparate agendas of development, security, and human rights themselves. It is not argued here that the rule of law is a pernicious idea or a Trojan horse. Effective governance of any society cannot rest on any basis other than law. But the term “rule of law” is currently capable of just too many disparate meanings depending on the international policy agenda in which it is invoked.

The invocation of the rule of law will be of limited relevance if there are conflicts between the agendas themselves—that is, between human rights and development or between human rights and security—and will not resolve fundamental contradictions between these various agendas. The current discourse, reflected in the High Level Panel report and the Secretary-General’s reports, is remarkably conflict-free and assumes a harmonious and mutually reinforcing relationship between development, human rights, and security. This assumption is unwarranted, and even perhaps ideological. Promoting the rule of law as part of disparate policy agendas also creates uncertainty in terms of the outcomes of programmatic approaches—in other words, it is not clear who will

be the losers and who will be the beneficiaries as a result of the implementation of these various policy agendas. A commitment to the formalization of informal property may mean, for example, that foreign investors are able to buy more land in an urban area and local entrepreneurs are bought out. This may indeed be the outcome that a particular society and government desires to achieve. But it does not help to camouflage that outcome in the language of the rule of law as though the outcome is justified by the very rationality and objectivity of the law itself.

Neither does a commitment to the rule of law as a way to rebuild or strengthen the state answer the question of how large or small the state needs to be. Nor does it resolve the question of whether the state needs to be strong in some areas while weak in others. The answers to these questions are likely to vary dramatically depending on the local/national contexts and the particular policy components of the agendas themselves. Finally, the commitment to establish the rule of law within failed states will be fundamentally undermined if the international rule of law is not given greater consideration, especially where rule of law programs are pursued through peace operations authorized by the Security Council. It is most unfortunate that the recent flood of U.N. reports does not deal with this issue with the seriousness it requires.