

## The Rule of Law Movement in the Age of Terror

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The September 11 attacks and the ensuing “war on terror” have challenged advocates of the rule of law<sup>1</sup> worldwide to reconsider some of the underlying premises of their trade. By damaging the moral leadership of the United States, the war on terror has deprived the rule of law movement<sup>2</sup> of its foremost governmental supporter. By revealing the capacity of small groups of determined individuals to destabilize global centers of power, September 11 and its successors in Europe and beyond have dramatically illustrated the importance of good governance everywhere. Finally, the reaction to terrorism’s twenty-first century revival risks diverting advocates from equally pressing, if less prominent, issues of justice and security.

One of the defining characteristics of the last half-century has been the expansion of the rule of law into many corners of the globe. At mid-century, core rule of law principles—an independent judiciary, due process, and the right to counsel—were mere aspirations in most societies. By century’s end, however, more than half the world’s population lived in countries whose legal systems afforded at least a modicum of protection of individual rights. Increasing acceptance of the principle that governments and individuals alike are accountable to publicly known, non-arbitrary rules equally applicable to all, manifested itself in numerous ways: the fall of dictatorships from Latin America to Eastern Europe; the growth of a transnational civil society movement for fundamental rights; the proliferation of donor assistance to legal institutions; and the establishment of international tribunals, including a permanent International Criminal Court, to try the most heinous crimes.

A broad array of actors has fostered the spread of law-based governance—businesses seeking predictable frameworks for investment; governments negotiating lower trade barriers; and victims of abuse demanding prosecution of perpetrators. The process has been far from smooth and hard to disentangle from the politics of the moment. And yet, with allowances for oversimplification, it is possible to discern three broad and overlapping dimensions of a multi-faceted movement to consolidate the rule of law. Human rights have been a central component of this progressive consolidation, and the

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1. The phrase “rule of law” is used here to “describe[ ] a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral and universally applicable rules, and in a manner that respects fundamental human rights norms . . . .” JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (2006).

2. The rule of law movement is a loose network of individuals and institutions from around the globe seeking—through the use of tactics such as litigation, advocacy, policy-relevant research, technical assistance, and pilot demonstration projects—to help consolidate the rule of law at home and abroad.

U.S. government played a distinctive role in supporting each aspect of the movement's work.

One strand of modern rule of law development, which commenced at the conclusion of the Second World War, focused on the international architecture of norms and institutions. The complete breakdown of institutional order, and the barbarity of war and its accompanying Holocaust, propelled the victorious Allies to construct a new global legal system—and, for the first time, to codify recognition of fundamental human rights at its core. The founding document of the new age—the Universal Declaration of Human Rights—proclaimed it “essential . . . that human rights should be protected by the rule of law.”<sup>3</sup> Ever since, the web of international rules and regulations has proliferated—on subjects ranging from monetary policy and international lending to arms control and human rights.

A second dimension of the movement focused on civil society—the nourishment of a wide-ranging group of individuals and non-governmental institutions committed to using, testing, and giving meaning to the new international rules through peaceful action. Amnesty International, the quintessential non-governmental rights group, was born in 1961, but the focus of energy really began to shift with the signing of the Helsinki Accords in 1975 by thirty-five governments in Europe and North America. A crowning achievement of the Conference on Security and Cooperation in Europe, Helsinki addressed everything from military maneuvers to research on glaciology, permafrost, and problems of life under cold conditions. It is perhaps no surprise that neither Gerald Ford nor Leonid Brezhnev (let alone Henry Kissinger) anticipated the galvanizing impact its human rights provisions would have upon an entire generation. But within a year, activists in Moscow were imprisoned for demanding that the Soviet government abide by its commitments. As their fate became known, a chain reaction of international proportions spawned the growth of a worldwide network. Over the next decade, first dozens, then hundreds, and ultimately thousands of people from Russia, Eastern Europe, and Latin America sought to hold their governments accountable for crimes committed in their names. By the early 1990s, independent civil society was an increasingly capable and influential member of the global body politic.

A third branch of rule of law promotion has sought to fortify state capacity. The goal was and remains, essentially, to foster effective, transparent, accountable governments capable of providing services, protecting security, and enforcing laws in open societies. Western donors poured tens of millions into judicial training seminars, police reform, and legal assistance programs in the hope of rooting law-based rights compliance in governments' capacity to provide security fairly and humanely. To be sure, both the standard-setting and civil society streams of rule of law development proceeded

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3. G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

apace during this period. But the problem of “weak states” commanded increasing attention.

By the end of the twentieth century, the rule of law movement, and particularly those elements focused on the protection of human rights, could claim partial credit for a series of advances in liberty and accountability across the globe. While there remained many uncompleted tasks, on the whole advocates were reasonably confident in their tools and their objectives, if not their timetable for success. With significant exceptions (Belarus, Burma, Saudi Arabia, and Uzbekistan, among others), substantial areas of the world seemed to be clearly, if not always consistently, on a path toward law-based governance.

The wave of terrorist attacks in major world capitals since September 11, the U.S. government’s ill-fated response, and, more generally, the accelerating pace of globalization, have altered the landscape and thrown up a host of challenges for the progressive realization of the rule of law.

For purposes of this brief essay, three stand out.

*First, how to compensate for the loss of U.S. prestige as a leading, if imperfect, force for human rights worldwide*

In the 1980s, though torture by U.S. proxies in Latin America and elsewhere was widespread, virtually no one in the U.S. government sought publicly to justify it as an accepted tool of interrogation. Moreover, despite criticism of U.S. policy, the American position as a global leader in the struggle for democracy and the rule of law was not seriously questioned. Indeed, the inconsistency between the widely accepted pretense of U.S. moral leadership in defending rights, and the more muddied reality of U.S. conduct, provided the fulcrum around which much human rights advocacy aimed at Central America pivoted.

Today, of course, torture is debated in respected Washington policy circles as a legitimate means of extracting information; interrogation tactics that amount to torture have been endorsed by senior U.S. officials. More generally, the Bush Administration’s pursuit since September 11 of what it has termed a “war on terror”—including its deployment of practices such as extraordinary rendition and disappearance and of interrogation methods such as “waterboarding,” and its brazen effort to dismantle any and all limits on executive power—has precluded the United States from playing a leadership role for human rights around the world for some time to come.

As the single most powerful military and political actor on the planet, Washington cannot be ignored. But the loss of U.S. influence is already being felt—in a newly repressive Russia, a worsening rights climate across broad swaths of the Middle East and Central Asia, and an increasingly assertive China ready to sacrifice rights for resources from Angola to Sudan.

The implications are clear. Rights advocates must rely less on U.S. leadership and cultivate alternative sources of moral, political, and financial sus-

tenance for their work. Europe is an obvious candidate, but it has too often failed to rise above the lowest common denominator in reaching a region-wide consensus. More generally, regional institutions—the European Union, the Organization of American States, the African Union—should be pushed to act more consistently, and publicly, in defense of rights and the rule of law. Finally, greater efforts should be devoted to forging stronger and more representative coalitions of rights and law reform advocates within, and beyond, national and regional borders. The abdication of U.S. leadership presents an opportunity of sorts to build a more balanced, multipolar movement for justice, monopolized by no single model, and drawing on many. But without a governmental voice carrying Washington's heft in the halls of power, the task is daunting.

*Second, how to respond to globalization's compression of time and space in ways that promote the rule of law*

The September 11 attacks were a graphic demonstration of the extent to which globalization has enhanced the power of non-state actors in countries lacking the rule of law to threaten personal security in Western capitals. As a result, the importance of improving the quality of governance everywhere has become more widely appreciated. Long considered a source of poverty, corruption, and disease to themselves or their immediate neighbors, weak or failed states are increasingly (and properly) seen to be a universal and pressing problem. The reconstitution of ordered society in post-conflict zones from Afghanistan to Somalia is everyone's concern. Rule of law reform has a clear, self-interested security imperative.

But it is not only that what happens abroad more clearly and quickly affects those at home. It is also true that issues which used to be considered "local" are increasingly intertwined with "international" law, institutions, and interests. Given the speed of contemporary communications, the publication in a Danish newspaper of cartoons of the prophet Mohammed rapidly escalates into a global crisis. Around the world, courts created to try perpetrators of mass crimes—genocide and crimes against humanity—blend national and international norms, practices, and personnel. Even in the United States, where ignorance of, and/or resistance to, international law persists in some quarters (and where domestic "civil" rights have long been differentiated from international "human" rights), reports about the mistreatment of detainees in American custody at Guantanamo and in secret facilities worldwide have made the Geneva Conventions and their "Common Article 3" more familiar terms. More and more, the rule of law is seen to be a domestic matter.

As a result, the constituency for rule of law reform is potentially far larger than previously believed. Moreover, the rule of law is not just a foreign problem, but a question very close to home. The rule of law movement

should seize on these developments to marshal greater public support for, and investment in, rule of law initiatives.

*Third, how to avoid becoming so preoccupied with terrorism and counter-terrorism as to overlook other problems that may affect more people more often*

Terrorism is a genuine threat to human rights and open society, and it clearly must be addressed. Nonetheless, a host of problems not directly linked to terrorism still require attention, even if they do not grab the headlines.

A somewhat random sample of “everyday” justice issues might include: improving prevention of ordinary crimes (e.g., theft, robbery) through better police performance, improved mechanisms of internal and civilian oversight, and enhanced community law enforcement collaboration; addressing and reducing massively high rates—and the attendant negative financial, health, and criminal justice consequences—of over-incarceration of nonviolent offenders in the United States, Russia, and other countries; reforming systems of government legal service delivery for the indigent accused to ensure better quality representation and more efficient use of public funds; and fostering government accountability and transparency through the adoption, and more consistent implementation, of laws guaranteeing public access to information.

Several other issues require urgent attention from law reform advocates, though they are neither linked to terrorism nor diminished by the events of 9/11. These include: mobilizing states’ support—in providing information relevant to investigations, as well as in apprehending indictees—for the prosecution of war crimes and crimes against humanity by international justice mechanisms; clarifying, expanding, and enforcing legal protection for a growing global population of “de jure” and “de facto” stateless persons; securing effective legal remedies for large-scale theft and corruption arising from the exploitation of natural resources, commonly known as the “resource curse”; and responding to recurrent situations of genocide, ethnic warfare, and government-sponsored murder that arise with distressing frequency.

Addressing these and other challenges will not be easy. But I see three reasons for measured optimism.

First, periods of terrorism are not unprecedented. One need not deny the novelty of the post-September 11 threat to acknowledge that terrorism has been around before in various guises. A wave of politically motivated assassinations successfully targeted European and American political leaders in the late nineteenth and early twentieth centuries. More recently, during the 1980s, the word “terrorism” was frequently brandished by U.S. officials and others to describe political violence against civilians by any number of indigenous and Soviet- or Cuban-inspired revolutionary movements throughout Latin America. And, of course, there have been a host of local-

ized eruptions of terrorist violence in, for example, Northern Ireland and the Basque region of Spain. Today, unlike in the past, terrorism threatens mass violence against everyone, everywhere—in New York and London as well as in Baghdad and Tel Aviv. But just as earlier eruptions of terrorist violence were ultimately defeated by broadening opportunities for the expression of peaceful dissent within democratic boundaries, today robust defense of the rule of law and human rights remains a foundation of, not—as some have argued—an obstacle to, the fight against terrorism.

Second, the rule of law movement worldwide is stronger, deeper, and more experienced than ever. It increasingly attracts the best and brightest among each year's new crop of university graduates, lawyers, and others. Leading NGOs help shape public policy; their reporting is read at the highest levels of government. Many organizations engaged in justice issues have developed sophisticated methods of working with, while not being co-opted by, state authorities. Institutional support for human rights and justice reform has grown within inter-governmental bodies, such as the United Nations and the European Union, and among private donors. Once little more than an idea, the rule of law—with human rights at its core—has become a force to be reckoned with.

Finally, since its inception, the rule of law movement's greatest strength has been its commitment to human dignity for all. Its fundamental premise—that all humans, by virtue of their humanity, merit the full and equal protection of the law—draws upon ethical as well as strictly legal underpinnings. In his final sermon in March 1980, Oscar Romero, the martyred Archbishop of San Salvador, spoke to this moral dimension in calling upon army soldiers to “recover your consciences” and in pledging not to “remain silent” before state slaughter.<sup>4</sup> Romero is gone, but his conscience, his courage, and his example live on in the struggle for justice that continues today.

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4. AMERICAS WATCH, *A YEAR OF RECKONING: EL SALVADOR A DECADE AFTER THE ASSASSINATION OF ARCHBISHOP ROMERO V* (1990).