Managing Public Security and the Rule of Law

An Introduction

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Someone must have been telling lies about Joseph K., for without having done anything wrong, he was arrested one fine morning.

Franz Kafka, *The Trial,* (1925)

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INTRODUCTION

This guide was originally written to accompany the module of the Cranfield University MSc in Security Sector Management entitled "Managing Public Security and the Rule of Law." It is, however, a freestanding document, and does not require attendance on, or knowledge about, the Module to be understood and, I hope, to be of value also. Two preliminary comments are in order.

I am not a lawyer, which is appropriate for a subject, which – in spite of its name – is not really a legal subject. Whilst it is true that the Rule of Law (henceforth ROL) is partly based on laws at national and international level, the subject goes much wider than that. The ROL is fundamentally about the relationship between the citizen and the state, and the nature of that state in turn is influenced by cultural, social and historical specificities, and by the processes of politics in the state. Indeed, other languages, such as French and German, use terms that translate as "law-based state" and express rather better, perhaps, what the issue really is. For all these reasons, the ROL is analysed in a multi-cultural context, and the limitations of some of its western-liberal assumptions are described.

Secondly, and as a result, this guide deals primarily with political and practical issues and problems surrounding the ROL, including the question of why public opinion is often hostile to some of its implications. Such issues are by no means confined to post-conflict or developing states, and indeed examples are taken from the developed West as well. It also concentrates on the security and justice sector, not because other sectors are unimportant, but because that sector is the heart of the strategic relationship between the citizen and the state.

To avoid cluttering up a relatively brief text with footnotes, an annotated reading guide is provided as one of the Annexes. Further proposed additions are very welcome.

ONE: WHAT IS THE RULE OF LAW?

The ROL is a complex and slippery subject, both inherently, and also because of its political instrumentalisation by governments, donors and international organisations. Most accounts of the ROL nod briefly to the plethora of overlapping and competing definitions, before proceeding to discuss it from the angle, or angles, which the authors themselves appear to prefer.

Conflicting and competing definitions are, of course, normal in the humanities and social sciences. There is not much debate about what a kilometre is or what the bile duct does, but there are large, and potentially endless debates about the nature of fascism, the causes of the French Revolution and the sociology of knowledge. The problem is, though, that much of the literature of the ROL, and almost all of the activities carried on under its banner, are not descriptive or analytical, but rather prescriptive and practical. That is to say that governments, donors and international organisations define the ROL as they see it, and then finance projects to achieve it, seeking to persuade governments to change their behaviour in line with the theories. Here, the often confused and contradictory nature of the definition of the ROL is a real practical problem, because governments may be asked by different donors to carry out a range of initiatives, with little coherence, sometimes in opposition to each other, according to different definitions used by the different actors.

Moreover, there are fashions in government reform as there are in everything else, and donors, as well as the community of NGOs and consultants that service them, will tend to clothe their proposals in the currently fashionable vocabulary. Thus, an NGO which has been working for many years for a donor to overhaul the code of justice of various African military forces may have described its work successively or alternatively as justice reform, military capability building, governance reform, security sector reform, human rights training and now ROL, even though in practice it might have continued to do exactly the same thing.

All of this, of course, is typical of the agendas of donors and international organisations, and is not intended as a criticism. It is important to understand, though, that the ROL joins a set of other nebulously-defined issues including governance, security sector reform, development, human rights and democratisation, where huge amounts of money are spent on programmes, but where agreement on even basic definitions is a long way away, and may indeed be impossible. Why this difficulty? There are two main reasons

First, ROL deals with the most sensitive part of the apparatus of state and governments, areas which even weak states try to cling on to. Acting in the area of the ROL – or at least using the vocabulary – is a way of forcing one's way into this most sensitive area, and having influence over the fundamentals of a state's operation and its relationship with its citizens. Naturally, there will be much enthusiasm to acquire this influence, and so outside organisations will tend to define the ROL as something that falls within their remit, and where they have a valid reason to involve themselves. Thus, for International Financial Organisations, the ROL is a prerequisite for economic growth and a component part of neoliberal economic theory. This is often presented as a given, although

in fact there is little actual evidence it is true. For development organisations, the ROL is a requirement for sustainable development, although, again, there is little direct evidence for this. For human rights groups, human rights and the ROL are essentially the same. For other actors, the ROL is a fundamental part of democratisation or the reform of the security sector, it is inseparable from greater media freedom, presupposes an increased role for women, or a stronger civil society, and many other objectives, according to the interests of the organisation concerned.

The second reason is more philosophical. As with democracy, human rights and similar concepts, most ROL ideas are based on assumptions that are often widely accepted, but always un-provable. For example, the idea of the importance of equality before the law is widely supported, but it remains, at bottom, only a personal preference to say that equality is preferable to inequality. There is no way in which it can logically be proved to be true, and in different civilisations at different times, inequality before the law was accepted as normal. Most ROL thinking is therefore essentially arbitrary (though to be fair, not random) in its choice of objectives, and the very breadth and fuzziness of the concept means that many initiatives will begin from quite separate and often irreconcilable sets of assumptions.

In its essence, ROL is about the relationship between the individual and the state, and so the elements of the ROL that you consider important will vary depending on your own conception of this relationship. As we shall see, much ROL thinking is anchored in western, and primarily liberal, traditions of thinking about the state. This creates its own problems when the ROL is applied to non-western liberal societies, but in this context it is also important to note that there is no unified western liberal view of the state, and so no single view of the ROL either.

Some traditions of western thinking, especially among Anglo-Saxons, have historically seen the state as the main danger to its citizens' well being, and so the ROL is assumed to be essentially about the limitation of state powers. Extreme versions of this approach deny much of a role for the state at all, beyond that of a kind of economic umpire and enforcer of contract law, and this is reflected in certain concepts of the ROL. On the other hand, mainstream social-democratic thinking sees a large role for the state in helping people to lead better lives. Some European continental traditions, of the *État de droit* type, with a strong tradition of administrative law, emphasise formal correctness of procedure and careful delineation of responsibilities. Many states have a tradition that means that all government actions have to be explicitly justified by a law or a decree. Recent securocratic thinking in major western states, on the other hand, has favoured reducing controls on the power of the state at the expense of individual freedoms. All of these different ideas have left their mark, often indirectly, on the ROL debate and on specific initiatives undertaken with third countries.

In most cases, these different (and relatively arbitrary) points of departure are not recognised as such, and the thinking behind each of them is assumed to be universally applicable, if, indeed, the question actually arises. It is therefore very difficult to make a sensible analysis of the various ROL propositions, or to

have a sensible debate. Understandably, some have wondered whether the effort is actually worth making.

It is possible, however, to isolate a small number of areas of common interest in the ROL debate. They do essentially flow from western liberal concepts of the state, and we shall see later why this is problematic. They are also subject to debate and challenge even within western liberal societies. But they will do in this context as a brief indication of what the ROL debate is (mostly) about.

First, few of us would like to live in a society where power can be used in a completely arbitrary way. From this comes the idea that all members of society, all institutions and all levels of government and their agents should ultimately be bound by the law, including international treaties and conventions. This has two immediate consequences. First, even if the principle of equality is established, in the Constitution or elsewhere, it still has to be put into effect. This means that, at least in principle, wealth, power, political position or influence should not affect the way that individuals are treated by the law. This is much more difficult and, in most societies, effectively impossible beyond a certain point. Secondly, and as we shall see later, there are no enforcement mechanisms by which governments can actually be bound to subject themselves to the law, if they refuse to do so. In this case, what we really mean is that governments, and the political culture from which they come, agree to be bound by the law, even if that law poses problems for them.

next, it is normally argued that laws passed by governments should have various positive characteristics. Different lists have been proposed, but in general it is argued that laws should be predictable, publicly promulgated, not be retrospective, not be impossible to obey, be clearly drafted and so forth. This is doubtless important, though of course any society – even the most authoritarian – may have laws which are technically perfect.

Third, government and its agents should act in accordance with the laws. This is often tacked on as something of an afterthought, but in fact it is the heart of the issue. Citizens do not have relations with institutions, but with individual policemen, tax inspectors or immigration officers. Whatever the constitutional position may be, and indeed whatever instructions are given by hierarchies, if the will to behave correctly at the operational level does not exist, or if there are stronger pressures in the other direction, the Rule of Law cannot be said to exist.

These criteria arose slowly and painfully over long periods, and often existed in practice before they were made any part of theory. Originally, human societies were under the control of the strongest, the best warrior or the wisest hunter. More settled societies generally adopted rules for their own internal management, usually based around compromise, and involving only those issues that were likely to arise in everyday life. There was little scope for criminal activity in such societies, and what there was, was usually punished through humiliation rituals and restitution. Relations between villages and tribes, whether of commerce or conflict, were also regulated. Many traditional social systems in Africa and Asia, even today, are deeply influenced by these traditions.

Eventually, powerful warriors would carve out kingdoms, towns and even cities would be established, and problems could no longer be sorted out at local levels. The earliest codes of laws, like that of Hammurabi (conventionally dated at around 1760 BC) were an attempt to deal with these problems by promulgating lists of standard punishments (often very harsh) for particular crimes. The administration of justice was an important part of the power and majesty of a ruler, and a uniform code meant that the ruler's justice could be dispensed everywhere in the same way, even if he was not present. We therefore get the beginnings of the idea that laws should be stable and predictable.

Codes of law became more complex as societies became more complex. At this stage, Trotsky's dictum that "all states are based on force", applied in its purest form. The early states, with their limited capabilities for coercion, were primarily designed to protect the ruler and the ruling elite. Codes of laws, but also armies and the earliest forms of police and intelligence services, were intended to preserve existing power structures. Whilst some societies made efforts to develop and enforce criminal laws for the common good, law was for the most part an instrument of oppression. Individual rights as we now think of them did not exist, and indeed are essentially a product of the last couple of centuries in the West. Insofar as rights existed in Shakespeare's times, for example, they were collective rights, often very ancient, in the form of privileges and exemptions from financial or other obligations. The idea of individual, universal rights, on which the modern concept of the ROL is based, would have seemed incomprehensible, as well as socially and politically subversive in those days. Codes of law of the day were often harsh, but they were accepted as long as they were not arbitrary, and as long as they were fairly enforced. This largely remains the case today: what people mostly want is stability and predictability in their lives, and even harsh and repressive laws will be respected provided they are consistently applied.

How this situation developed into modern legal and political practice is described in the next two chapters. Here, it is enough to record that the development of the ROL, in different ways in different societies, has historically been analysed according to three different types of theories about its nature, which have added a further layer of complexity to the debate, as well as to practice. One way of approaching these distinctions is to consider the most ambitious – or at least the longest – definition of the ROL yet produced: that of the Secretary General of the United Nations in 2003.

For reasons already given, there is little to be gained practically by trying to produce an analysis or synthesis of definitions originated by different organisations for different purposes, but I quote this example because it includes just about every characteristic of the ROL that has ever been suggested, in the form of a laundry list. The ROL, we are told is: "... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards." And moreover the ROL implies: …"measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of

powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

There are several issues hidden away here (separation of powers for example) about which a huge independent literature exists, and which we will come to presently. But here I want to use this all-inclusive definition to illustrate the two major tendencies in definitions of the ROL, and then glance briefly at a third.

The first is often described as the "formal" approach. It is concerned mainly with formal correctness of procedure, and the technical content of laws. This corresponds to the language in the UN definition about accountability, public promulgation, equality etc. Critics of this approach point out that it takes no account of what laws are actually *about*. In other words, an extremely repressive and anti-democratic judicial system, which criminalised dissent and criticism, would still meet the criteria for the ROL if the draconian laws were properly advertised and fairly enforced.

Those who are more interested in the content of the laws favour the so-called "substantive approach" which, as in the UN definition, requires that laws be "consistent with international human rights norms and standards." The problem of course is that there is no agreed list of such norms and standards. There are certainly lists of such norms and standards promulgated by politically powerful organisations, which nations generally find it prudent to pay at least lip service to, and which in some cases they formally adopt. But this does not mean that such norms and standards are universally, or even widely, accepted in all societies, nor that, in practice, governments always pay very much attention to them if they appear inconvenient. In addition, this approach introduces a dangerously subjective element into the debate, and facilitates political meddling by donors. It also has a curiously relativistic effect. To the extent that they theoretically exist now, such norms and standards were not widely observed fifty years ago, when presumably the ROL was enjoyed in few if any countries. And our descendants in fifty years time, when norms and standards have changed again, will no doubt conclude that the ROL did not exist in our epoch. Fashions change, moreover, and whereas seventy years ago the right to join a trades union was seen as fundamental, today it is seldom mentioned.

The third way of looking at the ROL is the "functional" approach, which effectively says that the ROL is strongest when rules and procedures give as little discretion as possible to government officials. This is particularly associated with the European *État de droit* approach, which has no exact English equivalent, but which I will refer to as the "law-based state". What you think about this depends on where you start from. It is true that excessive freedom of interpretation can promote injustice and inequality of treatment. But as anyone who has worked in government knows, excessively restrictive rules also make sensible – and even humane - decisions much more difficult to take. In practice, we all tend to want the rules enforced firmly against others, even if of course in our case we hope that the rules can be interpreted in a way that reflects our special circumstances.

But, to repeat, the answer to all these disputes – if there is one – must be that it is behaviour, not formal processes, documents and structures, which is important. Laws may be openly promulgated, but then simply ignored in

practice. Catch-all definitions such as "subversion" or "terrorism" may permit a government to arrest and detain anyone it likes, whilst still claiming to respect the ROL. Human rights laws may reproduce international treaties word for word, but governments and courts may simply ignore them in practice. No matter how little discretion government officials may have formally, power, wealth and influence will always find a solution.

In the end, the ROL is about culture and ethics, not processes, documents and structures. If the will to respect the ROL does not exist, processes, documents and structures are irrelevant. If it does exist, they are only of limited importance anyway.

TWO: LAW AND POWER

We have so far discussed the Rule of Law without being very precise about what the Law is which is to Rule, or which is the basis of a state. Law tends too often to be presented, especially by theorists, as an unproblematic good, and a semi-divine concept worthy of great respect, but it is seldom analysed in critical terms. This chapter addresses the issue of where Law, in the form of texts and procedures, actually comes from.

At its most basic, any system of law involves a power relationship. Law is more than just a power relationship, of course, but it is always at least that, or there would be no point in making laws.

Law does not create a power relationship, however, so much as it demonstrates that one exists. If this seems counter-intuitive, consider that no system will introduce a law which it expects to be widely ignored or disobeyed; laws are a symbol of the existence of a power relationship in which a group that has the power to make laws can be confident that another group will obey them.

There are two broad types of qualification to this general rule. First, some laws actually benefit rather than penalise those who are affected by them. Motoring laws, however tedious, help to reduce accidents and save lives. Commercial law was historically a form of self-regulation, from which all honest businessmen could ultimately expect to benefit, although extreme concentrations of wealth and power have made this less true in modern times. Second, some laws are essentially political statements, indications of where power lies and symptoms of the current state of political debates. Both of these are touched on below.

The simple concept of the law as a power relationship involves essentially four actors:

The Originator conceives the idea of the law in the first place, to serve some wider purpose. Normally, this actor will be a government, but, as we shall see, governments may be brought to introduce laws for all kinds of reasons independent of their own wishes

The Implementer turns the political objective into a legal text. Normally, this is the job of parliaments (again often influenced by outside interests) but in many systems, Ministers, or official organisations, are able to make regulations without parliamentary involvement.

The Enforcer is responsible for ensuring that the law is actually obeyed. In criminal law, the situation is generally fairly straightforward, but many other laws and regulations (such as those involving the environment) are policed by institutions which may have the right to exact fines, for example, but no more.

The Subject. In principle, it would be odd to have a law that applied to no one, although this comes quite close to happening in laws that are introduced as a result of moral panics, or to appease the media.

One conclusion from this – sometimes over looked by legal scholars – is that laws are introduced for a reason. Laws are seldom if ever introduced for their own sake, and it is always necessary to look behind the words employed, and to try to work out what the originator of the law (again, not always the government) was hoping to achieve.

We can distinguish broadly five political motives for originating laws, some of which apply to international as well as domestic law.

The first is to change behaviour, or stop it changing. An example of the first would be Prohibition in the United States, designed to stop people drinking alcohol by making it difficult and illegal for them to do so. An example of the second would be laws to stop people taking advantage of new technologies to download and copy various forms of entertainment media. In the latter case, the activity is impossible to stop: governments hope that the stigma of illegality and the (faint) risk of prosecution will be disincentives.

A second reason is to intimidate and frighten. Various "security" related laws (those relating to airline travel for example) can come into this category. For some nations, certainly, legally imposed security rituals are a useful political control device. Likewise, the introduction of more rules and restrictions serves to make people more conscious of threats (real or imaginary) and so more manipulable.

A third is to respond to public fears and prejudices, often exacerbated by an irresponsible media. Demands to "do something" about a problem which is likely to have been exaggerated, and may, indeed, not even exist, are often met with the reflexive introduction of pointless laws, which do at least give the impression of activity. Recurrent moral panics about the supposed effects of video games are a typical example.

A fourth reason is the protection of vested interests. Thus, in much of the developed world, trades unions began to develop in the nineteenth century, and posed a problem for vested interests that had not existed before. The reaction was not only open repression, but also laws to make such activities illegal, and pursue organisers through the courts. More recently, governments have devoted huge efforts to passing and enforcing laws to protect the intellectual property of various private companies.

A final reason is to send a political message of some kind, where the authority recognises that the law will have little or no practical effect, but wants to bring public attention to what it regards as a problem, and be seen to be offering a solution. It is a particularly popular expedient at international level, where nations will happily sign up to conventions that have no practical effect (like the Ottawa Convention on land mines) or address a largely non-existent problem (like forced human trafficking) but which look good.

Equally, there are also puzzling silences and gaps in national legal codes where one would have expected laws. Many activities that gravely harm the environment are unregulated in many countries, because the political power of those responsible is too great. Likewise, strict control of firearms in the United States would save tens of thousands of lives a year, but proposing such a law would be political suicide for any government.

Whatever the motives, the ability to pass laws, and have them obeyed, is one of the fundamental qualifications for an effective state. Indeed, a state that cannot enforce laws is not really worthy of being considered a state at all. Experience suggests that people view the legitimacy of a state primarily in terms of its ability to enforce laws, and so protect them, above all other criteria. A state that cannot enforce laws, and so cannot protect its people, forfeits this legitimacy, often with disastrous consequences for political stability.

The "why" of laws, already briefly referred to above, is obviously closely linked to the "how." Laws do not arrive on the statute book automatically and fully formed, and apparently small changes in drafting along the way can make an enormous difference to how the law actually operates.

Traditionally, laws are enacted by parliaments, and this has generally been the case even in dictatorships and one-party states. Even the most despotic of systems appears to feel the need for popular endorsement of its actions, and sometimes this goes beyond mere theatrics. In the old Soviet Union, for example, it does seem that the (limited) parliamentary discussion of new laws did result in some actual changes.

In any event, of course, a law that appears before parliament will be the product of many internal battles within and between the organisations that sponsor it. They may be government departments, political parties, outside pressure groups or industrial, commercial or professional interests. The resulting compromise may be further tweaked in a coalition system, where political party representatives may have to negotiate more changes. In some Asian countries, where a high value is based on consensus, the entire text of a law may be negotiated in private among all parties before it is tabled.

Finally, all sorts of influences will be brought to bear on parliaments as they discuss draft laws. In the "Westminster" system, which usually produces large and stable majorities, the eventual form of the law will be very close to what the government has tabled. In systems where parliaments are more powerful (notably coalitions) there will be more significant changes. In systems like that of the US, where parliament itself originates legislation, almost any result is possible. As a result, much depends on where pressure comes from. In countries like Australia, where campaign finance laws are very strict, it is very difficult for outside commercial interests to influence the content of legislation once it is in parliament. In the US system, which is notoriously for sale to the highest bidder, detailed drafting of legislation by lobbyists to further the interests of outside groups is the norm.

So "Law" in the end, is a very contingent thing, which we must not glorify or make a cult out of. It is a collection of words, which could, and in some cases should, have turned out differently, and which is often the product of power-

struggles, compromises and bribery, but also of mistakes, drafting errors, confusion and simple incompetence.

Moreover, in every society that has ever existed, laws disproportionately reflect the views and interests of the dominant group. This group may be social and economic, it may be religious or ideological, or a combination of several. In any society, no matter how democratic, it could scarcely be otherwise. Laws are originated and approved by elites, and it is hard to imagine how it could be different. Elite views of what is good for the economy, what are the main concerns about crime, what social problems are most pressing, what kind of foreign and security policy to conduct, and similar issues, are unlikely, except by chance to reflect popular opinion and popular interests, and this will necessarily have an effect on laws which are introduced.

Nonetheless, no matter how imperfect laws may be, and no matter how much people may resent certain laws, they generally obey them. Why is this?

It may be because they are afraid of the consequences of not doing so, although except for the most important crimes, statistics suggest that the chances of being caught are often quite small. It may be because laws reflect underlying moral values, and it is those values, rather than laws, which people are actually obeying. As we have seen, there are laws that are obeyed because there is a common interest in obeying them.

But the basic reason why people obey laws – even those they do not like – is contractual. That is to say, obedience to (reasonable) laws is given in return for other benefits, notably protection and predictability. If laws are coherent and impartially enforced, they will generally be obeyed. The establishment of the Rule of Law, or its reestablishment after a crisis, depends on this contract being observed.

THREE: DOMESTIC INFLUENCES ON THE RULE OF LAW

As already noted, formal structures, procedures and documents are largely irrelevant to the existence or otherwise of the ROL, unless governments, down to the level of individuals, agree to obey them. This does not mean that such elements are unimportant, but it does mean that they are not sufficient by themselves.

Some of these elements are domestic in origin, and form the subject of this chapter. They first include legal mechanisms, such as the Constitution of a country, human rights laws, and legislation that governs the security forces, both internally and in the relations with the citizen. There may then be a series of formal oversight procedures – independent commissioners, parliamentary committees and so forth. Finally, and very importantly, there are traditional cultural and social norms that govern behaviour. The last are sometimes at odds with the former two, when constitutions and laws have been imposed from outside, by colonial powers or by donors.

The key, of course, is that these documents are respected, and implemented in the correct spirit. Constitutions in particular can be very vague, as is usually the case with consensus drafting, and are frequently invoked to cover circumstances for which they were never designed. Thus, radical interpretations of the US Constitution in recent years have argued that some of its provisions put the actions of the President, and anyone acting in his name, above all national and international law if the security of the nations is thereby protected. Even disregarding such radical theories, constitutions and laws necessarily contain ambiguities such that a skilful lawyer can justify government policies that on the face of it are illegal. In addition, virtually every Constitution ever drafted, and many human rights laws, also contain "sudden death" clauses, which enable the Constitution or the law to be suspended in certain circumstances; Thus, such laws only protect the public as long as the government wants them to. Finally, a constitution may provide every guarantee one might hope for (as did the 1977 Soviet Constitution for example), but in a context where the nature of the legal system itself was oppressive. So in the latter case, "slandering the Soviet state" was a criminal offence, and people were solemnly charged and convicted of it, according to perfectly objective legal procedures.

What this means in effect is that the first line of defence of the ROL lies not in external control mechanisms, but inside the organisations themselves. Indeed, this is actually the principal fashion in which the ROL is implemented in daily life. Unless individual government employees, including those who advise and implement policy, are themselves committed to the ROL, then formal instructions and mechanisms will have no practical significance.

Formal control mechanisms themselves are largely inspired by the concept of the Separation of Powers, a doctrine originated by the now little-known Charles-Louis de Secondat, Baron de Montesquieu in his 1748 book, *De l'esprit*

des lois. Montesquieu, who lived in an age of triumphant absolutism, devoted four chapters of his book to the English system, which he regarded as well balanced between the Executive (the King and the aristocracy), the Legislature (Parliament, representing small landowners and wealthy gentlemen) and the Legislature, or Courts. Critically, he argued that the power to make war and treaties, the power to make laws and the power to punish, should not reside in the same person. Montesquieu's ideas were hugely influential, especially with the main actors in the American Revolution, and are now regarded as almost self-evident. However, Montesquieu was not a democrat, and there was no place in his scheme for ordinary people. He was concerned with the orderly management of an oligarchy such that no part of it became too powerful at the expense of the others. Even at the time, moreover, it was doubtful whether the clear distinctions he posited really existed, and now they scarcely exist at all in some cases. Thus, in Westminster-style political systems, the government (the executive today) is in power precisely because it has a majority in Parliament, and therefore controls it.

Nonetheless, in theory the courts and parliament represent countervailing powers that could be used for used for positive purposes to enhance the ROL. Many countries take this idea very seriously, at the formal level, anyway, and constitutional provisions and laws may legally establish a role for parliament and the supremacy of the courts for example.

But the real issue is less whether these provisions exist, than whether they are used. As we have seen, countervailing powers, no matter how significant in theory, cannot actually be exercised in practice unless the government itself is willing to respect them. But it may also be the case that parliaments and courts do not wish to challenge the government.

There are all sorts of reasons for this. In a Westminster-style political system, the instinct of an elected parliamentarian is to support their party. Indeed, there are often significant penalties for not doing so. This frequently means that elected parliamentarians of the government party will support a particular policy even when they think it is wrong, since they would not relish inflicting a defeat on a government that might be severe enough to bring it down. This is particularly the case in the security area, which is where most ROL problems arise. Parliaments have to be aware of public opinion, and, if that opinion is frightened and demands action of some kind, it can be difficult for parliaments to oppose, even if individuals within it think that the action proposed is wrong or immoral. Certainly, considering the damage that has been inflicted on the ROL in the last decade in western countries, there do not seem to be any cases where a western parliament has successfully challenged any law that restricted civil liberties. In turn, this is partly because the idea that something called "parliament" has a separate identity and set of interests that unite its members, is not true now, if it ever was.

The situation of courts is more complicated. There are countries, like Germany, where for political reasons the prestige of the Constitutional Court is very high, and the government would not think of disobeying a finding. In France, the *Conseil d'État* has preserved its independence from successive governments as much as anything else because, in the fragmented French system, magistrates are fiercely independent and jealous of their prerogatives.

In the United States, on the other hand, the current Supreme Court, with a majority of extreme right-wing judges, seems to be unwilling to challenge the government on security issues, and indeed agrees that some government actions should not even be subject to legal challenge.

Partly, this is because the idea of a clear separation between the executive and the legislature is a fiction to some extent. Judges are people, and they may have political, personal or ideological ties to members of the government, or they may have corrupt relationships with outsiders. There are many societies when judges will instinctively identify much more with the government minister, the General or the chief of police, whom they may know socially, or play golf with, than with an alleged subversive or terrorist whose ideas they disapprove of. This bias does not have to be conscious, and indeed many judges would be offended if it were suggested that they were biased. But it is hard to escape such problems in any society. It is for this reason that reserving too large a role for the courts ("rule by lawyers" as it is sometimes called) is often problematic in itself.

As well as the Legislature and the Judiciary, other actors have appeared since Montesquieu's time. Chief among them is the media, which has often been cited as a counter-weight to government in discussions of the ROL. It is obvious, of course, that the media is rarely completely independent as such. Some media are directly linked to political parties, some are owned by commercial forces who may support or oppose governments for financial reasons, some may be part of international media empires, others may support governments in expectation of favours later. In such situations, journalists, even if they want to, may find it difficult to publish stories that cause difficulties for a government. NGOs and think tanks, other relatively new developments, are also sometimes cited as countervailing powers. Yet of course they are not self-financing, and in some parts of the world (notably in Africa) they are seen, and sometimes resented, as instruments of western and donor influence. Even in the West, the need to attract financing can result in a brutally competitive market, where NGOs and think tanks have to mark themselves out and maintain a high public profile by presenting controversial and newsworthy reports and recommendations. It should be conceded that such organisations often do good work, but such are the pressures on them that it is unrealistic to expect that they can ever successfully act as countervailing powers. In addition, of course, no one elects them, and so such organisations often have very limited legitimacy.

Yet in many societies, journalists, experts, think-tank professionals and others find it difficult to challenge governments, even when they disagree with what they are doing. The reasons for this have more to do with psychology than with politics. There is a natural tendency to want to belong, and to form part of a consensus. There is also a natural tendency to want to identify with power. In an area like security where there are levels of secrecy and access, it is tempting to believe that some policy of government that you think is misguided or even dangerous is in fact justified by information that is not available to you. There are practical advantages as well. To support what government says is to be accounted "serious" and given privileged access to government thinking. You may be invited to discreet and off-the-record discussions and seminars, and in turn government personalities may support functions you organise. Access means that your articles or your reports will be better founded and more

authoritative. Finally, such a posture is largely cost-free. There are in practice no sanctions for journalists or other outsiders who get something badly wrong, or even tell deliberate lies. Retailing things you know to be untrue in order to maintain your access to important people is a perfectly reasonable choice for a journalist, for example, who is unlikely ever to be called to account for their behaviour.

There are, of course, journalists, NGOs and think tanks who do not follow the government line. But few are really independent, and many are reliably to be found *opposing* every government initiative in a certain area, in the company of others who generally do the same. Real independence is lonely, and psychologically difficult.

In addition to external laws and constitutional provisions, there are generally also laws to regulate the organisation and structure of the security sector, and rules for its internal functioning and discipline. In the case of the military, these can be quite elaborate and detailed, and, as we shall see, must also accord with international treaties on the law of armed conflict.

It is obviously important that these documents exist, especially in transitional situations where there may be genuine uncertainty and controversy about the functions of particular organisations. But it is no less important that they should actually be respected and implemented, and this is a question of organisation, leadership and discipline. The difference between a security sector which respects the rule of law and one which does not is not primarily one of organisation and rules, but one of a cultural willingness to respect the rule of law and work within its constraints. Experience suggests that, if the personnel of the security sector are not prepared to act correctly, no amount of external pressure will make them do so. There are, of course, things that outside forces can do to help, notably paying the security sector properly, and providing its personnel with decent conditions and enough resources. But whilst these can facilitate respect for the Rule of Law, they cannot make it happen.

Likewise, whilst you cannot lecture people into being good, you can set them a good example by people they respect and trust, and the kind of culture change which leads to improvements in the Rule of Law almost always happens in this way.

FOUR: INTERNATIONAL INFLUENCES ON THE RULE OF LAW

Many of the ideas reviewed in the previous section are international, in the sense that they are to be found in many countries, and they represent, to some extent at least, a partial consensus about the ideal relationship between a state and its citizens. But other elements of the Rule of Law are international in a more fundamental sense: they are derived from documents that are signed by large numbers of different states.

Some of these documents are formal treaties, which are legally binding on states, just like any other treaty, and which states should then incorporate into their domestic law. There are a large number of such treaties which have an impact on the ROL: some of the more recent and important include the (currently topical) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), the Convention on the Rights of the Child (1989) and the International Convention for the Protection of All Persons from Enforced Disappearance (2006). Some treaties and conventions have a more restricted application: the obvious example is the European Convention on Human Rights (1950, and five subsequent protocols), which is binding on EU members and takes priority over their domestic legislation. The ECHR is an interesting example of where a formal enforcement mechanism exists – in this case the European Court of Human Rights, whose judgements it would be politically unacceptable for any signatory to refuse to accept.

But a treaty is only a treaty, and it does not follow that a state which has signed a treaty, sometimes to please donors, or for the sake of a quiet life, is necessarily interested in implementing it. In some cases, indeed, the technical capability to implement the treaty may not exist. Nor is there usually any recourse against the state if it fails to do so, any more than with domestic legislation: a nation cannot literally be forced to implement a treaty commitment. Moreover, states are careful what they sign, and most treaties are worded in such a way that they allow a degree of flexibility. So in the case of the ECHR, for example, a number of rights that appear sweeping are in fact heavily qualified later. Thus, Article 11, guaranteeing the right of freedom of association and peaceful assembly is qualified by the exception that it "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in

confidence, or for maintaining the authority and impartiality of the judiciary." A determined government would not have to look far, therefore, to find a way around the Article.

Likewise, treaties are binding only when signed and ratified, and usually contain provisions for temporary or permanent withdrawal. Thus, Article 15 of the ECHR allows states to derogate from their obligations under the treaty "in time of war or other public emergency threatening the life of the nation." It is for states to make this judgement, and the UK duly derogated from some of the ECHR provisions after the attacks of September 11 2001, although thee attacks took place in a foreign country.

As well as treaties and conventions, groups of nations will often issue declarations after a conference or large-scale high-level meeting. (The most obvious case is the Universal Declaration of Human Rights, adopted in 1948 by the UN General Assembly, when it still consisted largely of western states). These are often no more than statements of good intentions, often drafted in such a way that it is impossible to judge whether or not they have been implemented or not. They are, of course, never more than politically binding, though it must be conceded that they can still have an indirect role in shaping policy and actions, especially where the content of the declaration is essentially uncontroversial.

Finally, there are what are usually described as "norms and standards;" sometimes the word "customary" is employed. There is, of course, no definitive list of such norms and standards, and there is very little agreement about what would go into any such list. One of the problems with norms is that they are not normal – they represent aspirations rather than reality. However, they can have an influence. One of the most notable cases is the progressive disappearance of the death penalty. Almost universal in the 1960s, it is now restricted to around a third of the world's countries, many of which are small island territories. And even many of these do not actually carry out executions in practice. There is no doubt that international disapproval, and developing norms of repugnance against state killing, have played a major part in this progress.

In theory, it is for states themselves to implement these treaties and respect these declarations. Few contain provisions for monitoring compliance, and there are limited mechanisms for doing so, although enthusiastic NGOs sometimes try to substitute themselves. Major powers, especially western ones, become sensitive and irritable if there is any suggestion that their own practices should be monitored, although, bilaterally and through donors, they often seek to micro-manage the affairs of others. The ROL, ill defined as it is, has become a major component of much post-conflict reconstruction activity, and is now also hopelessly mixed up with efforts at Security Sector Reform. Its very vagueness means that donors can secure access to sensitive parts of government by arguing that the ROL in a given country is inadequate: such a claim is impossible to disprove, and few small and weak nations will feel brave enough to try. But instrumentalisation by donors is only one facet of the use of treaties and convention, although an important one.

The importance of rights, freedoms etc, which make up part of the subject-matter of the ROL, has been stressed for a long time - at least since Article 55 of the UN Charter in 1944. But UN and other bodies have more recently taken to stressing the importance of the ROL as a component of peace and security itself, which is quite new, and largely unexplained, and unsupported by evidence. Thus, the Secretary General of the UN reported in June 2006 that the Council "... attaches vital importance to promoting justice and the rule of law, including respect for human rights, as an indispensable element for lasting peace" and that it "considers enhancement of the rule of law activities as crucial in the peacebuilding strategies in post-conflict societies." Now such texts are drafted with great care, and words like "indispensable" and "crucial" are not used lightly. In the first case, the implication is that a situation which is apparently peaceful, but where, in the view of outside observers, the ROL and human rights are not respected, is not in fact a peaceful one. The lack of clear definition of terms means that such a judgement will be based on relative political power, rather than objective criteria. In the second case, the implication is that ROL activities are an obligatory component of any strategy in a post-conflict society, whatever the conflict may have been about, and whether or not the local population considers that absence of the ROL (however defined) has been a problem.

Subsequently, in Resolution 64/116 of 2010,the General Assembly took up the baton, stressing "the importance of adherence to the rule of law at the national level, and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations ...." Now some of this thinking can be benign: as indicated above, some states lack technical capability to implement treaty obligations, and may genuinely seek help from abroad. But it seems unlikely that that is all that is meant here. Putting the two extracts together, we see a logic whereby the Security Council, charged with preservation of international peace and security, identifies the lack of the ill-defined ROL as a threat to this peace and security. A small state whose ROL status has been criticised by outsiders would therefore be well advised to "request support" from donors and large and powerful states to avoid being branded a threat to peace and security.

All this is to say that, behind the veneer of open agreements freely arrived at, and universally binding obligations, the position is actually just as complicated and confusing as one would expect from the way in which international relations usually works in practice. In a world where international commitments to ROL treaties and conventions are essentially unenforceable, the usual rules apply, and large states can, very often, get away with what small states cannot. Meanwhile, small states often cannot even defend their legal rights.

This lack of enforceability poses particular problems for the human rights treaties and conventions that are part of the ROL furniture. In some other contexts, treaties and conventions are at least partly enforceable. For example, arms control treaties such as the Chemical Weapons Convention and the Conventional Armed Forces in Europe Treaty have verification regimes which provide access to signatory states' territories under controlled conditions. But these are essentially exercises, and, whilst verification of such treaties is not perfect, large-scale cheating is difficult, and can be demonstrated technically. By

contrast, human rights type treaties are effectively unverifiable, because they depend on the behaviour of individuals towards other individuals. In effect, such verification and enforcement as there is can only be at the formal level. Thus, a state that has signed and ratified a treaty, incorporated its provisions into domestic law, issued instructions on implementation and trained the relevant personnel, has done everything that is actually verifiable towards implementing its obligations. By contrast, it is very hard, and probably impossible, to know how the state is implementing these obligations at the level of the individual citizen.

The UN Convention on the Rights of the Child (1989) is a useful example. Inevitably, many of its provisions are both vaguely described ("freedom of thought, conscience and religion" in Article 14) and then heavily qualified (subject to "public safety, order, health or morals, or the fundamental rights and freedoms of others.") Enforcement, or even verification, is therefore impossible. Although the CRC has almost universal coverage, it is impossible in practice, except from anecdotal evidence, to know if it is being implemented or not, and for the most part impossible to affect the situation. For example, only two countries (Somalia and the United States) have failed to ratify the Convention, although Somalia has said it will do so. But it is hard to imagine that ratification by Somalia would make much difference, given that the government in Mogadishu is effectively powerless to do anything. In turn, this is only an extreme case of the inability of many states, especially in Africa, to implement international obligations. By contrast, the United States would be much more capable of implementing the Convention's obligations, but there seems little prospect that international pressure could overcome the opposition of various religious and nationalist groups in that country to ratification. Finally, even if a large country (China, say) was to be found to be grossly in breach of the Convention, by some objective measure, it would be pointless to try †o apply international pressure, since it would just be ignored.

None of the above means that treaties and conventions are useless, or that further improvements in human rights and the ROL should not be sought But they are only the beginning of a very long process, and their contents and orientation represent a particular balance of political forces in the drafting process, rather than universal truths or moral imperatives. Their value tends to be indirect and long term, and in many cases they reflect changes in international opinion (as with the death penalty) rather than causing them. And, as always, unless a culture of respect for such provisions exists, then all the treaties, conventions and domestic legislation in the world will have little impact.

FIVE: THE RULE OF LAW AND INTERNATIONAL RELATIONS

As well as international treaties and conventions that affect how nations apply the ROL in their own countries, there are also a series of agreements and customs that set out the rules by which states normally deal with each other. It is conventional to describe them as "international law". Agreements of this kind are between states and affect only states: individuals cannot violate them. Questions about the legality of the 2003 Iraq war, for example, relate only to judgements about the behaviour of states, not individuals.

The question of whether international law can properly be called law or not continues to divide experts, and is unlikely ever to be settled. Moreover, it is not clear that those who believe it is law (essentially international lawyers) and those who do not (basically everyone else) are even talking about the same thing. Much depends on whether you believe it is a fundamental characteristic of law that it should be enforceable. If so, then it is hard to argue that international law is law, since there is no way of enforcing it. On the other hand, it can be argued that international law is influential, that states do not violate it easily, and that it is codified, and discussed and developed. All this is true, but whether it thereby qualifies as "law" is ultimately very much a matter of individual belief.

A balanced judgement might begin from the fact that the international system, in spite of what is sometimes alleged, is not in fact anarchic. Most states follow the precepts of international agreements most of the time, because it is in their interests to do so. A host of agreements related to such things as telecommunications, aviation, space, maritime trade and international standards, are internationally respected and implemented. The international system would not work otherwise. International agreements relating to the environment and to humanitarian affairs are more contentious, but are widely respected and states will feel awkward about violating them. Likewise, treaties, even on sensitive security-related issues, are generally adhered to.

This is law as collective self-interest and, paradoxically, major states are often enthusiastic about such agreements being respected, because they have the most to lose if they are not. But in the last analysis, little if any of this is enforceable, and as a general rule, the more significant the issue, the less chance of enforcement, especially against a major state. It is true that, even on sensitive issues, states usually adhere to these agreements, but it is not (at least in the case of the major players) that they feel constrained; it is that the agreements themselves (which are negotiated between states) suit their interests and needs. What is usually called "international law" is better understood, in fact, as a series of non-binding norms reflecting what major states, for the time being, are prepared to accept. It is also an agreed discourse

for discussing international issues, and states typically try to justify their own actions, and criticise those of other states, by reference to its vocabulary and concepts. For these reasons, international law does not try to prescribe, but to follow the evolution of international practice.

Formally, international law (let us call it that for simplicity) is divided into three parts. First is public international law, the law of states and organisations to which we have been referring. Private international law, on the other hand, covers individuals and commercial corporations at the international level, as well as questions of jurisdiction over them. Finally, supranational international law is the relatively new subject of states' relations with supranational organisations, such as the European Union. What follows will concentrate largely on the first, with brief nods to the third.

If we leave to one side the question of whether international law is law, as incapable of resolution, we are free to concentrate on the much more interesting question of whether something like the ROL exists at the international level. This is a question that experts have been slow to address, and normally approach only from the aspect of enforceability. This is analogous to ignoring all parts but the enforceability of laws in a discussion of the ROL in the context of a specific country. In fact, the way to approach the question is to look at the constituent parts of the ROL, as set out in the first section, and ask whether they apply.

Consider first the question of whether something analogous to the separation of powers exists at the international level. Unless such a separation can be shown to exist, then many of the features of the ROL cannot exist either Is there an international executive, legislative and judiciary?

Obviously, nothing resembling an international executive can be said to exist, since that would imply a world government of some kind. There are organisations, ranging from the Security Council to the European Commission, via the World Bank and the International Atomic Energy Agency, which have powers of sorts over governments. But they form a squabbling oligarchy, rather than a united bloc, and few of them are genuinely independent in the sense that a domestic state and its agents are supposed to be.

The International Court of Justice is held by some to be the equivalent of a national judiciary. Certainly, it performs useful functions, but also very limited ones. In particular, it is limited essentially to a kind of arbitration role, in which states have to agree to accept its jurisdiction before it can pronounce on a case. It also lacks any means of enforcing its judgements. Other international bodies, notably the World Trade Organisation, have quasi-judicial powers to rule on disputes, but again there is no way of enforcing them. These institutions have some symbolic properties of a judiciary, but no more than that.

Finally, there is no World Parliament. The UN General Assembly is sometimes instanced in this context, but it is not a law-making body, and it has

no real powers of oversight or control. It resembles more the kind of consultative assembly found in hereditary monarchies, although some of its specialised committees have influence, and even some financial control, over some of the UN's own activities. In summary, nothing like the separation of powers can be said to exist at the international national level. What about other components of the ROL?

Protection from arbitrary acts of government is generally regarded as a key element of the ROL. To state the obvious, there is no such protection in the international system, either from arbitrary acts of states, or, more importantly, those of international organisations. The UN Security Council, to take the most blatant example, has given itself the powers to do anything at all that it wishes. Whilst in theory it should always be acting against threats to international peace and security, there is no independent check on this, and no forum in which it can be required to justify its activities. It is also, inevitably, greatly influenced by the political interests of its permanent members. Similar considerations apply to organisations like the World Bank and the International Monetary Fund. The latter, for example, is both more powerful than most states in the world, and disproportionately dominated by a few of the largest ones. It is able to overturn elected governments, but has no accountability other than to its shareholders. Many multinational companies are now more powerful than states. Yet, far from protecting states, the international system tends to favour multinational companies, through various trade regimes and commercial treaties.

For this reason, few would seriously argue that, in practice, the international system is an equitable one, and that all states are treated equally under international law. Indeed, it is hard to see that this would ever be possible, in the absence of an enforcement mechanism that would be more powerful than the largest state in the world, yet independent of all states.

For the more technical and formal issues relating to the ROL, we can say that the position is very patchy. Treaties, for example, are for practical reasons negotiated behind closed doors, often by small groups of states that dominate the outcome. Most treaties are at least published, although many are never formally translated into the languages of countries most affected: for practical reasons negotiations cannot take place in more than one or two languages at the same time. Treaties also tend to be written in a contorted, mandarin style, which is often hard to understand and capable of various interpretations. This is inevitable when texts have to be agreed by large numbers of states, often working in second and third languages. Vagueness can be a virtue, indeed, in that it makes texts easier to agree.

The last criterion – that agents should act according to the law – has no real applicability in a situation where there is no world government. All that can be said is that there is no mechanism for ensuring that either states or their representatives act in accordance with the law, and that in practice international organisations tend to be above the law anyway, at lest as regards enforceability.

So if we look at the international system as it actually operates, we find it hard to argue that it demonstrates many of the characteristics of the ROL. This in turn has political implications that are now playing out. It has resulted, for example, in the increasing assertiveness of countries like China, Brazil and India, who primarily seek a world order they regard as more equitable, much as the middle classes disputed aristocratic power in Europe from the eighteenth century onward. It has also resulted in the international equivalent of vigilantism over the last decade or so, as unsatisfied groups take the law into their own hands, against the West. Each of these developments is likely to continue unless and until the international system develops attributes of accountability and equality it does not currently display.

If the international system is not, in fact, anarchic, then, nor is it a system of justice and equity. The best analogy, building on Charles Tilly's equation of state-building with organised crime, is to see the international system as a group of organised crime families, settling disputes among themselves through real but undocumented rules, and disciplining other actors who may rebel against their dominance. To continue the analogy, new organised crime families from abroad are disputing the territory of traditional groups, demanding a share of the proceeds from the rent-seeking activities which organised crime specialises in. In such a situation, there is no point in going to the police or the courts, because the police and the courts are owned by organised crime anyway. All that the weak can do is look to one of the organised criminal groups for protection. In most modern states, this model was replaced, over time, by power-sharing and political pluralism, and the rule of law displaced, at least in part, the rule of the strongest. Whether and if so how, this will happen at the international level is not at all clear.

SIX: INTERNATIONAL JUSTICE

As well as treaties and conventions that influence how the ROL is applied domestically, and the existence, or otherwise, of the ROL at the international level, there is, finally, the question of international justice. By this, we mean essentially what happens to those who are accused of violating International Humanitarian Law (IHL) and more narrowly the Law of Armed Conflict, and who for one reason or another cannot be prosecuted by courts in their own country.

We have seen that governments that sign treaties and conventions are expected to ensure that they are implemented, and to pass whatever national laws are required in order to achieve this. This applies equally to the conduct of military forces in wartime: indeed, given the decentralised nature of warfare, far from the control if governments, it is obvious that respect for the rules of war is only possible if it is enforced by commanders and leaders on the ground.

Since the middle of the nineteenth century, two broad traditions have gone to make up the corpus of law relating to armed conflict, named informally after the cities in which negotiations took place. One, often called the "Hague" tradition, is concerned essentially with the mechanics of conflict between armed forces, and ways of making it less savage. The other, sometimes called the "Geneva" tradition, is concerned with the protection of non-combatants in war. This is not the same as the protection of civilians, though the two are often confused. Civilians who take up arms may be treated as combatants, whereas soldiers who have surrendered may not. These two traditions have been converging for a while, and have essentially come together in the Statute of the International Criminal Court, agreed in 1998.

Domestic legislation, and codes of military law, have to incorporate these provisions, military training should inculcate them and military commanders should issue orders that respect them, and see them enforced. Once again, culture is the most important determinant here: many of the most central provisions of IHL (treatment of prisoners and the wounded, protection of non-combatants) are in fact part of the way in which well-disciplined and well-led military forces operate anyway, and good commanders throughout history have tended to adopt them instinctively. Likewise, units with high morale and good training and leadership almost always behave better than units without these advantages.

Actual respect for these provisions has been patchy for most of modern history. There are a number of reasons for this. One is the nature of the conflict itself. In the confusion of war, where guerrilla and partisan groups may be operating, the division between combatant and non-combatant may be unclear, and poorly trained or untrained troops, badly led, may commit violations out of fear, ignorance or hysteria. This takes place generally at the tactical level, but

such tactics may be adopted as part of a deliberate plan. The classic case is the German invasion of the Soviet Union in 1941, where written orders from the very top instructed the *Wehrmacht* that Russians were not civilised human beings, and would not themselves obey the rules of war. Therefore, they were not entitled to the protection of such rules themselves. In effect, the treatment of the Red Army was part and parcel of the policy of extermination that the Germans implemented towards Russians (and Slavs) as a whole. Thus, somewhere around 3.5 million Soviet prisoners taken in 1941 were left to die of cold and hunger, deliberately executed, or worked to death in concentration camps. (Casualties among Russian civilians were of course much higher).

Much the same cultural mindset was revealed in colonial wars in Africa and Asia, from Algeria to Vietnam. The enemy was non-western and hard to distinguish from the civil population. So the response was often indiscriminate killings, imprisonment and torture and direct attacks on civilians. In the colonies, as indeed in Russia, there was no hostile media to deal with, and little concern either among the population at home. From the 1940s in Russia to the 1990s in the Former Yugoslavia (and, unfortunately in the last few years as well) such behaviour has been justified by necessity and the need to protect one's own people. Actual disciplinary measures were rarely taken, and it was only massive media interest that caused the US Army to investigate the 1968 My Lai massacre, for example. Public opinion was generally uninterested as well. Moreover, from the 1940s to the 1980s, most of the advanced nations of the world were anticipating an apocalyptic nuclear war, to which laws and conventions of this type just seemed irrelevant.

The end of the Cold War, combined with the rise of new media technologies, removed some of the political, as well as technical, blocks to an appreciation of what modern conflict was actually like. During the fighting in the Former Yugoslavia, news footage of white Europeans slaughtering white Europeans was available in every home. The inevitable demands to "do something" proved, for practical reasons, impossible to satisfy, and almost in desperation, the idea of a special tribunal arose, initially as a way of putting pressure on the combatants where there were few other means of doing so. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the Security Council in 1993. When the dormant Rwandan civil war erupted into horrifying violence the next year, it was politically unthinkable not to establish a tribunal for that episode as well. The products of hasty decision-making, understaffed and underfunded at the beginning, the so-called "ad hoc" tribunals were not expected to last very long. In fact, both still exist, albeit in much reduced form, and their combined budgets have now well exceeded a billion dollars in total.

The two organisations were subordinate organs of the UN Security Council, which gave them unprecedented authority, and allowed them to pre-emptively indict individuals in other countries, whatever the justice systems there might be doing. Indeed, it was recognised that none of the political units that had succeeded Yugoslavia would have much appetite, or indeed much capability, to put their own people on trial. This, indeed, has turned out to be the fundamental problem of accountability for such misdeeds: no country is happy to see its own

nationals punished in this way.

The ad hoc tribunals surfed, to some extent, on the humanitarian vigilantist tide of the 1990s, which led eventually to fulfilment of the much-discussed proposal for an International Criminal Court. The ICC, established by the Rome Statute of 1998, bore hopes that were probably always excessive, given the way it was designed. Unlike the ad hoc tribunals, it is a treaty-based organisation, and so states that do not wish to be bound by it simply have to decline to sign the treaty. Thus, whilst many small, weak states have signed it, two of the Permanent Five at the UN (China and Russia) are not involved. The US, after some initial interest, subsequently attempted to destroy the organisation, the limited French enthusiasm for it rapidly waned and only the British really showed any enthusiasm, at least in the early days. (Though this has not prevented the Security Council from referring the case of Sudan to the ICC). The ICC does not have the powers that the ad hoc tribunals had, and can only involve itself where the signatory state is "unable or unwilling" to prosecute, unless as, in the case of Sudan, it is invited by the Security Council. The fact that membership is optional, that many large states are not members, and that major players can generally protect not only themselves but their clients, means that the exclusive concentration so far on African cases was probably inevitable, and is likely to continue. South Africa's withdrawal from the Court in 2016 was therefore not unexpected, though it was ironic in view of that country's strong support for the ICC in its early days.

In fact, enthusiasm and political support had already begun to wane by the time that the ICC statute came into force in 2002, as many of the practical and political problems of international justice became clear. The Special Court for Sierra Leone, established that year, was a much more modest affair, a so-called "hybrid" organisation, jointly responsible to the Sierra Leone government and the United Nations.

In effect, international justice itself has turned out to be much more difficult than anyone imagined. The law itself is often unclear – the concept of genocide, for example, has now been so distorted it has lost all meaning. Proving responsibility for crimes committed by others, especially among senior commanders and national leaders, has proved to be exceptionally difficult. For this reason, indictments of such people tend to be a laborious network of hypothesis and circumstantial evidence, a kind of conspiracy theory from which the defendant has to exonerate himself. The courts have been an uneasy marriage of different traditions, some entirely foreign to the areas where crimes were committed. Finding worthwhile witnesses and evidence has proved to be unexpectedly difficult. Witnesses disappear, are mistaken, tell lies or are suborned. Physical evidence, including documents, turns out to be much more ambiguous and less useful than hoped. In the absence of such evidence, judges have been obliged to make subjective judgements (eg about military command and control issues) for which they are generally not equipped. And finally, of course, none of these organisations have their own police forces, and they are dependent for arrests (as for almost everything else) on the willing cooperation of governments.

A reasonable verdict on the operation of these institutions would be that, because of them, a small number of very unpleasant people have been removed from circulation, who would otherwise be free. But it is hard to go much beyond that. Unfortunately, wildly disproportionate hopes were placed on international justice, assuming not merely that "impunity" would be "ended" (which was never remotely possible) but that somehow peace and reconciliation would naturally flow from trials and punishment. In practice, this has not happened, although the idea that justice (however we choose to describe that) will lead to reconciliation, to rebuilding and to the acknowledgement of "the truth" is now very deeply embedded in post-conflict peacebuilding doctrine, usually hopelessly mixed up with the idea of reconciliation through some kind of psychodramatic truth process. In reality, neither revenge no reconciliation seem to be effective strategies for building peace, and the former, in particular, has great potential for upsetting the political process and derailing peace processes.

In the end, no society likes to think that it is somehow guilty collectively, or that its representatives or leaders are criminals. Societies close ranks around those accused, and find excuses or rationalisations for them, as we have seen most recently in the case of the Bush government in the United States. In fact, this seems to be a universal trait, a belief that an attack on my country, my group or my ethnicity is an attack on me.

In addition, courts can never address all problems. Only a tiny minority of perpetrators will ever be prosecuted, some of the guilty will escape, and unfortunately some of the innocent may be punished. Judges will wrestle with intractable value-judgements about command responsibility, trying to decide whether the commander in front of them did just enough to restrain his men, and so free him, or whether he did not do quite enough, and so send him to prison for life. Far from truth emerging, trials and truth commissions often just add layers of uncertainty to an already complex and muddy picture.

In isolation, it is hard to oppose the idea that those suspected of grave crimes should be put on trial. The problem is that there is no such thing as a serious violation of international humanitarian law in isolation.

SEVEN: THE RULE OF LAW AND THE PROVISION OF SECURITY

As we have seen, the dominant tradition in thinking about the ROL is focused on the individual, and the individual's right to be treated fairly, not to be subject to arbitrary state behaviour, and to have certain expectations both of the nature of a state's laws, and the duty of all, including the powerful and even the state itself, to obey them.

There are other ways of looking at the same set of issues however, and these derive in turn from different assumptions about the relationship of the individual to the state, and indeed to the society of which the state is essentially an expression. In this section, we look at what is behind commonly accepted views of the ROL, and then go on to briefly examine why and how other traditions, found in many parts of the world, come to different conclusions. It will become apparent that the assumptions that underlie the dominant discourse of the ROL, with its emphasis on individual human rights, are ultimately arbitrary in their origins, since they cannot be logically proved to be better than other sets of assumptions.

The dominant tradition described above has ambitions to be universal. In fact, it is very specific in place and time, and finds its origins in the England and America of the eighteenth century. The rising middle classes in these countries, newly wealthy, chafed against the dominance of the King and aristocracy (foreign, of course in the case of the American colonists) and sought more power for themselves. Suspicious of royal power, wishing to promote the power of institutions like parliaments, where they dominated, they viewed the state with suspicion and sought to control it. Desiring security and a calm and ordered commercial environment, and distrusting war and imperial adventures, they naturally favoured a law-based state with strict limits on royal power. The state, in this way of thinking, was simply an agent, a kind of super-tradesman, to be tolerated only as long as it was effective. The citizen had the right, and even the duty, to overthrow the state if it misbehaved. These ideas, especially in the writing of John Locke (1632-1704) were immensely influential in the French and American Revolutions, and remain so today.

They are based, of course, on the idea that the state is strong, at least relative to other actors. This was the case in the eighteenth century, when post-Westphalian rulers had largely succeeded in bringing the territories of Europe under central control, and where other competing centres of power (notably commercial) had not yet arisen. This is not true today of course, and, in many nations where ROL initiatives have been launched, the state itself is only one actor among many, and often not the strongest. In many African states, for example, it is not at all clear that the public needs protection from an over-

mighty state, as compared to protection from militia groups and organised crime, or even multinational corporations Indeed, the result of ROL initiatives is often to weaken the state further, and to promote the interests of non-state actors, from NGOs to organised crime groups, who will rush in to fill the void.

As indicated, there are other traditions of thinking about these issues, depending on one's view of the relationship between the individual and the larger community. The Liberal State, which is essentially that sought by ROL advocates today, is based on the concept of the private individual, not particularly connected to an identity group of any kind, primarily seeking the maximum autonomy in political and commercial life. In this context, the state's functions are limited to being a kind of commercial referee, ensuring fair play and intervening only to protect individual autonomy, especially property rights. So long as it does this, the state is to be obeyed on pragmatic grounds, since it performs a legitimate function. Politics is about the competition between social and economic groups for power; ideology is unimportant, and there are no final truths. The state tries to keep the process of politics as civilised as possible, and to act as a neutral arbiter to some extent. There is no place in such a scheme for religious, ethnic or nationalist politics, for ideology, or for irreconcilable differences of any kind. The difficulty, of course, is that most of the world, indeed most of the West, is not like that. The Liberal State is therefore exported only with difficulty.

A more common model in practice is the Traditional Authoritarian State, based on hierarchy, duty and the respect for tradition. People have responsibilities, rather than rights, and their position is determined by their function, age and social and economic role. Whilst this is not necessarily a repressive model, in the sense that rank carries responsibilities to those below, individual rights, as opposed to status drawn from group membership, do not really exist. The state acts as agent to protect and reinforce the system, and its overall objective is social and political harmony. Its legitimacy derives from its performance of this role. Collective good is to be preferred to the good of the individual. Pretty much the whole of the world was organised in variants of this model until a few hundred years ago, and large parts of its still are.

By contrast, the Radical Authoritarian State is based on radical popular movements, often nationalist in outlook, and comes to power through overturning the existing order. It s claim to legitimacy is based on the claim that, through one or more charismatic leaders, it incarnates the popular will, and the national interest. Such states often arise as a result of the breakdown of democracy under conditions of economic and political stress.

Although less common than they used to be, one-party states do still exist. Some of them are still Marxist states, where the state itself is an extension of the ruling party, and derives its legitimacy from the struggle that produce the one-party state in the first place, and the leading role of the Party in building the future. Sometimes the party is a party of national liberation rather than of revolution, and there the state draws its legitimacy from the struggle for freedom that the party conducted, against a colonial power or an invader. In such a

system, such debate as there is will be within the party, which is often more powerful than the state, and the state itself is responsible for enforcing the party's rule.

A close relative is the ideological or theological state. The ruling party or tendency may not have the credibility that comes from revolution or national liberation, but it does occupy all the political space. It rules by virtue of being right about everything, and does not entertain alternative views. Its ideology or religious belief is beyond rational challenge, and the state exists to enforce this ideological hegemony. Again, parallel power structures, more influential than the state itself, generally exist in such societies.

Finally, there is the nationalist, or identity-based state. Here, the political base is not the nationals of a single defined territory political territory, but rather an ethnic or identity group, wherever they may exist. Conversely, those without the correct identity who happen to live within the boundaries of the formal state are not really part of the political base, and something needs to be done about them. Nationalist and identity states often have defensive, if not actually paranoid political cultures ("we are surrounded by enemies") and the state, and especially the security forces, exist to protect the identity group, and, as necessary, ensure that they have rights over members of other groups.

Obviously, the ROL means something different in all of these cases. The classic liberal figure of the undifferentiated, autonomous individual, seeking to expand their freedom and demanding equal treatment from the state, scarcely exists in most of these models, and indeed would hardly be understood in the societies that lie behind them. Rather, in most societies, people derive their privileges (if not actually rights) from their membership of a group of some kind. This may be an objective group (nationalist or ethnic) it may be elective (religious or political) it may be hereditary (membership of a powerful clan or family) or even competitive (member of the ruling political party). But the security sector in such a society makes no pretence of treating everyone equally, and exists to reinforce the social and political norms of the society.

Now as we have seen, all security forces, even in western democracies, do this to some extent. It cannot be avoided. The difference is that in some of the examples given above, inequality of treatment and arbitrary use of state power are written into the very fabric of the state: the party has a leading role, an identity group is singled out for protection, dissidents who might disturb the smooth functioning of society are specially targeted, and so forth. Consequently, groups who are not favoured by such systems will often withdraw from the state, and even set up their own parallel informal structures, or make use of existing ones. Thus, attempts to set up instant liberal states, full of autonomous individuals, without a larger identity, demanding nothing more than freedom from state interference, customarily take a little longer than was originally hoped.

There is a tendency to treat such states as embarrassing deviations from

the norm, or as rather backward children who have not yet caught up with generally accepted norms and values. But in fact, their ideas are deeply rooted in certain cultural and social realities. What we can broadly call "Confucianism" for example, from the social theories of Confucius (Kung Fu-Su 551-479 BC) is a reasonable product of a traditional, stratified, family and clan-based society where things change slowly if at all, and only complete cooperation, following traditional wisdom, and suppressing individuality, allows families and villages to survive from one year to the next. Confucianism also believed (as did many authoritarian theorists in the west) in an inherently established social and political order, where knowing one's place and fulfilling one's Role were the highest virtues. With most Asian societies a maximum of two generations from subsistence-level family agriculture, such ideas do not change quickly.

Finally, western theories of the strong state have a long pedigree. Thomas Hobbes (1588-1679) produced the best-known defence of the idea that a strong, authoritarian, unaccountable state is the only guarantee of the safety of the individual. The "social contract" – Hobbes seems to have invented the term – requires that people surrender all their rights to gain security. Likewise, such a state cannot accept any outside limitations on its freedom of action such as treaties, if it is to protect its people. Such ideas were very influential, especially in Europe, notably in the writings of GF Hegel (1770-1831), and were used to justify the fascist totalitarian states of the twentieth century. Carl Schmitt (1888-1985) famously argued that Hobbes had not gone far enough, and his own works served to justify the rise of Nazism (though he later recanted). Finally, Leo Strauss, a contemporary of Schmitt (1889-1973) who left Germany as a result of anti-semitic persecution, settled in the United States and became the intellectual godfather of American neo-conservatism. The absolutist theories of Presidential power described earlier ultimately derive from his writings.

What is surprising about this latter tendency is not that powerful elites promote it, but that ordinary people accept it. Why is that? There are three possible explanations. One is simply fear. Governments tell us that losing our freedoms will make us safe against nameless, terrifying fears. We obey them as we obeyed our parents who told us that a monster under the bed would eat us if we did not do as we were told. The second is that, for the most part, we do not believe that repressive measures are directed against us. Societies will generally accept, quite calmly, massive damage to the Rule of Law provided repressive measures are overtly directed at marginal groups, whether political, social, religious or ethnic. The third is that many countries have a political tradition of vigilantism. This may be from myth, legend and Hollywood cinema, it may more seriously arise from the incapacity of the security sector to do its job, or frustration with the difficulties of criminal prosecution. In any case, it tolerates irregular and often illegal action by the security forces to stop the "guilty" going free.

At a practical level, there is no evidence that the authoritarian model just described actually produces any more security in itself, and some evidence that it works less well than more liberal ones. In turn, this is because all such theories neglect the existence of informal rules and social controls which themselves

largely dictate the level of security enjoyed by a society. When these controls break down, not even the largest and most repressive security apparatus can successfully substitute for them. On the other hand, The Liberal model does not take account of these rules and controls either, and thus often attempts to graft formal structures of oversight and accountability drawn from liberal political societies onto cultures whose underlying social and political norms are very different. The results are seldom very pretty.

EIGHT: THE SECURITY SECTOR AND JUSTICE

Some systems of justice work, and some do not. Whilst technical characteristics of justice systems are part of the equation, the real determinant of whether a justice system works or not is the degree of public support it gets. If the general population does not report crime in the first place, or cooperate in investigations, or give evidence freely in trials, then there is little chance of having an effective justice system. But in turn, people will only support a justice system if they think it is effective. The argument is thus effectively a circular one.

The characteristics of an effective justice system are not difficult to list. Crimes are investigated expeditiously, those against whom a good case can be made are put on trial, if guilty they are convicted, if innocent they are freed, if convicted they are sent to prison and if sent to prison they stay there. This is what ordinary people expect of a justice system, but in many countries they are disappointed.

Crimes may not be reported in the first place, because there is no faith that they will be investigated properly. The authorities may see investigation as a financial opportunity, or may investigate crimes more or less willingly depending on which community is the victim. The technical and manpower capabilities of the justice system may be inadequate. The wrong people may be arrested and the guilty may go free. Trials may take so long to organise that judges may free prisoners, juries may convict the wrong people, judges may be suborned, and even convicted prisoners may be freed because there are no jails to accommodate them.

In such a system, the public see little point in cooperating with the justice system, since they derive little benefit from doing so. And because the public does not cooperate, the system itself is much less effective. And because the system is ineffective, public confidence declines further. This does not mean, of course, that the public is indifferent towards crime: indeed, public opinion often becomes highly inflamed and demands action. In such circumstances, parts of the justice system may take the law into their own hands, and vigilantes may appear from the local population. It is this question of effectiveness that is most important. As we have seen, people will put up with brutal and even corrupt justice systems so long as they produce results. But they will not tolerate systems that are simply ineffective. Initiatives to improve transparency and accountability, to bring the police closer to the community and so forth, are

valuable enhancements to a justice system which is effective in the first place, but they cannot substitute for this basic capability; something that ROL initiatives sometimes have a tendency to forget.

Of course, no system of justice is perfect, and all justice systems suffer from one or more of the above problems to some degree. But we can say that effective criminal justice systems have four main characteristics, without which it is hard for any system to gain credibility. The first is that the personnel of the justice system must be properly paid. This does not mean they should be rich, but it does mean that they should be paid sufficiently well that they are not obliged to turn to corruption in order to live, and have pensions on which they can survive. This simple measure would probably do more than anything else to improve the level of policing in many countries. It also enables anti-corruption campaigns to be much more effective, since it removes the classic justification for corruption in the first place. In addition, pay always functions, in some sense, as a surrogate for the value placed by society on certain functions. If policemen are badly paid, they feel resentful that society does not value their role, or understand the dangers they face, and they look for ways of taking their revenge on this uncaring society. Judges who feel that their qualifications and experience are not adequately rewarded will look for ways of making up the deficit.

Secondly, the individuals in the system must be properly led and managed. Organisations take their ethos and values from the top, and those in high places have a positive responsibility to provide this lead. But leadership is also a technical skill that can be learnt, and well-managed organisations are happier and more effective than poorly managed ones. The risk (not confined to developing countries) is of a leadership cadre which is too politicised, too close to political and financial elites, often disproportionately well paid, and which has lost touch with how their own personnel have to operate on the ground.

Thirdly, the organisations and personnel must be properly equipped. Sometimes this is very basic. A number of rural police stations in Africa have no vehicles, so only crimes in areas reachable on foot can be investigated. Needless to say, real-time response or pursuit of criminals is impossible. The provision of radios, simple computers for record keeping, simple forensic tools and even video cameras can transform the capability of a justice system to do its work. Mundane initiatives such as secure accommodation for holding the accused, video recording of testimony and a basic forensic analysis capability are among the foundations of a proper justice system. They enable the right people to be arrested and charged, and actually permit initiatives such as prison visits to be organised much more easily. The individual has to be properly equipped also. Nothing is more dangerous, for example, than to put a semi-trained policeman with a lethal weapon in a situation of public disturbance. On the other hand, properly equipped public order units, with body armour, shields and non-lethal means of crowd dispersal, will be able to react calmly to violence and to de-escalate the situation.

Finally, adequate training is essential at all levels in all organisations. Law is a complex issue in every country, and properly trained officials are essential if

the system is to work correctly. Laws do not draft themselves, and manuals and procedures need to be put together by experts. There are new disciplines, such as criminal analysis, which require lengthy training of high-quality personnel to be effectively employed, against organised crime for example. At the individual level also, training is critical. An untrained policeman, overworked and underpaid, will often resort to beating confessions out of habitual criminals, simply because it is easier. And more complex – and often more serious – crimes go unaddressed because the technical expertise to deal with them does not exist. Public opinion usually wants a good justice system without paying for it, and the system itself is often obliged to cut corners to satisfy this demand.

Experience suggests that very few people begin by being corrupt, or brutal, or deliberately trying to do a bad job. Human beings can be motivated to do a good job under the most unpromising circumstances. But they can also easily be de-motivated and corrupted by systems, and much bad behaviour in the security sector, such as corruption and brutality, is actually a reasonably rational response to the situation in which people find themselves. It is for this reason that abstract lectures on morality and human rights are generally beside the point, unless accompanied by fundamental systemic change. Most people ultimately want to do a good job, but if they cannot do this job properly they will do it improperly or not at all.

Poor pay, as we have seen leads to corruption, and to the police themselves becoming criminals. The sources of corruption will either by ordinary people, or the criminal fraternity themselves. In the first case, public support declines as a result, in the second, the fight against crime obviously suffers. The lack of equipment and resources to fight crime means, at its simplest, that this fight is conducted less effectively. But it also means that the justice system will pursue those it has the capability to address: traffic violations and street crime will be pursued, while more important crimes remain unaddressed, because of lack of capability. Poor leadership produces low motivation: if they are feathering their nest, it will be said, why shouldn't I? Technically incapable leaders, or those appointed for flagrantly political motives, often have a depressing effect on morale. And finally lack of capability and training means that the system will resort to short cuts to get what is wanted, and may itself behave illegally. Public opinion is also complicit here. Few politicians or media pundits will publicly criticise policemen who use underhand methods to secure convictions against those whom the public is afraid of. Ultimately, this can lead to the fabrication of evidence, witness corruption and even murder.

By definition, the ROL can only be effective if the state preserves the monopoly not only of the use of force, but of the exercise of judicial power. It is pointless to seek transparency from a vigilante group. The state will not ultimately preserve this monopoly without an effective justice system, but the effectiveness of this system, as already indicated, requires the public to identify with it. A system that is reactive to public needs, that treats all groups equally, and that is consistent and fair, will be one in which the public has confidence. In turn, that system will be effective because it receives public support. When attempts to introduce ROL changes fail – as often happens in Africa – it can be

because the proposed system is seen as a foreign import, in which the public can have no confidence, since it is alien to their traditions.

So far, the concentration has been on the police and justice system, but in many countries the military find themselves drawn into public order, and even into criminal investigation. How should such cases be handled? On the one hand, there will be a grey area where the level of violence reaches a point that the police cannot easily cope with. Here, the choice lies between a militarisation of the police, in the form of a gendarmerie, and the use of the military in a police role. If the military proper are used, it has to be in situations of large-scale violence, which go beyond merely law and order issues. The use of the military for crowd control or public order, on the other hand, is almost always a bad idea. When it is necessary (as was in the case in Northern Ireland) it may be because the police are perceived as the enemy in the sense that the military are not.

The military themselves, it needs to be re-emphasised, are citizens and members of the public for most purposes. A soldier alleged to have committed robbery or murder, for example, has broken the law of the land and should be tried before a civilian court. Military courts, on the other hand, are reserved either for trivial offences or for offences under military law. The latter include charges like hazarding a ship, or disobeying an order, for which there is no civilian equivalent, and where a normal court would have no expertise. By contrast the use of military courts to try civilians – as has been happening in the United States – is repugnant to the very spirit of the ROL.

The use of force by the military, when there is no armed conflict, is subject to exactly the same rules as the use of force by civilians. The military have no special rights to use force which civilians do not have. Although the precise detail varies from country to country, in general, the military – like any other citizens – can use reasonable force to protect themselves or someone near them. This can include lethal force if someone's life is threatened.

CONCLUSION

This brief introduction has attempted to make three main points. First, the Rule of Law is not primarily about the Law, or indeed about Rules. It is not primarily about not processes, documents and structures. It is rather an issue of political culture, and the willingness of that political culture to subject itself to the Rule of Law. If the will to respect the ROL does not exist, processes, documents and structures are irrelevant. If it does exist, they are only of limited importance anyway. Moreover, the ROL is never actually implemented by organisations, but only by people, and it either exists in the micro-level power relationship between the citizen and the representative of the state, or it does not exist at all.

Second, the philosophical basis for the current ROL discourse is essentially arbitrary. This does not mean it has been chosen randomly, or that it is necessarily without merit. What it does mean is that other bases could have been chosen, and have indeed been chosen in other epochs and by other civilisations today. Failure to understand this, or the tendency to assume that ROL thinking in other parts of the world is necessarily either wrong or insufficiently developed, has undermined much theorising about the ROL, as well as attempts to turn theory into practice.

Finally, politics, as always, is key. Undifferentiated enthusiasm for the ROL does not exit in any society. We demand fairness and equality for ourselves, but are often reluctant to accord it to others, especially those we dislike. We therefore do not object when the rights of those we dislike are taken away, and may indeed demand that the authorities treat them even more harshly.

Most people, in the end, would prefer to live in a society with the ROL than one without, at least as regards their own situation. There is little doubt that such a society is better than its alternative, even if, in the last analysis, that remains a value judgement rather than something that can be proved. But the concept of the ROL is very different in different societies, and this has to be acknowledged from the start. So we conclude, not with a definition as such, but with the conditions for the existence of the ROL in any given country.

Briefly, we can say that the Rule of Law is healthy when the reciprocal power relationships between the state, outside actors like parliament and the courts, and the people themselves, are effectively managed according to rules that are generally accepted, and widely respected in practice.

FURTHER READING

INTERNET MATERIAL

The vast majority of the authors, events and concepts referred to in the main text have Wikipedia entries. These can be used to get a general idea of the subject, and suggestions for further reading, but, as always with Wikipedia, the entries should not be used as primary sources, nor considered necessarily authoritative.

However, a number of peer-reviewed online encyclopaedias do exist, with entries written by experts, which may be freely cited. Examples are:

THE ONLINE ENCYCLOPAEDIA BRITANNICA
Superior to Wikipedia with more academic credibility and a very good selection of further reading. (http://www.britannica.com/)

THE STANFORD ENCYCLOPAEDIA OF PHILOSOPHY
(http://plato.stanford.edu/) has a series of excellent articles on many of the subjects covered in this guide.

THE ENCYCLOPAEDIA OF LAW AND ECONOMICS
Hosted by the University of Gent, a huge collection of online articles.
(http://users.ugent.be/~gdegeest/tablebib.htm)

HOME PAGES OF ORGANISATIONS

The principal organisations mentioned in this guide have their own home pages, including some sections specifically devoted to ROL issues, with useful essays and collections of documents. Examples include:

UNITED NATIONS ROL PAGE
http://www.unROL.org/

UNITED NATIONS INTERNATIONAL LAW PAGE
http://www.un.org/en/law/

INTERNATIONAL COURT OF JUSTICE
http://www.icj-cij.org/

INTERNATIONAL COMMITTEE OF THE RED CROSS
http://www.icrc.org/eng/index.jsp

INTERNATIONAL CRIMINAL COURT
http://www.icc-cpi.int/

EUROPEAN UNION
http://europa.eu/pol/rights/index_en.htm

EUROPEAN COURT OF HUMAN RIGHTS
http://www.echr.coe.int/echr/Homepage_EN

ORGANISATIONS WITH MATERIAL AND COMMENTARY ON THE RULE OF LAW

RULE OF LAW RESOURCE CENTRE
http://law.lexisnexis.com/webcenters/RuleofLawResourceCenter

INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE
http://www.ictj.org/en/index.html

CENTRE FOR THE STUDY OF VIOLENCE AND RECONCILIATION, SOUTH AFRICA
http://www.csvr.org.za/

INSTITUTE FOR SECURITY STUDIES, SOUTH AFRICA
http://www.iss.co.za/

THE WORLD JUSTICE PROJECT
http://www.worldjusticeproject.org/

ESSAYS AND COLLECTIONS ON THE RULE OF LAW

Essay on International Law
http://www.law.duke.edu/shell/cite.pl?67+Law+&+Contemp.+Probs.+147+%28autumn+2004%29

International Understandings of the Rule of Law
http://wikis.fu-berlin.de/display/SBprojectROL/Home

Pim Albers essays and articles
http://sites.estvideo.net/laurens1/web-content/publicationspim.htm

Stefan Voigt: How to measure the Rule of Law
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1420287

WHAT IS THE RULE OF LAW?

For a stringent critique of the whole governance and nation-building enterprise, of which the ROL is part, see Kate Jenkins and William Plowden, *Governance and Nationbuilding: The Failure of International Intervention*, Cheltenham, Edward Elgar, 2006. For a general presentation, see Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory,* (Cambridge 2004). A brief and lucid introduction, from an Anglo-Saxon standpoint, is Tom Bingham, *The Rule of Law*, Penguin, 2010. Thomas Carothers has edited a very interesting collection of essays, *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie, 2006. A standard presentation of the World Bank/IMF view is Helen Yu and Alison Guernsey, *What is the Rule of Law*, at http://www.uiowa.edu/ifdebook/faq/Rule_of_Law.shtml. The World Bank also has a substantial list of publications on its site http://www.worldbank.org/reference/)/ A useful, if demanding, exploration of the problem of multiple, mutually uncomprehending traditions of ethics, is Alasdair MacIntyre, *After Virtue*, Third Edition, London, Duckworth, 2007. There is a good discussion of collective and group rights, which have received less attention than individual rights at http://plato.stanford.edu/entries/rights-group/ A useful introduction to the ethical dimension is Michael J Sander, *Justice: What's the Right Thing to Do?* Farrar, Strauss and Giroux, 2009.

LAW AND POWER

On theories of power in general, see Barry Hindess *Discourses of Power: From Hobbes to Foucault,* Oxford, Blackwell, 1996. Michel Foucault wrote extensively about power all his life, and often in a legal/judicial context. See especially *Surveillir et punir: naissance de la prison,* (1975) translated as *Discipline and Punish: The Birth of the Prison,* Pantheon Books, 1977. There is a useful collection of resources at www.michel-foucault.com. Steven Lukes, *Power: A Radical* View, revised edition Palgrave Macmillan, 2005, has been highly influential. A popular account of the actual production of laws in the US is Ken Silverstein, *Washington on 10M$ A Day: How Lobbyists Plunder the Nation*, Common Courage Press 2002. A sceptical view of the politics of criminal justice is William J Chambliss, *Power, Politics and Crime*, Westview Press, 2000. On the UK, see also Philip Rawlings, *Crime and Power: A History of Criminal Justice 1688- 1998*, Longman 1999.

DOMESTIC INFLUENCES ON THE RULE OF LAW

The separation of powers is described in Montesquieu's *De L'Esprit des lois* (1748). A modern edition of the text is online at the University of Quebec's site: http://classiques.uqac.ca/classiques/montesquieu/montesquieu.html. A modern edition in English is by Cohler, Miller and Stone (Cambridge University Press, 1989). A large collection of documents leading up to the American Constitution of 1787 is at http://press-pubs.uchicago.edu/founders/. The development of the French system is described in the standard textbook *Histoire des institutions et des faits sociaux*, published under various editors since 1957 by Dalloz, Paris. JAG Griffith's classic *The Politics of the Judiciary* is now in its fifth edition (Fontana Books 2010). On the police more specifically see David Rose *In the Name of the Law: The Collapse of Criminal Justice*, Jonathan Cape 1996. The

reluctance of US courts and parliament to challenge their government's activities in the security area has been exhaustively documented, see for example "Obama Wins the Right to Invoke 'State Secrets' to Protect Bush Crimes," in http://www.salon.com/news/department_of_justice/index.html?story=/opinion/greenwald/2010/09/08/obama. Technical aids such as DNA testing, have now been found to be questionable or even faked: see for example http://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/ and http://www.slate.com/articles/news_and_politics/jurisprudence/2015/04/fbi_s_flawed_forensics_expert_testimony_hair_analysis_bite_marks_fingerprints.html. Meanwhile, confidence in external sources of "control" has dramatically reduced in recent years; For recent figures on the US, see http://memex.naughtons.org/wp-content/uploads/2016/04/Declining_trust.jpg

INTERNATIONAL INFLUENCES ON THE RULE OF LAW

The principal treaties referred to in the text are available online, as follows:

Convention Against Torture
http://www2.ohchr.org/english/law/cat.htm

Convention on the Rights of the Child
http://www2.ohchr.org/english/law/crc.htm

European Convention on Human Rights
http://conventions.coe.int/treaty/en/Treaties/Html/005.htm

Universal Declaration of Human Rights
http://www.un.org/en/documents/udhr/index.shtml

The United Nations Treaty Collection http://treaties.un.org/Home.aspx?lang=en contains a useful database of signatures and ratifications of the various treaties.

Amnesty International has a substantial page of statistics and other information about the progressive abolition of the death penalty worldwide at http://www.amnesty.org/en/death-penalty

THE RULE OF LAW AND INTERNATIONAL RELATIONS

The basis of the way the world is intended to work is the Charter of the United Nations http://www.un.org/en/documents/charter/index.shtml. The Dag Hammarskjöld Library site contains a wealth of documents: http://www.un.org/depts/dhl/index.html A useful analysis by a group of African scholars of the weaknesses of the Security Council and possible solutions is Afoaku, Osita G "United Nations Security Council reform: A critical analysis of enlargement options". *Journal of Third World Studies*., copy at http://findarticles.com/p/articles/mi_qa3821/is_200110/ai_n8976233/. Most textbooks on the international system are either legally based, and describe the

system as it notionally works, or are exercises in western realism or neo-realism. A better alternative is Hedley Bull, *The Anarchical Society*, Third Edition, Palgrave Macmillan 2002. From the security perspective, see Buzan, Waever and de Wilde, *Security: A New Framework for Analysis*, Lynne Reiner 1998. The reality of the international system for a quarter of the world's states, and how weak states survive, is described by Christopher Clapham, *Africa and the International System*, Cambridge University Press 1996.

INTERNATIONAL JUSTICE

The ad hoc tribunals have their own websites (http://www.icty.org/ and http://www.unictr.org/) as does the Sierra Leone Special Court (http://www.sc-sl.org/). Many of the organisations referred to earlier have useful material on their sites. There is now a large literature on war crimes and international justice, but of very varying quality. See however Roberts and Guelff *Documents on the Laws of War*, Third Edition, Oxford University Press, 2000, and Geoffrey Best, *War and Law Since 1945*, Oxford, the Clarendon Press, 1994. David Chuter *War Crimes: Confronting Atrocity in the Modern World*, Lynne Reiner 2003 may be of interest and has an extensive bibliography. William A. Schabas, *An Introduction to the International Criminal Court,* Cambridge University Press, 2001 is exactly what it says. A scathing commentary on how the Court has evolved is Julie Flint and Alex de Waal, "Case Closed: A Prosecutor without Borders", in *World Affairs*, Spring 2009 available at http://www.worldaffairsjournal.org/articles/2009-Spring/full-DeWaalFlint.html See also Mahmood Mamdani, *Saviours and Survivors: Darfur, Politics and the War on Terror*, Pantheon Books, 2009, for the political manipulation of suffering. David Chuter, "The ICC, A Place for Africans and Africans in Their Place," is available at http://www.davidchuter.com/Texts/ICC.PDF. A recent but fundamental new issue – the prosecution of adults who were child soldiers – is discussed at http://blog.oup.com/2016/09/child-soldier-prosecuted-icc-law/

THE RULE OF LAW AND THE PROVISION OF SECURITY

The text of Locke's *Second Treatise of Government* is online at http://www.gutenberg.org/ebooks/7370. The Peter Laslett edition (Cambridge University Press 1988) has a good introduction and notes. An excellent introduction to different theories of the state is Cudworth, Hall and McGovern, *The Modern State: Theories and Ideologies*, Edinburgh University Press 2007. For an idea of what it must have been like to live in a state where the ROL had entirely disappeared, see Richard J Evans, *The Third Reich in Power*, Allen Lane 2005. An interesting counter-perspective is provided by Rindova and Starbuck "Ancient Chinese Theories of Control" *Journal of Management Inquiry*, 1997, 6: 144-159, at http://pages.stern.nyu.edu/~wstarbuc/ChinCtrl.html . An edition of Hobbes' *Leviathan* is online at http://www.gutenberg.org/ebooks/3207. Richard Tuck, *Hobbes: A Very Short Introduction* (Oxford Paperbacks, 2002) is precisely that. Few people today read Hegel unless forced to, but a number of Carl Schmitt's works have been translated into English, notably *The Leviathan in the State Theory of Thomas Hobbes*, new edition, University of Chicago Press, 2008, which has an excellent introduction. A good summary article is at

http://plato.stanford.edu/entries/schmitt/ and an attempt to trace a direct line of influence through Schmitt and Strauss to John Woo and the Bush White House is at http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html

THE SECURITY SECTOR AND JUSTICE

Bruce Baker's site http://www.africanpolicing.org/ has a wealth of material on African justice, both formal and informal. A clear-sighted look at corruption and the reasons why its exists in Alex De Waal; *Dollarized*, available at http://www.ssronline.org/edocs/alex_de_waal_dollarised_240610.pdf . See also Joseph Hanlon "How Northern Donors Promote Corruption" available at http://www.thecornerhouse.org.uk/resource/how-northern-donors-promote-corruption . There is increasing interest in traditional justice mechanisms, see IDEA, "Traditional Justice and Reconciliation After Violent Conflict" at http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf . An important book on the link between trust and human behaviour is Piotr Sztompka, *Trust: A Sociological Theory*, (2008). A collection of material on public order issues is at http://www.usip.org/programs/initiatives/stability-policing-initiative

FURTHER THINKING

Given the multiplicity of definitions of the ROL, is it worth trying to develop a compromise or portmanteau definition? What practical use could it be? Is any kind of compromise between the Anglo-Saxon ROL tradition and the continental tradition of the law-based state actually possible?

Is there such a single thing as the ROL? Or are there different sets of rules for different societies at different times? If the latter, where do these rules come from, and who decides what they should be?

From your own experience, are there things that resemble the ROL in traditional cultures you know about? Have they lost their utility, or on the other hand do they have lessons for the wider world?

Do you always obey the law? If you do, why? Would you disobey any law if you knew there was no chance you would be caught? What would happen if everybody did that?

Are there customs or rules you have for yourself, or which your group has, and which you follow? Why do you follow them?

If you are in the military, do you see the laws of armed conflict as a protection or a hindrance?

Do you think the entry of China and other new powers onto the international scene will make international relations fairer and more equitable? I so, why?

Do ordinary people have confidence in the police and justice system in your country? How much? What leads them to this judgement?

How far, in practice, would you and those you know go to defend the rights of groups in your country you fundamentally disagree with, and which you might even consider dangerous?