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On Armed Conflict, Human Rights, and Preserving the Rule of Law in Latin America

Luz E. Nagle

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Articles

On Armed Conflict, Human Rights, and Preserving the Rule of Law in Latin America

Luz E. Nagle*

In a very real sense, the world no longer has a choice between force and law; if civilization is to survive, it must choose the rule of law.¹

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1. President Dwight D. Eisenhower, Statement on the Observance of Law Day (Apr. 30, 1958), *available at* <http://www.eisenhowermemorial.org/speeches/19580430%20Statement%20by%20the%20President%20on%20the%20Observance%20of%20Law%20Day.htm>.

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I. Introduction

The rule of law and respect for human rights in Latin America are under assault. Internal armed conflict spanning many years' duration in several Latin nations, criminal gangs and international crime organizations, international terrorist cells operational in the region, government corruption, loss of faith by citizens in their government institutions, the emergence of neo-feudalism in rural territories and areas of vital strategic importance, increased pressures on indigenous cultures, and the unregulated exploitation of natural resources by legal and illegal actors—all conspire to cast the Latin American world into a region of transborder conflict, lawlessness, and long term political and social instability.

This article examines the impact of internal armed conflict, terrorism, and human rights violations on the rule of law in Latin America. Further, this article considers what steps effected states must take. The United Nations ("U.N.") and the Organization of American States must take a leadership role in stabilizing the region. This can be accomplished by encouraging needed reforms within vital government and legal institutions and by reaffirming that protection of human rights and respect for the rule of law are paramount to long-term development and regional security.

First, we will examine several facets of what comprises the rule of law as we perceive it in the Western World. We will then discuss our understanding of the rule of law in the context of internal armed conflict, terrorism, and human rights in Latin America. In the course of this examination, we will look at comparable situations in Northern Ireland and the Middle East in order to understand better the challenges confronting Latin American states and international world bodies involved in protecting human rights, fortifying struggling democratic states, confronting armed conflict and terrorism, and preserving the rule of law. We will then conclude with several proposals for achieving sustainable security and pragmatic respect for human rights in the region.

II. The Nature of the Rule of Law in Latin America

Before referring to the state of the rule of law in Latin America, we must agree on what the “rule of law” means and what it implies. The rule of law is a misused, misunderstood, and at times maligned concept, and beyond our notions of law encompasses issues as diverse as property ownership, the aspirations of civil society, and retribution during regime change or following in the aftermath of internal armed conflict.² The broad scope of the rule of law raises many questions about its very nature.

For example, is the rule of law a term to describe due process, justice, and equality before the law? How do we determine the extent to which a state possesses the rule of law? Do we refer to the existence of judicial authorities, government institutions, and rules and procedures in the codes that embody the promise of justice, equality, economic development, and citizen participation? Or does the rule of law refer only to an even and equal manner in which government institutions contend with its citizens? Are we referring to how fair and just the system is? Are we talking about how much discretion a government has over its citizens? Does the rule of law assist economic growth? Does it protect human rights? Is the rule of law an essential precondition for democracy? Are we referring to the rules and procedures by which the state enforces its laws, and do we assume that the rule of law entails that the state is transparent, public, clear and explicit, and not arbitrary or subject to political exploitation by the state?

The answers to these questions depend on one’s understanding of the notion of the rule of law. This is a challenging task because the rule

2. See U. S. ARMY PEACEKEEPING AND STABILITY OPERATIONS INST., RULE OF LAW CONFERENCE REPORT JULY 6-9 2004 11 (2004) [hereinafter “U.S. ARMY REPORT”], available at <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA428140&Location=U2&doc=GetTRDoc.pdf>.

of law embraces several concepts,³ and each concept focuses on different institutions,⁴ norms, and aspects of the legal system.⁵ Central to understanding the meaning of the rule of law is recognizing that problems with current rule-of-law analysis, criticism and even reform policies arise directly from pitfalls inherent to the definitions used.

A. *Historical Roots of the Rule of Law*

Law professor Miguel Schor, in his thorough paper on the rule of law in Latin America, sets forth a clear picture of the evolution of rule of law institutions in the region.⁶ Professor Schor emphasizes that the rule of law in the Americas is informed by the region's historical roots, and that a thorough examination of the legacies at play in the hemisphere is

3. "The benefits of the Rule of Law depend on how the Rule of Law is defined." Melissa Thomas, *Rule of Law in Western Thought*, <http://go.worldbank.org/EB3RDGI5L0> (last visited May 14, 2008). Many associate the rule of law with notions of no *ex post facto* laws, presumption of innocence, dual jeopardy, or *habeas corpus*. Some include additional elements including the supremacy of the law, a concept of justice, restrictions on the exercise of discretionary power, doctrine of judicial precedent, common law methodology, prospective laws, independent judiciary, legislative power exercised by parliamentary body and restrictions on the executive's exercise of legislative powers, and moral basis of law. See, e.g., Mark Cooray, *The Rule of Law* <http://www.users.bigpond.com/smartboard/btof/chap180.htm> (last visited May 14, 2008).

Mark Ungar defines the rule of law as "comprising an independent effective judiciary, state accountability to the law, and citizen accessibility to conflict-resolution mechanisms." MARK UNGAR, *ELUSIVE REFORM: DEMOCRACY AND THE RULE OF LAW IN LATIN AMERICA* 1 (2002).

In commenting on a GAO report, USAID defined rules of law as follows: "The rule of law embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals. See U.S. GEN. ACCOUNTING OFFICE, *FOREIGN ASSISTANCE: RULE OF LAW FUNDING WORLDWIDE FOR FISCAL YEARS 1993-1998* 13 (1999), available at <http://www.gao.gov/archive/1999/ns99158.pdf>.

4. See Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners* 6 (Carnegie Endowment for Int'l Peace, Paper No. 55, 2005), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=16405&prog=zgp&proj=zdr1> ("Conceptual confusion may have arisen because practitioners working to build the rule of law abroad have developed an entirely different way of looking at the concept, based not on end goals but on institutions to be reformed.").

5. The expression "rule of law" is held by some to be ambiguous at best. See Rainer Grote, *Rule of Law, Rechtsstaat and Etat de Droit*, in *CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY—A COMPARATIVE ANALYSIS* 271 (Christian Stark ed., 1999), (reviewing the ways in which the phrase has been used in Europe and the United States).

6. Miguel Schor, *The Rule of Law and Democratic Consolidation in Latin America* (Mar. 2003) (unpublished paper, prepared for the 2003 meeting of the Latin American Studies Association, Dallas, Texas), available at <http://www.uoregon.edu/~caguirre/Schor.pdf>.

central to understanding the political and social tensions that affect nation building, development, and security in the region. Schor points out that modern Latin American nations are the embodiment of a centuries-old system in which a ruling elite maintains control by manipulated interaction among and within the three branches of government in order to preserve the status quo of a ruling class composed of large landowners in control of vast natural resources, and a powerful merchant class capable of manipulating trade and commerce to influence the political landscape.

The post-colonial societies that emerged in Latin America in the early nineteenth century were the *de facto* birthright of the Creole elites intent on taking charge of their hard-won economic, political and social destiny. Because they feared granting political power to those unfortunate enough to have been born to the lower classes, the new elite created institutions designed to preclude the masses from consolidating rights established on paper or in spirit in the early decades of democracy building.⁷ During the late eighteenth and well into the nineteenth century and despite several fits and starts and a handful of civil wars and border conflicts,⁸ Latin American nations implemented civil codes and constitutions in the course of modern nation building. But a closer look at the rules and constitutions reveals the sinister methods used by the elite to exclude the masses. For example, the vote was limited to free men with property who enjoyed the support and loyalty of a military class fully prepared to silence dissension.⁹ Women in many Latin American nations were considered second class citizens, were prevented from fully participating in legal and political affairs,¹⁰ and were subject to the authority of their fathers, brothers, or husbands (the patrimony

7. *Id.* at 13. See also ROBERT J. FERRY, *THE COLONIAL ELITE OF EARLY CARACAS: FORMATION & CRISIS 1567-1767*, at 7-8 (1989) (describing in his Introduction how elite families, particularly among the Caracas gentry at the close of the colonial era, took steps to “retain both wealth and political power for many generations”).

8. Latin nations engaged in a number of brief armed conflicts in the 19th and early 20th centuries. Notable among these conflicts are the War of the Triple Alliance (1864-1870), fought between Paraguay and combined forces of Uruguay, Argentina, and the Empire of Brazil; the War of the Pacific (1879-1883) between Chile and combined Peruvian and Bolivian forces; the War of the Schools (1876-1877) and the Thousand Days War (1899-1902), both Colombian civil wars; and the brief border conflict known as the Ecuadorian-Peruvian War (1941-1942).

9. See Schor, *supra* note 6, at 14.

10. See Inter-American Commission on Human Rights, Organization of American States, *Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas*, Ch. III(B) Civil and Political Rights of Women, OEA/Ser.L/V/II.100 Doc. 17 (Oct. 13, 1998), available at <http://www.cidh.org/countryrep/Mujeres98-en/Chapter%203.htm> (summarizing the advancements obtained for women’s rights in the last two decades of the twentieth century, following constitutional, human rights, and political reform movements throughout Latin America).

system). Intolerance of religions other than Catholicism was widespread, and the inquisitorial system of criminal justice persisted well into the latter half of the nineteenth century. Leaders obtained power through personal connections and strategic familial alliances¹¹ rather than through talent and hard work (the patronage system).¹² The ruling caudillos, with little more than a nod to the constitutions and the laws they had created in moments of republican ardor, infused order by relying on personal loyalties and a rigid patronage system with roots in Roman antiquity. Society was glued together by the charisma and alliances of these caudillos and not by the recognition and application of the legal norms they acknowledged—at least on paper.¹³ Economic fiat and laws protecting property rights were consolidated and infused with a formalism¹⁴ that the elite preserved from generation to generation.

The twentieth century brought minor improvement in the imbalances of power in the emerging Latin American states and can best be characterized as a series of governments struggling to provide some type of representation to a growing middle class and labor groups while still protecting the interests of the traditional ruling elite.¹⁵ Schor notes that while a growing bureaucracy began to provide civil and government services in an effort to consolidate and exert central control, individual rights remained subordinated to social rights, a phenomenon that made the Latin American constitutions very lengthy, overly legalistic, and unsustainable.¹⁶ For example, over the last two hundred years, Colombia and Peru have had no less than thirteen constitutions, while Brazil has had ten constitutions.¹⁷

11. See FERRY, *supra* note 7, at 8 (noting that colonial elites emphasized the importance of marriage in maintaining their power and station in Latin American society); *id* (“Much is made of the value of marriages of prominent creole women to peninsular Spaniards, who brought both prestige and new commercial contacts to the family.”).

12. See KENNETH L. KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 639 (1975); see also Luz E. Nagle, *The Cinderella of Government: Judicial Reform in Latin America*, 30 CAL. W. INT’L L.J. 345, 352 (2000).

13. Schor, *supra* note 6, at 14.

14. For a brief discussion on formality of the Latin American legal system, see Luz E. Nagle, *E-Commerce in Latin America: Legal and Business Challenges for Developing Enterprise*, 50 AM. U. L. REV. 859, 914-18 (2001) (noting that formalism “is such that the amount of written documents, signatures, and stamps required to conduct commercial transactions presumes that every citizen is lying unless he produces written, documentary proof that he is telling the truth”).

15. See Schor, *supra* note 6, at 15. See generally William Aviles, *Paramilitarism and Colombia’s Low-Intensity Democracy*, 38 J. LATIN AM. STUD. 379 (2006), available at http://www.accessmylibrary.com/coms2/summary_0286-17434946_ITM (last visited May 14, 2008) (discussing the tentative emergence of democratic controls over the Colombian government and military classes).

16. Schor, *supra* note 6, at 15.

17. See Nagle, *supra* note 12, at 352-53.

During the post-colonial decades of the nineteenth century, the executive branch gradually consolidated power and “became the managers of a great bureaucratic organization aimed at providing welfare and promoting economic development,”¹⁸ but at the same time, the executive used its decree powers to implement economic policies that excluded those perceived as sectors or individuals not necessary to achieve development. When economic disputes arose that threatened the interests of the elite, the settlement apparatus of the bureaucratic institutions would kick in and stonewall resolution of the disputes or manipulate the process in favor of the elite. Where threats to the power of the elite persisted, the military could be called upon to quell unrest.¹⁹ There was little need, then, for an impartial judiciary to settle disputes between private litigants, or to provide a forum to address a citizen’s grievances against the state or its representatives. Instead, the judiciary became a loyal and dependable “rubber stamp” for the executive and for the larger ruling class.²⁰ For example, the existence of complicated license systems and protecting intellectual property became an obstacle for the growth and maintenance of business competition.²¹ Citizens found that the process to reach the courts was too complicated, complex, costly, and lengthy, and failed to accommodate various groups and their interests.²²

As the laws developed, they excluded a large part of society and stymied the enforcement of legal rights for those outside the elite class. Nearly two centuries after the end of the colonial rule, these and other legacies leave Latin American nations still struggling to determine the precepts, foundations and the limits of a pluralistic form of government. Democracy and the rule of law remain tenuous at best and the purview of the few.

B. Evolution and Concept of the Rule of Law

In the last decade, concern for preservation of the rule of law has evolved from the realm of scholarly discourse to become the focus of proactive political debate and policy implementation throughout Latin

18. Schor, *supra* note 6, at 16.

19. See Luz E. Nagle, *Evolution of the Colombian Judiciary and the Constitutional Court*, 6 IND. INT’L & COMP. L. REV. 59, 66 n.56 (discussing how the military protects the interests of the traditional elite).

20. See Schor, *supra* note 6, at 16.

21. See Ronald Corbett, *The Judicial Enforcement of Intellectual Property in Argentina—Is Society Being Served?* 10 CURRENTS INT’L TRADE L.J. 3, 11 (2001) (noting how political interference with the judiciary reduces public confidence and hinders foreign investment).

22. See *id.*

America—a phenomenon that transcends borders and legal systems in the region. The “globalization” of the rule of law discourse in Latin America promotes the rule of law as a manifestation of identifiable elements and norms that the governments must embrace in order to attain the requirements of stability, transparency and accountability necessary to attract international investment to the region.²³ Indeed, the capacity of an emerging nation to embrace a rule of law paradigm “helps determine democracy’s character and future prospects.”²⁴ Such a trend is evident among the Latin American states where rule of law projects and initiatives have proliferated in the last three decades through the implementation of uniform rule of law projects—a “reform menu”—to achieve a rule of law standard suitable to stimulating confidence, political stability, and foreign investment.²⁵

Problems with current rule of law analysis, debate over the meaning of the rule of law, and even reform policies instigated under the title of “rule of law” programs arise directly from pitfalls inherent in either the lack of a clear definition and/or confusion with the definitions in use and disregard for value of the law undergoing reformation.²⁶

But despite the proliferation of efforts to stabilize and enforce the rule of law, there remains significant confusion over the definition of the “rule of law” as it should be implemented and applied to the Latin American region.

C. *Distinguishing “Rule of Law” from “Rule by Law”*

The concept of the “rule of law” identifies a vital component of a western tradition with roots in Roman antiquity that centuries later fully developed during the birth of liberal constitutionalism centuries later. It is best characterized, in the words of Max Weber, as “legal domination.”²⁷ If we talk about the rule of law, we are talking about a concept in which the law is autonomous from the government. Because

23. See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95, 95-96.

24. See UNGAR, *supra* note 3, at 1.

25. See Carothers, *supra* note 23, at 95-96 (discussing how rule of law reforms have been arranged by subject matter).

26. See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75 (2008) (noting that rule of law reform initiatives ignore “much of any value to existing law anywhere in the region,” and “undermines state law and institutions while simultaneously purporting to support them. It keeps a range of questions off the table, depriving all of the Americas of any real engagement with the pre-reform options embodied in the law of Latin American states. And, it weakens the position of many Latin Americans within international legal politics.”).

27. See Bo Li, *What Is Rule of Law?* PERSP., Apr. 30, 2000, available at www.doge.us/govecon/WhatIsRuleofLaw.pdf.

it is autonomous from the government, institutions, and codes, the rule of law is supposed to provide checks and balances to curb the government's power.

Therefore, the two concepts of rule *of* law and rule *by* law are absolutely different. When we consider the role played in democracy building by such entities as the United States Agency for International Development ("USAID") and the World Bank, it can be argued that the rule of law projects imposed upon Latin American governments in the name of mutual assistance, foreign aid, economic development, and regional security, are little more than reform regimes designed for recipient governments throughout the region to continue ruling *by* law and not by rule *of* law.

The "rule *by* law" is a legal order dependent upon and subject to the government as the power regulator, but otherwise containing no substantive moral standards.²⁸ Under a rule of law regime, "[l]aw is an instrument of the government, and the government is supreme and above the law."²⁹ What we are talking about is oppression of those desiring meaningful reform and democratic representation by the very democratic regimes claiming to have the best interests of the citizenry at heart. Rule *by* law allows a small group of politicians to cover themselves in a cloak of democratic models to continue policies that preserve the corrupt political institutions that have tarnished the democratic process in Latin America since independence from European hegemony.

Rule *by* law imposes no brakes or restraint over a government's actions; it can act capriciously, arbitrarily, and unpredictably. Rule *by* law "means that a government in all its actions is bound by rules fixed and announced beforehand,"³⁰ rules making it possible to foresee with reasonable certainty that government authority will use coercive force under some circumstances, and to intervene in an individual's personal affairs "when justified for the good of the state."³¹ We have seen such manifestations of the rule *by* law in the recent past in Latin America, particularly in the form of military juntas in Argentina, Paraguay, and Uruguay.³²

28. BRIAN Z. TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 98-99 (2001).

29. See Li, *supra* note 27.

30. See FRIEDRICH AUGUST HAYEK, THE ROAD TO SERFDOM 80 (Univ. of Chicago Press 1994) (1944).

31. *Id.*

32. See Paul C. Sondrol, *1984 Revisited? A Re-Examination of Uruguay's Military Dictatorship*, 11 BULL. OF LATIN AM. RES. 187-203 (1992) (discussing Uruguay's military dictatorship from 1973 to 1985). See generally RENE HARDER HORST, THE STROESSNER REGIME AND INDIGENOUS RESISTANCE IN PARAGUAY (2007) (discussing the Stroessner dictatorship from 1954-1989); PAUL H. LEWIS, GUERRILLAS AND GENERALS:

The rule of law, on the other hand, is founded on a legal order independent from the government—a legal fiction framing a set of norms, values, and legal traditions defining a code of conduct and boundaries necessary for the maintenance of a civil society and responsive government.³³ The authority bound in the rule of law depends on its degree of autonomy and not on the “instrumental capabilities” imbued in the laws promulgated by government.³⁴ Such a degree of autonomy and independence gives the law a distinct and separate structure from other organizations.

As an independent legal order, the rule of law serves three functions: first, the rule of law regulates government power; second, the rule of law provides equality before the law; and third, the rule of law ensures procedural and formal justice.³⁵ The rule of law as a regulator of state power limits arbitrariness and abuse,³⁶ and restrains government “tyranny” because the law and not the government is the supreme authority.³⁷ To limit government abuse and discretion, the laws and procedures are pre-enacted and publicized, which means that government officials must obey the presently legal positive law, and that they must conform to restraints on their law-making power, including their power to change the law as mandated by natural law, customary law, and respect for human rights.³⁸

The rule of law as *equality before the law* implies that no man may be above the law and that the rule of law offers equal protections “without prejudicial discrimination.”³⁹ The rule of law should be of “general application and consistent implementation,”⁴⁰ can be obeyed⁴¹ and put in writing.⁴² In the political and social fabric of Latin America, recognition of the rule of law under this concept has at times seemed remote and ephemeral.

The third meaning of the rule of law pertains to *formal or procedural justice*, and demands that procedures and decisions are deduced from the legal system itself and that the rules must be applied consistently. The rules defined under a rule of law paradigm are

THE “DIRTY WAR” IN ARGENTINA (2001) (discussing the conflict between the military junta and leftist insurgents between 1976 and 1983).

33. See Li, *supra* note 27.

34. See *id.*

35. See *id.*

36. See Simon Chesterman, *An International Rule of Law?* 56 AM. J. COMP. L. 331, 342 (2008).

37. See Li, *supra* note 27.

38. See *id.*

39. See Chesterman, *supra* note 36, at 342.

40. See *id.*

41. See *id.*

42. See U.S. ARMY REPORT, *supra* note 2, at 70.

predictable because they were previously enacted and proclaimed, fair, transparent, and consistently applied.⁴³

D. Rule of Law Concepts

The lack of a well-developed notion of the meaning of the rule of law is a serious concern, especially in light of past efforts to reform legal institutions. When reading about the rule of law in Latin America, one gets the impression that the rule of law is analogous to the existence and preservation of certain institutions, the need to reform legal institutions, the need for new rules and codes, and the training of individuals to adjust to newly created institutions.⁴⁴ Writings make reference to “building the rule of law,”⁴⁵ to “governments being bound by the rule of law,” and that the rule of law is essential for economic and political development,⁴⁶ and many more epithets. Most of the scholarly writings define the rule of law from one specific method or a combination of formal, substantive, and functional methods.

1. The Formalism Definition

A formalist approach considers the existence or nonexistence of specific, recognizable criteria in the legal system and describes “instrumental limitations on the exercise of State authority.”⁴⁷ Formalism seems objective and clear because it avoids rendering conclusions based on subjective analysis and observation.⁴⁸ This method looks at the presence of provisions such as publicly known rules,

43. See Li, *supra* note 27.

44. USAID describes promoting and assisting the rule of law in Latin America and the Caribbean as follows: “Mexico launched new Freedom of Information legislation, modeled in part on U.S. legislation, with assistance from USAID.” See Press Release, USAID, USAID Promotes the Rule of Law in Latin America and Caribbean Democracies 5 (Oct. 13, 2004), available at http://www.usaid.gov/locations/latin_america_caribbean/pdf/dg_ruleoflaw.pdf. “Under USAID/Bolivia’s Administration of Justice (AOJ) program, Bolivia now has an oral, adversarial criminal justice system that is significantly more transparent, efficient, and participatory.” *Id.* “There are more personnel working in justice systems, and more of them receive specialized training. Judges and staff are better qualified, and more are selected based on merit systems. In most countries, justice budgets are larger, productivity is higher, and backlogs are smaller.” *Id.* at 10.

45. See Belton, *supra* note 4.

46. See Kenneth W. Dam, *China as a Test Case: Is the Rule of Law Essential for Economic Development?* (Univ. of Chicago, John M. Olin Law & Econ. 2d series Working Paper No. 275), available at http://www.law.uchicago.edu/Lawecon/WkngPprs_251-300/275-kd-china.pdf.

47. See Chesterman, *supra* note 36, at 340.

48. See Matthew Stephenson, *The Rule of Law as a Goal of Development Policy*, <http://go.worldbank.org/AQ875YH880> (last visited July 16, 2008).

impartially applied norms, rules that are clear and prospectively applied by an impartial and independent judiciary, and judicial review of government action. In formalistic definitions “the rule of law is measured by the conformity of the legal system to these explicit standards.”⁴⁹ A formalist classification, however, concentrates on the existence of procedures applied to implement the norms, but loses sight of the content, consequences and applicability of those laws.

The formalistic approach puts great importance on the written laws (“the law on the books”) and how the laws are implemented (“law in action”). In fact, Latin American countries proclaim rule of law principles in their official documents and substantive legal norms, but in actuality, the principles alluded to are often missing or misconstrued, or distributed unevenly. The result is a vacuum between what is ideal law on the books and the operative law in action.⁵⁰

Relying on this approach because Latin American countries revise old laws and promulgate new laws under the rule of law rubric, one could conclude that most of these countries have a well-founded rule of law. However, this strategy ignores many important and relevant factors that affect the rule of law.

One very important element is the exclusion of sections of the society and the suppression of different viewpoints. Drafting is often done by small groups of lawyers who share a common ideological viewpoint, and according to Hammergren, “This tends to produce lopsided codes which optimize one set of values or intended impacts while ignoring many others.”⁵¹

Another factor affecting the rule of law under this formalistic approach is that governments perceive that they need to expedite the implementation of certain statutes, codes, and reforms. In fact, in the name of free market reforms, governments not only have rushed to enact new legislation, thereby sacrificing the same market reforms they try to put in place, but they have used questionable tactics to achieve support for the legislation.

Presidents have curtailed public debate and opposition using presidential decree powers to implement new market reform legislation.⁵²

49. *See id.*

50. According to Professor Joseph Thome, this situation is not unique to countries that had authoritarian regimes during the 1970s and 1980s. *See* Joseph R. Thome, *Heading South but Looking North: Globalization and Law Reform in Latin America*, 2000 WIS. L. REV. 691, 701 (2000).

51. *See* Linn Hammergren, *Code Reform and Law Revision 2* (USAID Ctr. for Democracy and Governance, Paper No. ACD-022, 1998), available at http://pdf.dec.org/pdf_docs/PNACD022.pdf.

52. *See* Judith Teichman, *Latin America in the Era of Globalization: Inequality, Poverty and Questionable Democracies* 9 (Univ. of Toronto Ctr. for Int'l Studies,

In the long run, speed and exclusion sacrifice the same policies the government sought to implement. "The very process of pushing through the reforms, combined with the concentration of economic power that accrued afterwards, has undermined democratic deliberative mechanisms."⁵³ Events in the region indicate that disaffected citizens often react to their political isolation by violent protest, creating chaos and causing material damages.

In the name of market reforms, governments have used questionable tactics to gain supporters. One is the "material exchange relationship" of granting "monopolies for extended periods of time," or the implementation of "provision of export subsidies to companies already exporting or in a position to do so," to the exclusion of others.⁵⁴ Another old but still effective government tactic is clientelism whereby government officials selectively distribute patronage to trade unions and key leaders in exchange for political support.⁵⁵ These methods of exerting force and control all have a detrimental effect on the rule of law.

It has been well recognized that establishing the rule of law entails giving priority to laws that encourage investment and empowerment.⁵⁶ Yet, codes and legislation promoting market reforms come at a high cost to several Latin American nations. Several are the product of governments employing coercive means to implement changes while demonstrating "a tendency to cronyism and to the establishment of new forms of rent-seeking."⁵⁷ Various sectors of the society have been excluded by the powerful businessmen who "gained preponderant influence over public policy as a consequence of their closes personal ties with political leaders." Norms were implemented not with transparency but as a result of "under the table business deals in which political leaders received high kickbacks, or businessmen fronted business deals of politicians."⁵⁸

The speed under which legal changes take place also affects relations between governments and citizens, with citizens frustrated by the lack of time given to comprehend fully the changes and their impact.

Working Paper 2001-2, 2001), *available at* http://www.utoronto.ca/cis/working_papers/2001-2.pdf.

53. *See id.*

54. *See id.* at 10.

55. *See id.* at 10-11. For example, in Mexico, the government allowed a leader of the state petroleum workers union to set up his own contracting company. *Id.* He cashed in on the state petroleum company's move to make greater use of outside contractors. Using clientelistic methods, Argentina's President Carlos Menem channeled funds toward the social funds and selectively increased salaries of those who supported his policies. *See id.*

56. *See* U.S. ARMY REPORT, *supra* note 2, at 60-61.

57. *See* Teichman, *supra* note 52, at 4.

58. *See id.*

The rush to implement laws reinforces Latin Americans' belief that their governments' authoritarian impulses are yet another aspect of abuse of power.

Further, the formalistic approach neglects to consider how the constant implementation of new laws and codes causes instability and inconsistent application of laws, and renders rules unpredictable because of the speedy way in which they are enacted. Rules then become unfair, without transparency, and selectively applied. The Justice Studies Center of the Americas analyzed various reforms in the region and found that rules without implementation fail to consolidate the much needed rule of law. In every country the Center examined, the following problems were found:

[A]n overall inability to manage the scheduling and inter-agency coordination necessary to hold oral hearings, which translates to delays, loss of prestige of the systems vis-à-vis its users, misuse of resources, and deterioration of public relations and of transparency. Even incarcerated defendants fail to appear for hearings due to problems with prison transport services or communication systems between the courts and the prisons. The reform process has not systematically dealt with the administrative challenges implied by oral hearings. The entire administrative apparatus was developed for processing cases in the written system and is, therefore, intent upon producing a formal written record. To add to the difficulties of inter-agency coordination, the infrastructure of courts in some countries is simply not set up for holding public trials.⁵⁹

The formalistic approach, finally, fails to give a proper reading of the rule of law and may in fact exacerbate its demise.

2. The Substantive Definition

The substantive definition focuses on results and concentrates on "justice" or "fairness."⁶⁰ The substantive definition links the rule of law with something "normatively good and desirable,"⁶¹ such as a set of ideals, "whether understood in terms of protection of human rights, specific forms of organized government, or particular economic arrangements."⁶² This concept measures the rule of law by how well the system being considered resembles the initial goal and how well the system's basic components function. For example, the substantive

59. See Christina Biebesheimer, *Expectations and Reality in Rule of Law Reform in Latin America* (unpublished paper).

60. See Stephenson, *supra* note 48.

61. See *id.*

62. See Chesterman, *supra* note 36, at 340.

approach examines whether the court system works efficiently, are criminals convicted and held accountable, are mechanisms in place for restitution, and do local communities have faith in the capacity of the courts and the judges to enforce the rule of law?⁶³

But this approach has its shortcomings. Deciding how just and fair a specific legal system is entails a very complex and subjective analysis.⁶⁴ Moreover, it seems that we should not be concerned with whether a society possesses or lacks the “rule of law” when we are determining whether the nation is just and good. This approach gives an unfair, even contradictory and false reading of the rule of law in Latin America. Is this approach judged according to what the civil society in a nation thinks is “fair and just” for their way of living and goals?⁶⁵ Who compares the society, a reformer or a citizen of that society? Or does this method evaluate a nation’s rule of law as it is compared to others, and if compared to others, are the other societies similar to the one being evaluated? Will concluding whether one country possesses the rule of law depend on the organization or individual evaluating the nation? Or will it depend on what the nation’s citizens believe ought to be fair and just?

If we adopt the substantive definition we run into the problem of the “one-size-fits-all” approach to rule of law reform. In the name of improving the rule of law, the countries in the region have embarked on several institutional reforms. Some perceive such reforms in public institutions as of “overwhelming importance of the institutional framework to global competitiveness.”⁶⁶ But, this strategy has created frustrating results not only with the reforming institutions but in the nations reformed. Judgment on a nation’s rule of law cannot ignore the opinion of the citizens affected by the systems. Likewise, reforms cannot be imposed from outside a nation by individuals whose careers depend on securing continuing contracts for rule of law reform projects or who may have ulterior motives for promoting reforms.⁶⁷

3. The Functional Definition

The functional definition of the rule of law explains how the rule of law functions to serve a society and places the rule of law within the

63. See U.S. ARMY REPORT, *supra* note 2, at 70-72.

64. See Stephenson, *supra* note 48.

65. See *id.*

66. See Christopher Sabatini, *In Today’s Latin America, Competitiveness Requires More Than Free Trade*, VIEWPOINT AMERICAS, Apr. 2005, available at <http://coa.counciloftheamericas.org/article.php?id=309>.

67. See Thome, *supra* note 50, at 698 (describing World Bank’s evolution throughout its involvement in rule of law projects in the Americas).

context of supporting the foundations that fortify the civil society.⁶⁸ Central to this definition is the capacity of a nation's population to sustain the institutions crucial to maintaining order and promoting equality for all before the law, such as supporting and funding an efficient judiciary, supporting law enforcement, and empowering local authorities to feel that they have a critical stake in the sustainability of the rule of law.⁶⁹

In his cogent analysis of the functional definition, Matthew Stephenson focuses on how well the law and legal system prevent governmental indiscretion and arbitrary action and make the legal system predictable.⁷⁰ A great amount of government discretion in a society equates to a nominal rule of law, while little discretion equals a greater level of rule of law. This approach presents its own obstacles; it seems to give legitimacy to actions performed in accordance with the law, even if the effected individuals oppose those governmental actions.

Government discretion does not necessarily equate to a greater rule of law.⁷¹ In Latin America, executive officials make many decisions daily. Presidents often legislate by presidential decree and administrative agencies issue thousands of regulations and codes. Outsiders tend to evaluate the amount of presidential decrees as arbitrary governmental actions while many nations construe such "prerogative" not only as following the law but as being constrained by it. How then are we to total the levels of discretion for individual types of decisions into an overall measure of the rule of law?

Under the functional approach, in order to prevent governmental abuse and arbitrary action and to make the legal system more predictable, nations implementing reforms require a judicial institution that is strong, independent, ethical, and effective.⁷² To achieve this goal, Stephenson notes, there is a need for a judiciary that can balance the power of the political branches while avoiding arbitrariness and tyranny.

Linn Hammergren has described judicial reforms already implemented in the name of rule of law as slow, inherently unpredictable and messy.

Anyone who thought they could design a comprehensive reform program to be implemented in five years was not living in the real world. However, excessive delays in some cases, massive investments with minimal or the wrong results in others, and the fewer instances of appreciable success do suggest that reforms must

68. See Chesterman, *supra* note 36, at 341.

69. See U.S. ARMY REPORT, *supra* note 2, at 60-61.

70. See Stephenson, *supra* note 48.

71. See *id.*

72. See *id.*

be more systematic as well as systemic in their focus, and that it may be time for a third generation approach, one which is more selective in what it attempts and how it attempts it, which prioritizes and sequences types of change, and which more closely examines the external and internal incentive systems it utilizes and attempts to alter.⁷³

The reality of government in Latin America challenges the goals of rule of law reform. Throughout the region, the executive branch still exerts tremendous power over the other two branches, ruling by decree to force its will on the judiciary and legislature, or undermining judicial authority through political subterfuge and cronyism. There is little accountability for the actions of civil servants and influential citizens. Rules are made by members of the elite and upper-class with little or no citizen participation. Equality under the law is just a statement on the books that the powerful need not obey, giving truth to the Latin America clichés, “made the law, made the trap,” (*hecha la ley hecha la trampa*), and “the deal for my friends, the law for my enemies” (*la movida para mis amigos, la ley para mis enemigos*).⁷⁴

The reforms in place also call into question the approach taken toward reforming the rule of law. Hammergren’s brilliant analysis of rule of law projects in Latin America details a laundry list of maladies:

Still the advances have been uneven, both within and across countries. Some of the largest, most ambitious donor programs seem to have produced the least measurable progress—USAID’s program in Colombia (supporting an extremely ambitious national restructuring of the entire justice sector) or the World Bank’s Venezuelan project are arguably two examples, although in both cases participants argue that it is too early to make this determination. Even in countries which seem to have done more, observers have questioned the quality or long term significance of their accomplishments. The new programs, as designed and implemented, often seemed driven by extraneous or counterproductive criteria, sometimes openly contradicting the accumulated lessons of earlier experience. More laws were rewritten, but attention to their intrinsic quality or the conditions for their effective implementation continued to receive short shrift. Monies were spent on infrastructure, equipment, or massive training programs, but appointment systems continued to be ruled by personal and partisan contacts; disciplinary and evaluation systems are nonexistent or underutilized, backlogs accumulate, and delays increase. Higher budgets, and greater judicial

73. See Hammergren, *supra* note 51, at 11.

74. See WILLIAM RATLIFF & EDGARDO BUSCAGLIA, JR., *JUDICIAL REFORM IN LATIN AMERICA: A FRAMEWORK FOR NATIONAL DEVELOPMENT* 3 (1995).

control of administration and financial management have sometimes produced still more opportunity for questionable use of resources, while the introduction of judicial councils has often transferred undesirable practices from the courts to the new entities. Efforts to depoliticize the appointment of Supreme Courts have not produced noticeably better candidates and have often meant a shift from one-party control to multi-partisan colonization. More independent courts or councils have sometimes escalated conflicts with other branches of government leading some citizens and many politicians to question the wisdom of their greater autonomy.⁷⁵

4. The Goal/Ends-based Definition

A goal-oriented “ends-based definition,”⁷⁶ as defined by Rachel Kleinfeld Belton, provides perhaps a better barometer to assess the level to which a Latin American nation possesses the rule of law. This definition specifies the goods that the rule of law provides to a society, and includes goals that the rule of law seeks to achieve within a nation. Under this definition, a society with the rule of law is one that illustrates and exemplifies the following five achievements: “1) government bound by the law; 2) equality before the law; 3) law and order; 4) predictable and efficient rulings, and; 5) human rights.”⁷⁷ When a nation determines the goods and ends to include as part of the rule of law, then and only then, can the nation organize, prioritize, and budget the “tools” that will help to reach those goals. These tools, such as upholding law and order, training the police, or providing predictable judicial proceedings are “what most people mentally measure when determining the degree to which a country has the rule of law.”⁷⁸

The ends-based concept did not surface all at once, but developed gradually over a period of time in response to different historical needs representing distinct societal goals that are often in tension but advanced together.⁷⁹ As Belton so aptly points out, “each end goal touches on different cultural and political issues. Each is thus likely to meet different pockets of resistance from different portions of society in countries being reformed.”⁸⁰

75. See Hammergren, *supra* note 51, at 11.

76. See Belton, *supra* note 4, at 6. According to Belton, there are two working definitions for the rule of law: those that emphasize the ends that the rule of law is intended to serve within society, and those that highlight the institutional attributes believed necessary to actuate the rule of law. See *id.*

77. See *id.* at 3.

78. See *id.* at 6.

79. See *id.* at 8.

80. *Id.*

E. Problems with the Latin American Approach to the Rule of Law

The many problems confronting the region are of both external and internal character. External problems arise when governments and institutions attempting to induce Latin America to improve its rule of law overlook and underestimate rule of law goals by overstressing institutional reforms. Reforms are promoted by developed nations to achieve Western-like institutions. However, in pushing Western ideals, western governments ignore the difficulties and flaws contained within their own political institutions, and may also unintentionally impose a different set of expectations on the institutions undergoing reform.⁸¹

For example, judicial and criminal reforms agendas throughout Latin America are modeled after the Anglo-American adversarial system and discount entirely the social, cultural, and historical background of Latin America's centuries-old continental legal traditions. Completely discarding entire legal systems because they are considered by so-called rule of law experts to be inferior to the common law milieu of the United States presents a number of problems. It is presumptuous at the very least and invites discontent, confusion and animosity toward reform projects. It may also deter rule of law ends. Rather than helping to improve the delivery of justice and reinforce the rule of law, this approach, Beltran argues, borders on bullying by the United States reformers and deters meaningful and enduring change.⁸² There is plenty of documentation to advocate for a reform of the judicial institutions in the Americas, but as Joseph Thome points out, "there are clear risks in using models from the North to fix the legal 'insufficiencies' without due regard to the particular needs and contexts of the Southern 'receiving' societies."⁸³

Reformers give the impression that the modeled institutions are the solution to every problem and present them as perfect and invulnerable. Reform promoters seem not to accept that the very institutions upon which reform regimes are modeled are themselves susceptible to corruption, abuse, and political machinations, particularly within the judicial process. Reform consultants coming to work in Latin America from abroad often fail to acknowledge fallibility in the systems they are transplanting, and they forget to communicate to reform recipients that

81. See U.S. ARMY REPORT, *supra* note 2, at 70-72.

82. See Belton, *supra* note 4, at 20 (stating that, depending on how legal reforms are implemented, institutional reforms can undermine the rule of law).

83. See Thome, *supra* note 50, at 701.

the institutions being modeled are also deficient and in a constant state of evolution toward better goals themselves.⁸⁴

The developed nations, namely the United States, also overlook the fact that their legal cultures are different from those of Latin America and that such cultures have at times created their own cushion for when their own institutions fail.⁸⁵ “Not only are innumerable institutions to be reformed not necessarily essential to rule-of-law reform, but they can even impede it, by insisting on a model that is either unnecessary or unsuited to the political and cultural landscape.”⁸⁶

There are also many internal problems that impede meaningful reform and reinforcement of the rule of law in Latin America. These problems concern the failure of Latin America’s leadership first to consider the implications of rule of law initiatives from aiding nations that affect the goals to be reached, and neglecting to properly and pragmatically identifying the institutional, political, and cultural changes truly necessary to best achieve those goals.

Leaders need to communicate with their own citizens—from all sectors of the society—and make them participants (stakeholders) in the reforms.⁸⁷ They need to connect the goals before changing institutions. For example, to attack criminality in order to achieve law and order, equality under the law, and human rights, several tools can be improved: police reform and retraining, revising criminal codes by increasing certain penalties, establishing procedures to facilitate just and fair trails of suspected individuals, creating a court system with independent and ethical judges, rules of procedure that will allow judges to hold trials that are just, speedy, and fair, and establishing a judicial police force that is well trained and tooled to investigate fairly, speedily, humanely, and ethically every crime, including those committed by corrupt community leaders and politicians.

84. See Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 617-19 (2007) (characterizing the network of reformers as a “Southern activist expert network”).

85. It is not easy to measure or define legal culture. Culture is a broad “catch-all term for an array of complex beliefs, symbols, and patterns of behavior.” Not even anthropologists agree on a definition of culture. Cf. World Bank—Topic Brief, *Legal Culture and Judicial Reform*, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LegalCultureBrief.pdf> (last visited Jan. 15, 2006).

86. See Belton, *supra* note 4, at 18.

87. See U.S. ARMY REPORT, *supra* note 2, at 79-80.

III. Internal Armed Conflict, Terrorism, and Human Rights in Latin America

A. *The Big Picture and Latin America*

The attacks of September 11, 2001, were the defining moment for our new millennium; a brutal announcement to the world by fanatical extremists that the assault upon civil societies by terrorist actors will likely be among the most pressing issues confronting nations over at least the next two decades.⁸⁸ Whether we are now involved in a third world war or only immersed in yet another cycle of a centuries-old religious and cultural conflict, the challenge before policymakers, military strategists, lawyers, judges, and law enforcement professionals around the world, is how best to protect populations from terrorist attacks while preserving the rule of law and respecting human rights.

How do we protect the rule of law and respect human rights while combating those who give no value to human life and view their own deaths as a victory? How do we hold preservation of the rule of law to the highest of philosophical and moral standards while recognizing that the fight against terrorists and illegal armed groups may at times require measures that come dangerously close to stepping over the line of the established norms of conduct memorialized in international agreements and commitments between nations? How do we accomplish nation building and achieving political and economic stability in places such as Latin America where endemic social and political challenges and the viscera of failing states contribute to and fuel the criminal activities of illegal actors and allow human rights abuses to occur with impunity.

Terrorism takes many forms in Latin America. In recent decades several illegal armed groups have emerged, such as Sindero Luminoso and Tupac Amaru (MRTA) in Peru, Sandanistas in Nicaragua, Tupamaros in Uruguay, Montoneros in Argentina, Zapatista rebels in the southern Mexican state of Chiapas, and right-wing paramilitary and left-wing guerilla groups in Colombia,⁸⁹ operating within and beyond their national borders. Mixed into this witch's brew are sundry criminal gangs, narcotraffickers, and transnational criminal organizations. In some instances the active home grown terrorist groups are colluding with

88. See *Global Threats and Challenges: The Decades Ahead, Hearing Before the S. Comm. on the Armed Forces*, 106th Cong. (1999) (statement of Lt. Gen. Patrick M. Hughes, Director, Defense Intelligence Agency), available at <http://armed-services.senate.gov/statemnt/1999/990202ph.pdf>.

89. Colombian illegal armed groups include Fuerzas Armada Revolucionarias de Colombia (FARC), Ejército Liberación Nacional (ELN), Ejército Popular de Liberación (EPL), and the Autodefensas Unidas de Colombia (AUC).

international terrorist organizations from Europe, the Middle East, and Asia,⁹⁰ who see fertile ground throughout Latin America for finding safe haven, for conducting the types of illegal activities that fuel terrorist movements (for example, drug trafficking, weapons smuggling, trafficking in humans), and for establishing staging “bases” for launching terrorist attacks against the United States and Canada, or other target-rich Latin American states.⁹¹

Fundamental to the challenges confronting nation states in the war against terrorism and illegal armed groups is determining a definition of terrorism that can pass universal scrutiny. While the meaning of the term “terrorism” has evolved over the last two centuries, the global community has yet to reach a consensus on a legal meaning.⁹² The word has gone through various metamorphoses. It first appeared during the French Revolution as a term with a positive connotation used to describe a government for establishing order and consolidating democracy.⁹³ It later became a term “with overt criminal implications,” and was associated with an abuse of power.⁹⁴ Still later “terrorism” described the usage of acts of violence to attract attention to a group and its cause,⁹⁵

90. See, e.g., The Americas Foundation, *Iranian Investment in Colombia Raises Suspicion*, <http://www.theamericas.org/colombia.htm> (last visited Apr. 27, 2008).

91. For example, fundamentalist Islamic terrorist organizations were behind the attacks against the Jewish community in Argentina several years ago, and were able to do so via a sophisticated terrorist network established in the border regions of Brazil, Uruguay, and Argentina, known as the Iguacu Triangle. Cf. REX HUDSON, LIBRARY OF CONGRESS, *TERRORIST AND ORGANIZED CRIME GROUPS IN THE TRI-BORDER AREA (TBA) OF SOUTH AMERICA* (2003), available at www.loc.gov/rr/frd/pdf-files/TerrOrgCrime_TBA.pdf.

92. Defining terrorism “has haunted the debate among States for decades.” United Nations Office on Drugs and Crime, *Definitions of Terrorism*, http://www.unodc.org/unodc/terrorism_definitions.html (last visited July 28, 2003). “There is no universally accepted definition of international terrorism.” RAPHAEL PERL, CONG. RESEARCH SERV., *TERRORISM, THE FUTURE, AND US FOREIGN POLICY 7* (2003), available at <http://www.fas.org/irp/crs/IB95112.pdf>.

93. Cf. BRUCE HOFFMAN, *INSIDE TERRORISM 15-16* (1998) (discussing the origins of the word “terrorism”).

94. See *id.* at 16-17.

95. This meaning is based on the principle of “propaganda by deed” inspired by Carlo Pisacane, an Italian republican extremists. See *id.* 17-18. According to Pisacane, “ideas result from deeds” and violence was necessary to draw attention and “to educate and rally the masses behind the revolution.” *Id.* To challenge the tsarist’s rule, a group of Russian constitutionalists, the Narodnaya Volya, used Pisacane’s principle. They chose their victims for a symbolic value. They targeted a selective group of civilians considered “the embodiment of the autocratic, oppressive state.” *Id.* The group aborted missions to kill intended victims’ when the family was around. *Id.*

and most recently to denote acts of violence motivated by a particular belief system (ideological and/or religious).⁹⁶

In the absence of a universally recognized consensus defining terrorism, the nation states of Latin America at war with illegal armed groups and terrorism on their own soil have to overcome credibility issues with regard to the preservation of human rights, and to holding accountable those within the government chain of command who violate such rights. But determining where the line is drawn, without a baseline definition, invites emotional subjectivity.

The United Nations and other international extra-political organizations, in their roles as facilitators of the norms of universal conduct and accountability, have articulated a definition of terrorism as an attack against human rights. At the United Nations, former Secretary General Kofi Anan emphasized that failing to attend to the “observance of human rights standards . . . would be self-defeating.”⁹⁷ The International Commission of Jurists (ICJ), in a 2004 position statement presented to the UN Commission on Human Rights,⁹⁸ urged that fighting against terrorism must not “undermine the human rights law that member states have themselves painstakingly built up over fifty years.”⁹⁹ The ICJ identified the following specific protections as having already been violated in the war against terrorism:

- freedom from torture;
- the right to life;
- freedom from arbitrary detention;
- the right to a fair trial by an independent and impartial tribunal established by law;
- freedoms of association and expression;
- the right to asylum;
- the right to non-discrimination.¹⁰⁰

Failure of the institutions by which we define our civil societies to preserve these and other human rights norms will reduce a government’s

96. For an excellent book with a multidisciplinary approach to understanding terrorists’ motivations, see WALTER REICH, *ORIGINS OF TERRORISM: PSYCHOLOGIES, IDEOLOGIES, THEOLOGIES, STATE OF MIND* (1998).

97. Leslie Palti, *Combating Terrorism while Protecting Human Rights*, U.N. CHRON. ONLINE EDITION, Dec. 1, 2004, available at <http://www.un.org/Pubs/chronicle/2004/issue4/0404p27.html>.

98. The Human Rights Council succeeded the Commission. See G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

99. See Statement by the Int’l Comm’n of Jurists to the United Nations Comm’n on Human Rights, Protection of Human Rights and Fundamental Freedoms While Countering Terrorism (Apr. 19, 2004) [hereinafter ICJ Statement], available at http://www.icj.org/IMG/pdf/Item_17_counter-terrorism.pdf.

100. *Id.*

ability to retain the high moral ground in the fight against terrorists and result eventually in victory for those who seek to destroy the fundamental human rights that underpin the foundations of modern life. Failure to preserve the integrity of any of these protections degrades the rule of law and undermines the civil society.

There is a bumper sticker making its rounds around the United States that reads, "We are making enemies faster than we can kill them." There is a terrible irony in that dark humor. We are confronting international terrorists and illegal armed groups who are fanatically committed to seeing the United States and its allies weakened or destroyed.¹⁰¹ On a regional scale, we must contend with "local" criminal organizations and illegal armed groups and the criminal activities that sustain them.¹⁰² These groups have many characteristics and vary in scale, but are just as pernicious and deadly to a regional or national population as are terrorist groups operating globally.¹⁰³ Yet, in our rightful zeal to combat terrorists who follow no rules of conduct, who sneer at accepted laws of war and international humanitarian law, and who have no regard whatsoever for human rights, we seem to take two steps backward for each step we take forward when implementing our counter-terrorism policies and tactics.¹⁰⁴ Even though we are fighting terrorists who use children and women as human shields¹⁰⁵ and who store weapons and hide in civilian abodes and places of worship,¹⁰⁶ the United

101. See generally *Global Threats and Challenges: The Decades Ahead*, *supra* note 87.

102. See Carlos Escude, *From Captive to Failed State: Argentina Under Systemic Populism, 1975-2006*, FLETCHER F. WORLD AFF., Summer 2006, 125; Carrielyn Donigan Guymon, *International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention*, 18 BERKELEY J. INT'L L. 53 (2000); Edward Kleemans, *Organized Crime, Transit Crime, and Racketeering*, 35 CRIME & JUST. 163 (2007).

103. See Garry Leech, *Bush Administration Fails to Acknowledge Existence of Paramilitary Groups in Columbia*, Mar. 17, 2008, <http://www.columbiajournal.org/columbia279.htm> (last visited May 17, 2008); Press Packet, United Nations World Summit, *Securing a Dangerous World* (Aug. 2005), available at <http://www.un.org/summit2005/presskit/Peace.pdf>.

104. See Amos N. Guiora, *Legislative and Policy Responses to Terrorism, a Global Perspective*, 7 SAN DIEGO INT'L L.J. 125 (2005); Christian Halliburton, *Letting Katz Out of the Bag: Cognitive Freedom and Fourth Amendment Fidelity*, 59 HASTINGS L.J. 309 (2007); see also Gerald P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, 35 PARAMETERS 54, 62 (2005), available at <http://www.carlisle.army.mil/usawc/Parameters/05autumn/fogarty.pdf>.

105. See *Terrorists Use Children As Shields; Child Dies in Firefight*, CONG. Q. REG. INTELLIGENCE UPDATE, Sept. 21, 2005; *Algerian Army Close to Assault Group of 50 'Terrorists' in Jijel*, BBC WORLDWIDE MONITORING, May 3, 2006.

106. See Neville Dean & Nick Allen, *Terrorist Weapons Seized in Mosque Raid*, INDEPENDENT (U.K.), Feb. 7, 2006, available at <http://www.independent.co.uk/news/uk/crime/terrorist-weapons-were-seized-in-raid-465868.html>.

States and its allies are vilified by critics and by governments antagonistic to the United States and its influence in the international arena and accused of violating human rights if military efforts to prosecute military operations do not result in pinpoint accuracy against terrorist targets.¹⁰⁷

B. *Toward an International Standard of Conduct*

In late 2003, twelve influential non-government organizations¹⁰⁸ issued the *Joint Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism*.¹⁰⁹ The declaration expressed profound concern that “human rights and fundamental freedoms have been or may be undermined by certain counter-terrorism measures adopted or contemplated”¹¹⁰ by nations involved in the international war against terrorists. The declaration cited specific violations of human rights in the name of fighting terrorism, including:

- the practices of administrative detention without judicial review;
- prolonged incommunicado detention;
- transfer, return, extradition, denial of entry, or expulsion of persons at risk of being subjected to torture in contravention of the principle of *nonrefoulement* or asylum;
- the adoption of loose definitions of ‘terrorism’ or ‘terrorist organizations’, capable of resulting in breaches of the principle of legality and allowing for the criminalization of legitimate acts in exercise of fundamental freedoms;
- the removal of basic safeguards to prevent torture or cruel, inhuman or degrading treatment or punishment and violations of the right to life;

107. See Uri Dan, *Airstrike Dilemma*, N.Y. POST, June 23, 2005, at 20; Uri Dromi, *Singling Out the Terrorists from Innocent People Is Not a Simple Task*, MIAMI HERALD, June 23, 2006, at 29.

108. The organizations represented were: The Coalition of International Non-Governmental Organizations against Torture (CINAT); Amnesty International; Association for the Prevention of Torture (APT); International Federation of Action by Christians for the Abolition of Torture (FIACAT); International Commission of Jurists; International Rehabilitation Council for Torture Victims (IRCT); Redress: Seeking Reparation for Torture Survivors; World Organization against Torture (OMCT); Fédération Internationale des Ligues des Droits de l’Homme (FIDH); Human Rights Watch; International Service for Human Rights; Friends World Committee for Consultation (Quakers).

109. A copy of the document is available at <http://www.fidh.org/IMG/pdf/jointdeclaration1211a.pdf> (last visited Apr. 30, 2008).

110. Joint Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism, at 3, available at <http://www.fidh.org/IMG/pdf/jointdeclaration1211a.pdf>.

- the adoption of measures which curtail the right to fair trial, freedom of association, basic labor rights, the right to asylum and the principle of non-discrimination.¹¹¹

Since its publication, at least seventy-eight non-government organizations have endorsed the Declaration, a fact in itself that validates the universal concern over how nations choose to prosecute war against terrorism and illegal armed groups.

1. Antecedents to Latin American Conflict

The tension between confronting terrorism while preserving the rule of law and respecting the rights of the Latin America's civil society is not a phenomenon unique to Latin America. This phenomenon can be traced back to several conflicts in the last century. For example, the sectarian violence in Northern Ireland between the Irish Republican Army and Irish Protestant and British constabulary and military forces offers key insights into the issues before us.¹¹² That long-running armed conflict grew from British and Irish Protestant resistance to the aspirations of Northern Irish Catholic nationalist communities to be annexed by the Irish Republic after enduring decades of disenfranchisement and discrimination at the hands of the British-backed Irish Protestant elite.¹¹³ The conflict degenerated into a protracted and extremely brutal internal armed conflict pitting Catholic guerrilla groups operating under the umbrella of the Irish Republican Army against Protestant paramilitary forces organized and supported covertly by the British military and the Royal Ulster Constabulary. During the particularly bloody period of 1966 to 2001, thousands of people were killed by Republican and Loyalist groups in a series of terrorist acts and political killings followed by retaliatory acts of equal or greater violence.¹¹⁴ Many of the tools and techniques employed by today's

111. *Id.*

112. The Northern Irish conflict arose following the Anglo-Irish Treaty of 1921, when a guerrilla conflict commenced two years earlier by nationalists in the south resulted in the partition of Ireland into the Irish Free State and Northern Ireland, which remained a self-governing part of the United Kingdom. *See* Northern Ireland (Huridocs Code: 8239), available at <http://www.law.qub.ac.uk/humanrts/emergency/nireland1/INTRO.HTM#human>.

113. The provisional IRA identified closely with the Irish Republican Army, which conducted a guerrilla war in Northern Ireland in the 1920s in an effort to unite the entire Irish territories into a single independent republic.

114. "From the late 1960s through the 1990s, over 3,700 individuals died as the result of political violence in Northern Ireland—a figure that would translate into roughly 500,000 deaths had a conflict of similar scale occurred in the U.S. Parties to this conflict included both non-state and state actors: the IRA and smaller armed Republican groups;

terrorists and illegal armed groups were honed in the streets of Belfast, Ulster and Londonderry throughout the last century; indeed, some IRA members later became mercenaries for hire to train illegal armed actors and foment internal armed conflict and narcoterrorism in Latin America.¹¹⁵

Throughout the Northern Irish conflict, particular concern persisted over the following specific violations of human rights, most often perpetrated against the Catholic communities:

(a) Lethal Force: alleged operation of shoot-to-kill policies by security forces throughout the emergency but principally in 1978-79, 1982 and from 1987 onwards; alleged manipulation of coroners inquests to prevent full evidence of incidents being produced;

(b) Torture: alleged use of torture and/or inhuman or degrading treatment on persons held for interrogation in 1971-72; alleged systematic beating of persons held for interrogation in 1976-78; alleged inhuman treatment of prisoners during protests over political status in 1978-81;

(c) Detention: alleged unjustified and discriminatory use of detention powers in 1969 and from 1971 to 1975;

(d) Arrest: alleged use of emergency arrest and search powers to harass members of the Catholic community throughout emergency;

(e) Trial: alleged use of special 'Diplock' courts to secure unjustified convictions, many based on involuntary or fabricated confessions, since 1972; alleged manipulation of evidence given by informers from paramilitary groups in 'supergrass trials' between 1983-85.¹¹⁶

The results of decades of adjudication involving human rights abuses in the Northern Irish and United Kingdom courts indicate a schizophrenic response by the courts of justice in grappling with the rights of a sovereign state to combat terrorism and the rights of citizens living within that state to be protected from state excesses. Among the conflicting decisions rendered over the years:¹¹⁷

Loyalist paramilitaries, most notably the Ulster Defense Association (UDA) and Ulster Volunteer Force (UVF); the Royal Ulster Constabulary (RUC), the province's largely Protestant police force; and the British Army and secret service." Christopher Connolly, *Living on the Past: The Role Of Truth Commissions in Post-Conflict Societies and the Case Study of Northern Ireland*, 39 CORNELL INT'L L.J. 401, 413 (2006).

115. See Luz E. Nagle, *Global Terrorism in Our Own Backyard: Colombia's Legal War Against Illegal Armed Groups*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 5, 53 (2005).

116. *Id.*

117. *Id.*

1922—refusal by court to inquire into reasons for administrative detention in habeas corpus proceedings;¹¹⁸

1972—Army must inform suspect of broad legal basis for arrest;¹¹⁹

1984—Suspicion of involvement in specific terrorist incidents not required under emergency arrest power;¹²⁰

1988—Assault leading to injury during detention may render the detention unlawful;¹²¹

1981—Refusal of prison authorities to accept claims to special status for terrorist offenders not in breach of European Convention on Human Rights;¹²²

1987—Arrest for questioning for more than four days without judicial authorization in breach of the European Convention on Human Rights.¹²³

1988—Assault leading to injury during detention may render the detention unlawful.¹²⁴

The “Troubles,” as the Northern Ireland conflict has come to be known, provides a cautionary tale for Latin American states struggling with internal armed conflict and terrorism in that the imposition of military rule in order to contend with conflict led to abuse of the basic human rights of civilians without justification.¹²⁵ From its inception in 1922, the Royal Ulster Constabulary recruited a far greater number of

118. *R (O’Hanlon) v. Governor of Belfast Prison*. (1922) 56 Ir. L.T.R. 1.

119. *McElduff, Re.*, (1972) N. Ir. 1, *available at* 1972 WL 37585.

120. *McKee v. Chief Constable for Northern Ireland*, (1984) 1 W.L.R. 1358.

121. *Re (on the application of Gillan) v. Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 A.C. 307 (U.K.), *available at* 2006 WL 502934.

122. *McFeeley v. United Kingdom*, App. No. 8317/78, 3 Eur. H.R. Rep. 161 (1981).

123. *Brogan v. United Kingdom*, App. No. 11209/84, 11. Eur. H.R. Rep. 117 (1988).

124. *Gillan*, [2006] UKHL 12.

125. The Northern Ireland conflict has also raised probing questions about protecting the human rights of children caught between terrorist groups and government forces. A 1992 Human Rights Watch report on children being abused by combatants in Northern Ireland presented several issues that transcend the specific conflict and can be found in other counter-terrorism campaigns, including abuse of children repeatedly detained and abused while held in custody by government forces, harassment of children on the streets by both government forces and terrorist groups, and children falling victim to punishment and retaliatory violence by armed terrorist groups. *See* HUMAN RIGHTS WATCH, CHILDREN IN NORTHERN IRELAND ABUSED BY SECURITY FORCES AND PARAMILITARIES (1992).

Protestants,¹²⁶ which undermined the Constabulary's credibility among the Catholic community and created conditions for Constabulary members to establish covert ties to Protestant militant groups.

We can see similar traits emerge among military and national police forces throughout Latin America, particularly in Colombia, where covert ties to paramilitary armed groups operate with direct and indirect command, control, and material support from government forces and corrupt politicians, and weaken confidence among the civilian populations toward their governments.¹²⁷ In addition, whereas the court system could have been the arbiter in Northern Ireland holding accountable those individuals responsible for human rights violations against the population, the courts, judges, and prosecutors instead were intimidated and victimized by those individuals and groups opposed to the rule of law.¹²⁸

The issues involving the fight against terrorism and illegal armed groups and preserving human rights as identified in the Northern Ireland conflict parallel other conflicts involving terrorist groups worldwide and collectively show us that the international community has been ill-equipped to intercede, let alone stop, terrorism. This emerged in the early years of the United Nations when its actions to broker the creation of a Jewish homeland in Palestine exacerbated indiscriminate attacks by Zionist terrorist organizations such as Irgun Zvai Leumi (also known as ETZEL) against Arab and British government targets.¹²⁹ The inability and incompetence of the United Nations to respond at the beginning of the Middle East conflict set in motion decades of retaliatory strikes and

126. See Commission on Policing for Northern Ireland, <http://www.bbc.co.uk/northernireland/schools/agreement/policing/commission1.shtml> (last visited July 22, 2008) (reporting that "although Catholics represent more than 40% of the Northern Ireland population they comprise only 7% of RUC membership").

127. See UNHCR, INTERNATIONAL PROTECTION CONSIDERATIONS REGARDING COLOMBIAN ASYLUM-SEEKERS AND REFUGEES (2006), available at www.unhcr.org/refworld/pdfid/422c832e4.pdf (noting that a 2004 UN Human Rights Committee finding indicated close ties between Colombian security forces and paramilitary combatants and a climate "of tolerance and complicity of State agents in extra-judicial executions and enforced disappearances").

128. The killing in Northern Ireland of Lord Justice Gibson, as an example, targeted the preservation of justice and "was a blow against much that decent people cherish: the rule of law, and a forum for the resolution of disputes which operates on the basis of law, fairness and impartiality. It was a murder that encouraged chaos and a complete breakdown of society." See JUSTICE PETER CORY, CORY COLLUSION INQUIRY REPORT—LORD JUSTICE GIBSON AND LADY GIBSON 8 (2003), available at <http://cain.ulst.ac.uk/issues/collusion/cory/cory03gibson.pdf>.

129. See American Israeli Cooperative Enterprise, Irgun Zeva'I Le'umi, "The National Military Organization" (Etzel, I.Z.L.), <http://www.jewishvirtuallibrary.org/jsourc/Histroy/irgun.html> (last visited Aug. 2, 2006).

the rise of the international Islamic terrorist organizations now threatening the security of nations and regions worldwide.

2. State Terrorism and Human Rights in Latin America: The Case of Pinochet

In Latin America, opposition to perceived threats to the rule of law combined with the fear among traditional ruling elites over losing their power and privilege have manifested in horrific periods of political violence and human rights abuses carried out by the state against perceived subversives. Nowhere in Latin America was this conflict between preserving the status quo and resisting pressure by leftist movements more volatile than in Chile in the 1970s, when a progressive socialist, Salvador Allende, rose to the presidency on a popular mandate, only to be violently overthrown and assassinated by a brutal military oligarchy led by General Augusto Pinochet?¹³⁰

The human rights atrocities committed by General Pinochet over the course of his 26-year dictatorship stemmed from his prominent role in Operation Condor, a plan developed among seven Latin American dictators in the early 1970s to suppress opposition movements and eliminate individual dissidents by sending teams of hit men and interrogators across national borders to track down, torture, and often kill their targets. The success of this cooperative covert operation was premised on the notion that dissidents living in other countries could be kept under surveillance without their knowledge and would be unable later to identify their captors or interrogators.¹³¹ One could reasonably argue that Operation Condor was an act of state sponsored terrorism against dissidents and a callous violation of human rights, foreign sovereignty, and the rule of law. Yet, it was not until 1992 that a judge in Paraguay brought the nature of Operation Condor to broad public light when he stumbled across the “so-called Terror Files, giving names and details of thousands of victims of South American military regimes.”¹³²

Among the most notorious of murders carried out under Operation Condor was the 1976 assassination by car bombing in Washington, D.C., of Orlando Letelier del Solar, a political analyst and former Ambassador to the United States under President Salvadore Allende.¹³³ The attack

130. For a definitive treatise on the Pinochet dictatorship, see CARLOS HUNEEUS, *THE PINOCHET REGIME* (Lake Sagaris trans., 2006).

131. Phil Davison, *Will Pinochet Be Brought to Justice in His Native Chile?*, BELFAST TELEGRAPH, Jan. 6, 2005.

132. *Id.*

133. See Christopher Marquis & Diana Jean Schemo, *Documents Shed Light on Assassination of Chilean in U.S.*, N.Y. TIMES, Nov. 14, 2000, at A14.

took the lives of Letelier and his American assistant, Ronnie Moffit, and severely wounded Moffit's husband.¹³⁴

While undergoing medical treatment in England in October 1998, Pinochet was placed under house arrest¹³⁵ after Spanish judge Baltasar Garzón Real indicted Pinochet and requested his extradition to stand trial for torture, genocide, and terrorism against Spanish nationals in Chile.¹³⁶ The former dictator then claimed sovereign immunity as a defense that as a former head of state, his actions while in power were above the law, and therefore, he could not be tried on such charges.¹³⁷ He then embarked on a cynical and often overtly melodramatic campaign to show that he was too infirm and feeble to be sent to Spain, and after some seventeen months of political maneuvering, legal acrobatics and exceptional prowess, Pinochet was released from British detention and returned to Chile. One might note that the bounce in his step and his alert and smiling demeanor as he stepped off the plane in Chile was in stark—or miraculous—contrast to his pallor and disoriented proclivities while a guest of the British government.

The lesson to be considered with regard to Pinochet's methods of resisting international accountability for crimes against humanity is whether the international community has the resolve to strip "immunity from government leaders suspected of committing war crimes and crimes in violation of human rights laws."¹³⁸ Then, once steps are taken to hold state actors accountable, the challenge becomes whether justice can be achieved more quickly and "justly" in an international criminal tribunal than in a domestic court of justice.

Notwithstanding what was by any standard of justice a bold and noble attempt by Judge Garzón to try Pinochet in Spain, consider for a moment that if Pinochet were to have been extradited to face charges

134. See *id.*; Larry Rohter, *Chile Seeks U.S. Files on 1976 Assassination*, N.Y. TIMES, Sept. 21, 2006, at A6.

135. Alex Perry, *Pinochet Under House Armed Arrest for "Genocide" in Chile*, AGENCE PRESSE FRANCE, Oct. 18, 1998.

136. See Juzgado Central de Instrucción No. 5 de la Audiencia Nacional, Dec. 10, 1998 (Procedimiento Sumario No. 19/97), available at www.fasic.org/doc/auto.pdf.

137. See generally Frances Webber, *The Pinochet Case: The Struggle for the Realization of Human Rights*, 26 J.L. SOC'Y 523 (1999). While held in custody in London, the English House of Lords rejected Pinochet's claim of head of state immunity and determined that immunity only applies for functions performed in an official capacity. See Brandon Mark, *Acknowledging our Criminals: Henry Kissinger and East Timor*, 32 DENV. J. INT'L L. & POL'Y 1, 9 (2003); Claudia Martin, *Catching up with the Past: Recent Decisions of the Inter-American Court of Human Rights Addressing Gross Human Rights Violations Perpetrated During the 1970's-1980's*, 7 HUM. RTS. L. REV. 774, 778 (2007); Robert C. Power, *Pinochet and the Uncertain Globalization of Criminal Law*, 39 GEO. WASH. INT'L L. REV. 89, 106-44 (2007).

138. See U.S. ARMY REPORT, *supra* note 2, at 14.

there, what Pandora's Box would this open for the diplomatic status of government officials traveling abroad? Could Henry Kissinger be detained during a trip to Belgium to face charges in Indochina for crimes against humanity? Could Donald Rumsfeld be arrested in France and sent to Syria to face a domestic court there on charges of international torture? Could Bill Clinton be detained on a trip to Argentina and sent off to Somalia to face charges of aiding and abetting in fratricide? Assuming that a current or former head of state was detained and sent to another nation to stand trial and was convicted, what would prevent the head of that nation's state to grant an immediate amnesty? Would not such a situation amount to nothing more than a pyrrhic victory?

Despite Judge Garzón's resolve in Spain to hold Pinochet accountable when not even the Chilean courts were able to do so before Pinochet died in December 2006, one could argue that despite the best of intentions, universal crimes are best tried in the domestic courts of the state or states in which the perpetrator and his or her crimes are most associated, or in the international criminal tribunals if the domestic state is not capable of carrying out a judicial proceeding.

Three goals, then, emerge for nation states to preserve the rule of law by holding accountable those who commit terrorist acts and violations of human rights. First, removing immunity from government leaders responsible for perpetrating violations of human rights; second, combating organized criminal activities that fund illegal armed groups, terrorist acts, and sustain corrupt political regimes, and, third, strengthening the capacity of judiciaries to bring terrorists and human rights abusers to justice.¹³⁹

C. *A Plan of Action for Fighting Illegal Armed Groups and Terrorist Actors*

In the course of defending the rule of law, Latin American nations confronting illegal armed groups and their terrorist acts within their own borders face a difficult challenge in balancing respect for human rights while conducting security operations. Nation states confronting terrorist threats are inherently constrained by several fundamental tenets that define a nation's legitimacy under the rule of law,¹⁴⁰ in particular, that decisions made by the state in a war against terrorism and internal armed conflict must be made in the public interest, must be made objectively on

139. *See id.*

140. *See* Fletcher N. Baldwin, Jr., *The Rule of Law, Human Rights and Proportionality As Components of the War Against Terrorism: Is the U.S. Judiciary in Self-Imposed Exile?*, 7 J. MONEY LAUNDERING 218 (2004),

the basis of shared values, must be fair, and that the actions ultimately taken by the state must not be deemed cruel, unusual, or excessive.¹⁴¹

Adhering to and honoring these and other basic norms of a civil society are put to the test in this new Age of Terrorism. No legitimate fighting force relishes pursuing terrorists who use innocent civilians as shields as a means to prosecute terrorist goals. The seizure of innocent school children by Chechen terrorists in the Russian city of Beslan in September 2004 and the botched rescue attempt by government forces that left hundreds of hostages dead, graphically demonstrated on television screens around the world the difficulty in protecting innocent civilians from the predations of fanatics willing to kill.¹⁴² Certainly, the human rights of the victims caught in the Beslan catastrophe were ignored by the terrorists who put them in such dire peril, and the government forces that resorted to extreme measures to end the crisis seem to have been no more mindful of such concerns for human life.¹⁴³ Regardless of the root causes or motivations behind the Beslan massacre, the result of the tragedy left even some hard liners in the war against terrorism wondering if the ends sought by the government to stop terrorists justified the means.

There are and will continue to be times when security forces are compelled to undertake operations that will be condemned for resulting in human rights violations by individuals or groups seeking to capitalize on a legitimate government's actions in order to sway public opinion or inflame emotions. But nation states involved in the fight against terrorism and illegal armed groups must adhere to the primacy of the rule of law and respect for human rights over military and security objectives.

The United States military has devoted significant study to achieving a balance between prosecuting military operations against terrorists and illegal armed groups and respecting human rights and preserving the rule of law. The several key factors that have emerged from the US analysis have direct application for Latin American nation states struggling to fortify the rule of law, achieve socio-political stability, and respond to violations of human rights. These include:

141. Cf. LON FULLER, *THE MORALITY OF LAW* (1977).

142. See Seth Mydans, *Russia Grieves for Children and Putin Vents His Fury*, N.Y. TIMES, Sept. 8, 2004, at A10.

143. See, e.g., Michael Ross Fowler, *The Relevance of Principled Negotiation to Hostage Crises*, 12 HARV. NEGOT. L. REV. 251 (2007); Lawrence Uzzell, *Officials Evade Responsibility as Death Toll Remains in Doubt*, N. CAUCUSES WKLY., Oct. 6, 2004, http://www.jamestown.org/publications_details.php?volume_id=396&issue_id=3104&article_id=2368670; Fred Weir, *Russian Forces Faulted in Beslan School Tragedy*, CHRISTIAN SCI. MONITOR, Sept. 1, 2006, available at <http://www.csmonitor.com/2006/0901/p07s01-woeu.html>.

Recognition that preserving human rights is central to achieving any success in combating terrorism and illegal armed groups. “We must move away from the rhetoric of human rights to the implementation of human rights. Without human rights as an integral part of any transition plan in a post conflict stage we are failing to establish sound government.”¹⁴⁴

A strategy for communication and consultation with “stakeholders,” those at the regional and local level who represent pillars of a civil society—lawyers, jurists, doctors, or other key actors such as community and faith based leaders. “These Communications must be meaningful, genuine and occur before the implementation of the reform measures; not after.”¹⁴⁵

Balancing expectations between military/security forces and the stakeholders. There must be realistic expectations about what can be accomplished within a reasonable time frame.

Strengthening communications between military/security forces and human rights organizations operating in zone of internal conflict or in the aftermath of terrorist acts. While the United States military believes that relations with humanitarian organizations are strong, effort must be undertaken to build partnerships with human rights organizations. “It is critical for the military to be able to identify and inform the respective human rights organizations when there are violations of human rights. The military must be able to assist in being an active player in advancing human rights and rule of law.”¹⁴⁶

Improve coordination among all actors involved in legal reform efforts. The military must expand that effort to all “actors” such as policy makers, civil society, etc.”¹⁴⁷

Establish, fortify, or reform a national constitution and other legal instruments critical to nation building and preserving human rights. Legal reforms and law making “must be viewed by all as legitimate, realistic and genuine, both by the international community and the public at large. Without these key components, a legitimate process will not exist.”¹⁴⁸

144. See U.S. ARMY REPORT, *supra* note 2, at 79-80.

145. See *id.*

146. See *id.*

147. See *id.*

148. See *id.*

Establish Human Rights Institutions within governments that are funded and capable of carrying out effective investigations and bringing human rights violators to justice.¹⁴⁹

IV. The Rule of Law and International Organizations in Latin America

The international community and global organizations have long played a role in charting the course of modern nation building and establishing the rule of law in Latin America. The Inter-American Development Bank, chartered in 1959, articulates four primary strategies that go to the core of preserving the rule of law against illegal armed actors and human rights violations:

- **Social development**, particularly poverty reduction through sustainable economic development, educational reforms, and initiatives that promote social inclusion.
- **Competitiveness**, particularly supporting activities that improve countries' ability to compete in the global economy as well as strengthen their financial sectors and capital markets.
- **Regional integration**, including integration at the sub-regional, regional and hemispheric levels.
- **Modernization of the state** activities, including the processes of state reform and institutional strengthening at the national and sub-national levels.¹⁵⁰

The United States has promoted nation building in Latin America through a host of international government entities such as the United States Agency for International Development, the Department of Justice's International Criminal Investigative Training Assistance program, and various military training agreements through the Department of Defense. At the core of national building efforts are the priorities of security for economic development and investment, the proliferation of democracy in the region, and protection of fundamental human rights. However, it is to the United Nations and the Organization of American States that Latin American nations have turned for establishing and preserving the rule of law and protecting human rights in the region.

149. See U.S. ARMY REPORT, *supra* note 2, at 70-72.

150. Inter-American Development Bank, Institutional Strategy—IDB, http://www.iadb.org/aboutus/1/ma_institutional.cfm?language=English (last visited Aug. 3, 2008).

A. *The Role of the United Nations*

The United Nations has long been at the forefront of articulating, affirming, and supporting the resolve of member states to respect human rights and to preserve the rule of law. In fact, the Universal Declaration of Human Rights (“UDHR”), drafted by the United Nations in 1948, was among the young organization’s first order of business.¹⁵¹ The UDHR stated in the most unambiguous and unequivocal terms that it is essential that “human rights should be protected by the rule of law,” and that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁵²

Unfortunately, the aspirations of the United Nations have not always coincided with reality. According to the International Commission of Jurists, the United Nations record in protecting human rights in the course of “refereeing” the campaigns against terrorists has been woefully inadequate, and that the then United Nations Commission on Human Rights failed in the aftermath of September 11 “to establish even a modest mechanism to monitor the performance of states.”¹⁵³ The ICJ pointed to the fundamental problem of guaranteeing respect for human rights in the war against terrorists, that “[t]he existing UN human rights system is simply not adequate” to “assess the compatibility of national counter-terrorism measures with international human rights obligations.”¹⁵⁴ The ICJ also stressed that the fundamental problem of tracking states’ obligations is that human rights treaties are not universally ratified and the Human Rights Committee which has oversight of individual country reports is limited in the number of reports it can examine in a year’s time. It seems profoundly disconcerting that the inability of the United Nations to fulfill its obligations to member states is due to internal administrative shortcomings. But, if not the United Nations as the international organization most responsible for urging respect for human rights upon its member states in Latin America, then who else will be capable of bringing sustained pressure on these nations to ensure that human rights are protected in what has become a protracted war against terrorists around the world?

The United Nations, in its role as a facilitator of the norms of universal conduct and accountability, relies upon legal mechanisms developed through consensus that articulate and inform a universally

151. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

152. *Id.* at pmbl.

153. *See* ICJ Statement, *supra* note 99.

154. *Id.*

acceptable embodiment of the rule of law. The authority carried by the United Nations to interpret and defend the rule of law, however, is dependent upon constant recognition that its members states enjoy equal sovereignty and standing before the world body, even if in reality such is not always the case.¹⁵⁵

Simon Chesterman raises the view of some that “it is questionable whether the United Nations may properly be said to embody the rule of law in a meaningful way, in large part due to the peace and security powers given to or asserted by its Security Council” and other security arrangements available under the terms of the United Nations Charter.¹⁵⁶ Rather, the United Nations and other international deliberative bodies in the world may reflect the concept of a universal or international rule of law from which the standards and ambitions of individual nations may be drawn. In the case of protection of human rights at the regional or national level, a rule of international law would assert “primacy of human rights covenants over domestic legal arrangements,”¹⁵⁷ and provide a model for nation states to determine how the rule of law is used rather than what the rule of law means.¹⁵⁸ In other words, the concept of government of laws would demand moral and non-discriminatory accountability, and that such recognition would compel a nation state to protect human rights in the course of bringing terrorists and illegal actors before the law.

The International Commission of Jurists (“ICJ”), in a 2004 position statement presented to the UN Commission on Human Rights,¹⁵⁹ urged that fighting against terrorism and by extension, illegal armed groups, must not “undermine the human rights law that member states have themselves painstakingly built up over fifty years.”¹⁶⁰ The ICJ identified the following specific protections as having already been violated in the war against terrorism:

- freedom from torture;
- the right to life;
- freedom from arbitrary detention;

155. See Chesterman, *supra* note 36, at 354 (noting that the structure of the Security Council of the United Nations, for example, is such that some nations are more equal than others).

156. See *id.*

157. See *id.* at 355.

158. See *id.* at 359.

159. On March 15, 2006, the Human Rights Council replaced the Commission. See G.A. Res. 60/251, U.N. Doc. A/RES/60/251 (Mar. 15, 2006). The Commission’s last session took place on March 27, 2006. See CHR—62nd Session, Geneva 2006, <http://www2.ohchr.org/english/bodies/chr/index.htm> (last visited July 15, 2008).

160. See ICJ Statement, *supra* note 99.

- the right to a fair trial by an independent and impartial tribunal established by law;
- freedoms of association and expression;
- the right to asylum;
- the right to non-discrimination.¹⁶¹

Failure of the institutions by which we define our civil societies to preserve these and other human rights norms will reduce a government's ability to retain the high moral ground in the fight against terrorists and result eventually in victory for those who seek to destroy the fundamental human rights underpin the foundations of modern life.

B. The Role of the Organization of American States

In 2001, several foreign ministers of states belonging to the Organization of American States adopted the Inter-American Democratic Charter,¹⁶² which greatly expanded the concept of democracy to include all the aspects of human dignity, the right to constitutional guarantees according the citizens of members nations, and the hope that Latin American states could move toward greater implementation of democratic protections for all members of society.¹⁶³ The 9-11 attacks in the United States challenge directly the democratic aspirations and goals set forth by the Charter.

In June 2005, the OAS General Assembly adopted the Declaration of Florida ("Declaration"), entitled "Delivering the Benefits of Democracy,"¹⁶⁴ in which member states pledged to advance the hemisphere's democratic values and democratic institutions. The signatories of the Declaration declared that "elimination of extreme poverty is essential to the promotion and consolidation of democracy," and that to reach such a goal, governments will need to create "decent" and lucrative employment.¹⁶⁵ Further, the ministers stressed "that for democracy to prosper governments must be responsive to the legitimate aspirations of their people, and must work to provide their people with the tools and opportunities to improve their lives."¹⁶⁶ In accordance with the Declaration, people have a right to democracy, governments have a

161. *Id.*

162. Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, available at http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm.

163. *Id.*

164. Organization of American States, Declaration of Florida, AG/DEC. 41 (XXXV-O/05) (June 7, 2005), available at <http://www.oas.org/juridico/english/ga05/ga05.doc>.

165. *See id.*

166. *Id.*

duty to “promote and defend it,” and governments “must be answerable to their peoples.”¹⁶⁷ The Declaration states the manner in which countries ought to be democratically governed: “with full respect for human rights and fundamental freedoms, the rule of law, the separation of powers and independence of the judiciary, and democratic institutions.”¹⁶⁸

The Declaration underscores the daunting challenge confronting Latin American states as they seek to preserve the rule of law while achieving regional security objectives against illegal armed groups and terrorist organizations working within the region. Ongoing political unrest and protest suggest that the democratic governments throughout the region are ineffective, weak, threatened, or have failed completely.¹⁶⁹ Leaders need to instill in their constituencies the sense that democracy is not just a government task but a nation’s duty and dependent upon the efforts of each individual citizen. It is a goal to be aspired to by all, and one for which everyone must persevere and work hard to achieve on one’s own in the course of one’s daily routine. Democracy does not transpire overnight with the implementation of new legislation, but rather emerges, remains and continues through modification, change, and evolution of individual behaviors and cultural orientation.

Fulfilling commitments under the Declaration seems unreachable when the region is awash with several forms of smuggling (trafficking in drugs, weapons, documents, and humans), the escalating violence and destabilization associated with such activities, and increasing gang-related violence in areas where government law enforcement is ineffective.¹⁷⁰ Also, corruption remains a weakening influence in both the private and public sectors,¹⁷¹ contributes significantly to economic

167. *Id.*

168. *Id.*

169. See Symposium, *Challenges to Fragile Democracies in the Americas: Legitimacy and Accountability*, 36 TEX. INT’L L.J. 319 (2001); Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry on International Law*, 87 GEO. L.J. 707 (1999).

170. For several decades, Colombia has languished under drug-related violence and insurgency by non-state actors. In Central America and Mexico, gang violence presents a growing threat to an already tenuous stability in the region. See Press Release, Org. Am. States, *Gangs Pose a Serious Threat to Hemisphere*, El Salvador Official Tells OAS (Nov. 30, 2005), available at http://www.oas.org/OASpage/press_releases/press_release.asp?sCodigo=E-274/05.

171. Corruption continues to be a major problem in the hemisphere. According to Transparency International’s 2005 *Corruption Perceptions Index*, Haiti has the highest corruption in Latin America while Chile has the least corruption. See Transparency International, CPI 2005, http://www.transparency.org/news_room/in_focus/2005/cpi_2005 (last visited July 27, 2008). Even after most of the countries in the hemisphere have signed, ratified, and implemented legislation to adopt the Inter-American Convention Against Corruption, bribes continue to be the biggest problem in the region. See Paul Constance, *Inside the Beast*, IDB AMERICA, Mar. 2002, available at

and political instability¹⁷² and renders impotent government institutions in which the separation of powers is frequently encroached upon by a bullying executive branch.¹⁷³ Furthermore, the independence of the judiciary continue to be undermined by the political interests and subterfuge within the other political branches.¹⁷⁴ Economic inequity remains high throughout the region and massive poverty overstates the ability of governments and non-government institutions to bring relief. Even efforts to bring change are met with skeptical apathy in a region where political tradition suggests that “reformers are crooks waiting in the opposition.”¹⁷⁵

V. Proposals to Achieve the Balance

The rule of law and its benefits under democratic systems in Latin America are of an ephemeral and elusive character; it is not sustained merely by undertaking and holding elections or establishing free trade agendas for stimulating trade and commerce. As in other regions of the world where democratic institutions form the foundations of government, “the ability to create a rule of law helps determine democracy’s character

<http://www.iadb.org/idbamerica/index.cfm?thisid=385>. In Peru, for example, the Montesinos-Fujimori corruption case uncovered a widespread network of criminal activity that resulted in the prosecution of 1200 individuals in all three branches of government, as well as in the military, in the electoral system, and in the press. See John MacMillan & Pablo Zoido, *How to Subvert Democracy; Montesinos in Peru*, J. ECON. PERSP., Fall 2004, at 69-92.

172. Ecuador has seen seven presidents come and go since 1996, with one holding office for just three days. See *Mi Poder en la Constitución*, <http://www.ecuaworld.com/discover/president.htm> (last visited Aug. 4, 2008) (listing Ecuador’s presidents and their terms). On June 6, 2005, after nine months in office, Bolivian President Carlos Mesa was forced to resign by the country’s indigenous population. This was Bolivia’s second president in less than two years. In 2000, Peru’s Fujimori announced that he would run for a third term despite a constitutional restriction to two terms. His winning was tainted with vote fraud allegations and boycotts. In the face of overwhelming corruption allegations, Fujimori fled to Japan and resigned. In 2001, Argentina’s economic collapse caused serious political instability, resulting in the appointment of six presidents in four years, five of whom served over a period of just two weeks. See Harold Trinkunas & Jack Boureston, *Financial and Political Crisis in Argentina: Walking a Wobbly Tightrope*, STRATEGIC INSIGHTS, Mar. 2002, available at <http://www.ccc.nps.navy.mil/si/mar02/latinAmerica.pdf>.

173. On April 4, 1992, Peruvian President Alberto Fujimori dissolved the national Congress in what became known as the “auto-coup.” See U.S. Dep’t of State, Background Note: Peru, <http://www.state.gov/r/pa/ei/bgn/35762.htm> (last visited Aug. 4, 2008). He then revised the Constitution, called new congressional elections, and implemented substantial economic reforms. See *id.*

174. For a review of presidential hubris in Latin America, see Human Rights Watch, *Rigging the Rule of Law: International Norms on Judicial Independence*, <http://www.hrw.org/reports/2004/venezuela0604/2.htm> (last visited Aug. 4, 2008).

175. See Jorge Dominguez, *Latin America’s Crisis of Representation*, FOREIGN AFF., Jan./Feb. 1997, at 100.

and future prospects.”¹⁷⁶ Democratic nations require institutions that are effective and efficient, with a participatory civil society and rulers who are responsive to the society’s needs and accountable for their conduct in office. Governments need to lead competently by offering pragmatic and attainable solutions to the myriad criminal and socio-political challenges facing the region.

How then can Latin American nations involved in combating internal and global terrorism and assaults against the civil society by illegal armed groups while protecting the rule of law achieve the intended goals in bringing terrorists and illegal armed combatants to justice while demonstrating a strong commitment to human rights? The best solution would be to look to models that are already underway elsewhere in the world by organizations that have implemented viable rule of law strategies. The United States military is one such entity that has devoted considerable effort to articulating the rule of law in the context of conducting security and peacekeeping operations while preserving human rights as a principle that:

- Includes the application of the Charter of the United Nations, international humanitarian law, human rights law, military law, criminal law and procedure, and constitutional law.
- Incorporates principles that govern civil and criminal accountability for management and conduct of peace operations (hereafter referred to as peacekeepers).
- Includes standards by which national institutions of the host country may be held accountable for their failure to comply with universal legal principles and rules.
- Is the framework that governs the relationship between intervening forces and the local community; and the basis upon which the local population may be held accountable for their actions prior to, and following, the intervention.¹⁷⁷

From a security perspective, the rule of law entails the establishment and support of those systems and organizations that can fight against threats to the rule of law while fortifying components crucial to the preservation of the civil society, namely regional and national law enforcement agencies; judicial systems; a functioning legal system based on written codes and regulations; human rights monitoring capabilities; and a functioning government structure at local and national levels that are representative of the people and devoted to enforcing the

176. UNGAR, *supra* note 3, at 1.

177. See U.S. ARMY REPORT, *supra* note 2, at 2.

moral underpinnings of social order.¹⁷⁸ But how can these goals be achieved?

First, Latin American nation states must recognize that the rule of law forms the core of protection of human rights, specifically: prohibiting arbitrary detentions, ensuring fair trials of accused by an independent and impartial judiciary interpreting laws that are capable of being obeyed, and ensuring that all individuals are held as being equal before the law.¹⁷⁹

Second, Latin American nation states should advocate for the development and implementation of reliable human rights monitoring. Furthermore, states should pursue international training and education programs that reinforce existing human rights laws, particularly those regions where the war on terror and illegal armed groups is waged.

Third, Latin American nation states committed to the war against terrorism should advocate more forcefully for the establishment of a universal and comprehensive mechanism at the international level, specifically the United Nations, “to monitor the compatibility of domestic counter-terrorism measures with international norms and human rights, especially such measures related to the implementation of Security Council resolution 1373 of 2001.”¹⁸⁰

Fourth, Latin American nation states must induce the United Nations, the Organization of American States, and interested non-government organizations to develop the mechanisms to monitor and ensure compliance of member states with their international human rights obligations. This element could be achieved by adopting the recommendations set forth in the joint non-government organization *Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism*:

- (a) have the capacity to undertake *in situ* visits;
- (b) establish a dialogue and enhanced cooperation with the UN Security Council with a view to assisting States to better meet their human rights obligations in implementing UN Security Council resolution 1373;
- (c) engage with and take into account the observations and recommendations of all relevant treaty bodies;
- (d) engage with and take into account the analyses, observations and recommendations of all Relevant Charter-based organs;

178. *See id.* at 8.

179. *See* Chesterman, *supra* note 36, at 344.

180. *See* Joint Declaration on the Need for an International Mechanism to Monitor Human Rights and Counter-Terrorism, http://www.fidh.org/IMG/pdf/joint_declaration1211a.pdf (last visited May 14, 2008).

- (e) engage with and take into account also the analyses, observations and recommendations of regional institutions and mechanisms;
- (f) Coordinate activities with the UN Human Rights Council.¹⁸¹

Fifth, Latin American nation states must crack down on the financial apparatus, loopholes, conduits, and corridors that continue to provide the ways and means for terrorist groups to continue operations. Better enforcement of mutual assistance protocols and stronger commitments by nation states to abide to conventions to combat money laundering would go a long way to combat terrorism at its roots without threatening human rights conditions.

Sixth, Latin American nation states must strengthen the resolve to isolate nation states within the region and beyond that sponsor terrorism by prosecuting any actors engaged in circumventing international efforts to pressure pariah states into abandoning support for terrorists groups.

Seventh, Latin American nation states must provide the resources and cooperative mechanisms over the long term to crack down on international organized crime and the criminal activities, such as drug trafficking, weapons smuggling, and document counterfeiting that provide funding and materiel for terrorist organizations

Eighth, Latin American nation states must exert far tighter border controls to reduce the inflow of terrorist elements across porous borders while doing more to contain internal armed conflict from spillover.

Ninth, Latin American nation states must drastically increase the level of transparency and accountability within the agencies and security forces involved in combating terrorism and illegal armed groups, and prosecute to the fullest extent of the law any government actors, representatives, and other individuals found to be in violation of international law.

VI. Conclusion

How Latin American nation states choose to prosecute the war against terrorism and illegal armed groups with regard to respecting human rights obligations can set an example for how other nation states conduct themselves in their own efforts to counter terrorism and illegal armed groups domestically or in concert with multinational actions. Can there be a framework in which security objectives can be achieved without infringing on fundamental freedoms? Yes, but there must be

181. *Id.*

resolve, consistency, and clarity on the part of all nations to retain the moral high ground.

In the final analysis, it must be up to the Latin American nation states individually (based on national consensus) and in concert (through the Organization of American States, and United Nations, and with the input of the United States and involved non-government organizations) to determine how best to define and enforce the rule of law, using the best possible models available from international sources as lodestones for action. While political will is essential,¹⁸² the most critical element for protecting the rule of law from attack while preserving human rights is the legal component. "That component must contain a clear mandate that allows the legal mechanism to function and provides for the power of the court, the international police and prosecutors. If this fails there will be no substance within the system."¹⁸³

182. See U.S. ARMY REPORT, *supra* note 2, at 17.

183. See *id.* at 20.