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Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Association November 9-10, 2005

By
Katharina Pistor*

PART I: INTRODUCTION

A. The Rule of Law Symposium

The American Bar Association hosted the first International Rule of Law Symposium in Washington, D.C. on November 9-10, 2005. The Symposium brought together representatives from all over the world who share a common interest in advancing the rule of law as a means to tackle major obstacles that hamper social and economic growth and development around the globe. Some were ministers and government officials, others entrepreneurs and business people, yet others represented non-governmental organizations or employees of multilateral donor organizations. The topics addressed at the Symposium were equally far reaching in scope, covering everything from poverty alleviation and improving public health, to fighting corruption, promoting private business development and dealing with the terrorist threat. For two days, participants at the conference listened to panels, participated in discussions and engaged in Q&A sessions.

Given the range of people in the room and topics addressed, it should not surprise anyone that the views varied widely as to the definition of the rule of law, its meaning to different constituencies and how best to promote it in

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different settings. Yet, there was sufficiently common ground at the close of the two day symposium for a standing ovation when Hilario G. Davide, Jr. Chief Justice of the Supreme Court of the Philippines, pronounced the launch of a “global rule of law movement.”

For those who believe in the universality of the rule of law ideal, the major ills of the world today can be addressed by promoting the rule of law. Improving accountability, creating monitoring mechanisms (checks and balances), enhancing access to justice, and promoting human, political and civil rights will improve the livelihood of people around the globe and ensure sustainable social and economic development. On the other hand, those who are more skeptical of the universality of the ideal believe that the rule of law is of varying significance to various constituencies. They further noted that rule of law promotion efforts did not always bring about hoped for results, in part because these efforts were not adequately attuned to local circumstances.

The aim of this report is not to reconcile the different views. Instead it tries to highlight the primary points of the debates and their implications for launching yet another round of rule of law reform. The occasional lack of clarity may appear to obscure simple recipes for advancing the rule of law. This, however, is intentional. Early rule of law movements were denounced by its key promoters in the 1970s due to the mixed results of the extensive rule of law projects implemented in Latin America and the former socialist countries.¹ Today, it seems more sensible to acknowledge contestation and debate than to tout rule of law promotion efforts as an elixir of sorts.

B. Symposium Themes and Focal Points

Today's world poses new challenges for the rule of law and those concerned with developing, strengthening and spreading it. Rule of law cannot any longer be restricted to its classic domain, that is, controlling state authority and ensuring predictability and procedural fairness of government actions. In many countries the development of such structures remain, at best, an aspiration, as was pointed out by Philippine Chief Justice Hilario G. Davide, Jr. and Ana Palacio, a member of Spain's Parliament and a former Foreign Minister, in the *Opening Discussion: Why the Rule of Law Matters*. In still other countries the scope of the rule of law discourse has expanded, challenging assumptions about the balance of power between executive, legislative and judicial branches, particularly where governments struggle to fight new threats such as terrorism.

While stressing the need to uphold and build the basic tenants of the rule of

1. According to David Trubek, since the early 1990's the World Bank alone conducted over 300 rule of law projects with an expenditure of \$2.9 billion. See David Trubek, *The "Rule of Law" in Development Assistance: Past, Presence, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, 74-95 (David M. Trubek & Alvaro Santos, eds., Cambridge Univ. Press, 2006).

law's classic domain, the Symposium has sought to broaden the rule of law agenda and has linked it specifically to debates on terrorism and international security, public health and health pandemics, and global poverty. Moreover, the Symposium's agenda explicitly recognized various constituencies as integral to a rule of law agenda. Governments and citizens of a nation state are not the only players anymore. Instead, in today's world the players participating in building and shaping the emergent rule of law includes civil society and non-governmental organizations, corporations and business associations, as well as bilateral and multilateral donor organizations. Recognizing multiple players within and across the confines of the nation state implies that building the rule of law is no longer limited to a national agenda. Building and sustaining the rule of law is a process that takes place at each step from the local to the international, and at each point where the interests of different constituencies conflict.

Broadening the debate in this fashion entails a potential cost: the blurring of boundaries between rule of law and other aspects of "governance." Instead of being confined to formal legal governance mechanisms, a broader rule of law agenda embraces other forms of governance, which are often described as "informal," or "non-legal." Such structures include social norms, communities and self-governing organizations in economic, political and social life. What then is the rule of law? Few panelists or speakers sought to resolve this issue at the Symposium – not surprising given the millennia old debate about the meaning and contents of this concept. Instead, the participants at the Symposium took a pragmatic approach, assuming a common understanding of basic features of the rule of law without confining it to a particular definition. However, upon closer analysis of the Symposium debates, three primary themes emerged.

1. The Rule of Law is a Process in the Making

The rule of law is a core aspiration of mankind alongside peace, democracy, and freedom. In his opening remarks to the Symposium, the ABA's President, Michael Greco, stated that building the rule of law "is a never ending process." Similarly, Ashraf Ghani, Afghanistan's former Minister of Finance and now Chancellor of the University of Kabul, reminded us that "Rule of law is an ideal – and as such is always in the making."

What societies are striving for in the rule of law is not a set of easily definable outcomes, but the creation of procedures or fair systems of governance. Symposium speakers emphasized the need for fair structures to ensure the delivery of the most fundamental social needs such as: peace, security, recognition of human rights, protection against abuse of state power and—if not prosperity—then at least the absence of severe poverty. The inability of societies to deliver these is the first indicator of the lack of the rule of law. Thus, even though it may be difficult to define the rule of law in different contexts, its absence can be more easily observed.

2. The Rule of Law is a Complex System

Societies that can justifiably claim to be governed by the rule of law are not immune to weakening and partial breakdowns in the rule of law. Basic security and social order can and do break down rapidly when confronted with shocks, such as natural disasters or the sudden outbreak of violence. Such incidents are a reminder of how fragile the rule of law is. They highlight how much its sustainability depends on its perceived legitimacy in the eyes of the people whom it is supposed to serve and who are its ultimate guardians. The resilience of the rule of law is revealed by how these various constituencies of the rule of law respond to a breakdown and their ability to rebuild its core tenets.

Because the rule of law is a complex system, it cannot be easily reduced to a set of institutional variables, such as independent and impartial judiciary, effective law enforcement based on due process, and rules governing a transfer of political power, even though these remain crucial elements of the rule of law. To be effective, these institutions must be embedded in the broader political and social context; it follows that a sustainable rule of law system cannot be simply constructed top down, but must be rooted in the local culture. Most importantly, legal institutions must be legitimate in the eyes of the citizenry whose support and readiness to defend the basic principles of due process, fairness, and equitableness are critical for sustaining the development towards an ideal rule of law.

3. Building the Rule of Law is an Inherently Political Process

Building the rule of law involves constraining political, social and economic power. While in the long run constraints that come with the rule of law are likely to benefit all, in the short term some can and will take advantage of their absence and may actively oppose being subjected to them. Building the rule of law therefore is inevitably a contested political process. Countries that have built the rule of law over centuries have experienced episodes of civil war and civil unrest along the way, giving testimony to how strong the resistance against the rule of law can be.

The best guarantor for a peaceful process towards the rule of law seems to be a participatory political process where contests take the form of debates and are resolved in electoral processes, not by violence or brute force. Democracy with universal suffrage and contested elections remains the most participatory political system to this day. Experience with attempts to build democracy, however, have shown that formal attributes such as elections and voting rules are a necessary, but not a sufficient condition for democracy to take hold. Ideally, the rule of law and democracy are closely intertwined processes that reinforce each other. Democracy fosters the rule of law by ensuring broad participation in the contest over the allocation of resources and powers in society. The rule of law in turn should protect the democratic process by protecting participation in the political process. However, the rule of law also

constrains the democratic process, in that every ruler, including the *demos*, is bound by the rule of law. The precise nature of the legal constraint and the relation between rule of law and political regime will differ across countries and over time.

C. The Rule of Law in a Changing World

Today's world is extremely intertwined, and becomes more so with each passing year. Capital, people and organizations are less constrained by national borders than they have ever been. Information technology facilitates communication and coordinated action among people in distant places. These processes have led some to declare the demise of the nation state; they claim that in its stead, markets and multinational firms, or transnational networks are shaping peoples' lives. If the rule of law were confined to the boundaries of nation states and their formal legal systems, this would also imply the deterioration of the rule of law. In fact, the international order has become ever more rule bound with increasingly interconnected and interdependent rules. Examples include not only the United Nations, but the European Union and the World Trade Organization. Many countries have ceded sovereignty and accepted restraints on exercising their own powers for the benefit of a rule bound international order. Amplifying the need for a global rule of law is the ever increasing participation of non-state entities acting to form the international order. They include businesses, non-governmental organizations, and interest groups that often transgress the boundaries of individual nation states.

Even traditional areas of law enforcement, that is, the fight against fraud and corruption, organized crime, or terrorist acts require not only coordinated efforts among enforcement agents across different nation states, but also participation by the communities whom they serve. Community involvement is critical for collecting information, building support for law enforcement, separating perpetrators from sympathizers and containing recruitment into criminal or terrorist organizations.

In short, in an era of globalization, there is a need for complex new forms of governance that stretch across traditional state boundaries. But the need for local governance capacity and informal structures persists and indeed these must be integrated with new international governance mechanisms.

A major challenge for advancing the rule of law in a global world then is to discover how formal legal institutions can facilitate and support the emergence of governance structures capable of addressing the critical challenges the world faces – from alleviating poverty to ensuring peace, security and prosperity. Of equal concern is the fact that law can be and often is used to discourage and undermine effective governance by restricting access to legal institutions, prohibiting organization, or restricting funding sources for non-governmental organizations. Whether domestic laws are used to foster or to inhibit social and economic development varies by country. Advancing the rule of law cannot

mean the simple spread of formal law. That would advance the rule *by* law. Instead, it is the advancement of broader social goals closely associated with justice, fairness, and predictability. As Symposium discussions suggest, it is important to keep these goals in mind and to assess critically which strategies under which conditions are most effective in achieving them.

D. Outline of the Report

The following summary of the discussions and debates that took place at the Symposium is divided into three parts.

Part I, “Fundamental Social Needs and the Rule of Law,” focuses on poverty, health pandemics and the absence of peace and security, all strong indicators of the absence of the rule of law. It is therefore critical to understand what remedies may work and how building the rule of law might contribute to the fight against poverty, health pandemics, war and civil strife.

Part II, “Rule of Law and Economic Development,” emphasizes the relation between rule of law and economic development. Two panels specifically addressed this relation, “The rule of law and Economic and Business Development,” and “Corruption as a Threat to the Rule of Law.” The discussion at these panels suggested that the presence or absence of the rule of law, or of corruption, is not simply a feature of a particular host country, but is shaped by the players themselves, including by multinational corporations (MNCs).

Part III, “Constituencies Involved in Building the Rule of Law,” reports on the role of the three main constituencies actively engaged in building the rule of law: civil society, the private sector, and governments and international organizations. Although they all share an interest in the rule of law, the goals they associate with the rule of law, and by implication their preferred strategies for building it, differ significantly. Bringing these diverse groups together was one of the major achievements of the Symposium and potentially the most fruitful foundation for a new rule of law movement.

Part IV concludes with a discussion of the different objectives that are pursued by various constituencies interested in advancing the rule of law. It advocates continuing discussions and reflection of the goals and means used by different organizations.

Each of the key sections below includes a bulleted text box highlighting critical areas of concern and suggestions raised throughout the symposium.

PART II: FUNDAMENTAL SOCIAL NEEDS AND THE RULE OF LAW

Societies cannot develop and prosper when large numbers of people suffer from crushing poverty, debilitating diseases and health pandemics, or when they are facing persistent unrest and civil strife. Poverty, health, and peace are closely intertwined, making it difficult to prioritize them. A strong argument has been made that peace and stability is a pre-condition for social and economic

prosperity.² Yet, the reverse may also be true: societies that are beset by poverty are often engulfed in repeated episodes of civil unrest, making it difficult to identify the direction of causality. Building the rule of law seems to be a critical ingredient to address both ills. Constraints on executive powers and basic protections of civil liberties should help prevent conflict, while institutions that curb corruption and ensure monitoring and checks and balances should help alleviate poverty. Unfortunately, the same factors that may impede poverty alleviation and give rise to civil unrest also create major obstacles to building the rule of law. Among those identified by the panels were severe inequality, ethnic tensions and marginalization of entire groups within society. To break this vicious cycle, institutional and legal reforms must be backed by the actual delivery of better living conditions and security, as well as some form of compensation for those who might be losing out in the process.

A. Poverty Alleviation:

- ◆ *Poverty results from institutional bottlenecks to prosperity and the lack of resources which cause them. Effective development strategies will identify such bottlenecks rather than expanding additional resources across the board.*
- ◆ *In many countries, local, regional and central governments hinder development by creating barriers to property ownership, failing to provide basic property rights protection or engaging in outright expropriation.*
- ◆ *Women suffer disproportionately from poverty. Educating and promoting women's participation in political and economic decision-making are crucial for helping societies to grow out of poverty. Promoting women's rights can help women become more effective participants in the political sphere and as economic actors.*
- ◆ *The international aid system is in need of reform. Aid should not be regarded as an entitlement nor should it be used by donors to protect powerful elites or to advance short term agendas that undermine long term development. Instead, international aid should ensure self-help by promoting access to information, education, rights recognition and rights enforcement.*

1. Building Trust in Government

Mistrust in government action and skepticism about government's willingness and ability to alleviate poverty and promote growth is often the result of repeated experience that requires deep political and economic reform. As pointed out by Symposium panelist and Professor of Economics at New York University, Bill Easterly, in many poor societies law is an instrument for

2. See generally ROBERT H. BATES, PROSPERITY AND VIOLENCE: THE POLITICAL ECONOMY OF DEVELOPMENT (2001).

the ruling elite to entrench its power and privilege. He gave examples from Latin America, where local entrepreneurship was destroyed by local governments that expropriated successful new businesses, sometimes pretending that such actions were legal, and other times in open violation of the law. Access to local courts may not be sufficient to address this problem, as judges often are part of the local elite, or may otherwise find it difficult to distance themselves from their interests. Historical experience suggests that in such settings competition among law enforcement agencies may be an important strategy.

Building trust in public institutions and ensuring that power is perceived to be legitimate is not easy. Familiarity with customs at the regional and local level may help in taking first steps in changing peoples' perception of the role of the state and its needs for revenue. Ashraf Ghani reported in his key note address that as Minister of Finance in Afghanistan he attended community meetings at mosques and explained the need for tax collection, government revenues and the public purposes for which they would be deployed. The direct contact with important social leaders (in this case religious figures) and their constituencies was important in building trust in law and in the government function of law enforcement.

More generally, building trust in government requires communication, transparency, and access to information and education as critical resources for ensuring that power is allocated through fair institutions—and not simply taken by those who have the power to do so.

2. Women's Rights

There was broad agreement among the panelists that women's rights are critical for alleviating poverty. Geeta Gao Gupta, President, International Center for Research on Women, pointed out that empirical studies have shown that women's property rights in land is critical for land improvement and land productivity. Other studies suggest that women's basic education is important for bringing down birth rates and improving family health. A recent comprehensive study by the World Bank has compiled strong evidence that discrimination against women impedes economic growth and development.³ More generally, in most societies women are the central contributors to the survival and prosperity of the household – the cell of social and economic life. Yet, women often do not possess property rights and decision making powers, which instead are vested with men, be they fathers, husbands, brothers, or brothers in law. The devastating effects of depriving women of basic economic and social rights have come to the fore in the AIDS crisis that is ravaging Africa. In certain countries, women whose husbands have died from AIDS, experience appropriation of the household's property. Valuable assets are transferred to the

3. See generally WORLD BANK AND OXFORD UNIVERSITY PRESS, *ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE* (2001).

deceased husband's family. The widows themselves are either left homeless or are often forced into marriage with a brother in law or other relative.

The role of women in society is determined by a combination of formal law and social norms. In many countries, the formal law sanctions social norms that deprive women of their internationally recognized rights, for example, by negating their ability to exercise property rights, subject their decision making powers to approval by male members of the household, and by diluting their power to give evidence in court trials. In other countries, the formal law may support women's rights, but is left un-enforced. Women often do not know about their rights or are afraid to invoke them in fear of social sanctions against such behavior.

Using formal law to change social customs is not a quick or easy response to such problems. Additional steps, such as community-based education programs, the organization of support groups and the mobilization of civil society, etc., must be taken to trigger a process of change that will ultimately transform the lives of women and their position in the community. This is one example of how law reform may aid social change, but on its own is unlikely to accomplish it.

A specific legal intervention that may trigger social change is affirmative action particularly in politics. Afghanistan has become a prominent example for a political system that now ensures women representation in parliament by reserving twenty-five percent of the seats in the lower house and seventeen percent in the upper house for female representatives. Perhaps even more important than the numbers alone is that the presence of women in political debates may have ramifications beyond the immediate elections or even parliamentary debates: it may encourage more participation even in areas where affirmative action laws are not in place.

International coordination and publicity aids the cause of women's rights by exerting political pressure on repressive regimes, thereby contributing to the alleviation of poverty. This point was stressed by Senator Hillary Rodham Clinton. The senator recalled her participation in the 1995 Beijing Conference United Nation's Fourth World Conference on Women. Women from around the globe participated in the official conference, as well as the parallel event organized by non-governmental organizations. These events have triggered a series of initiatives that have greatly advanced the role of women in today's world. Some initiatives were primarily legal in nature. They included the drafting of laws that better protect women's rights. Others have been non-legal, such as the creation of networks and organizations devoted to advancing women in politics, business and society. Together, both legal and non-legal initiatives can combine to advance the rule of law, as the rule of law is rarely advanced by legal reform alone.

3. *International Aid System*

A major goal of international aid is to alleviate poverty and to help less developed countries catch up. Increasing evidence, however, suggests that these goals are often not attained. One explanation is that donors often pursue multiple goals, including foreign policy goals that might be at odds with poverty alleviation. In the past, the absence of monitoring mechanisms failed to ensure that aid funding and resources reached the poor for whom they were intended and were not siphoned off along the way. This not only neutralized aid efforts, it actually furthered corruption and control by well connected insiders. A major condition for successful aid programs therefore must be the establishment of robust monitoring systems to track the management and disbursement of resources.⁴ Such mechanisms should be enforced even in the face of demands that international aid is an entitlement. While there may be strong historical and moral reasons for the rich West to deliver aid to the poor in other parts of the world, transfers that are blind to how resources are used on the ground will entrench existing elites and fuel corruption, but will not deliver growth.

Closely intertwined with the delivery of aid to those in need is the question of who defines the purposes for which aid should be allocated. Some panel members pointed out that aid is too often supply driven and lacks active participation by aid recipients. There is little evidence that the supply of aid alone can improve the livelihood of the poor and promote economic growth and development, as Bill Easterly has suggested in his work.⁵ In fact, aid organizations have often failed to monitor the delivery of financial aid to those in need and have thereby often contributed to corruption and the entrenchment of elites. Improving monitoring mechanisms, including accounting and book-keeping of externally provided aid flows could address some past abuses.⁶

4. For a critical assessment of post IMF policies in this regard, see Melissa Thomas, *Getting Debt Relief Right*, FOREIGN AFF., Sept. – Oct. 2001, at 36.

5. See generally WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2002).

6. Thomas, *supra* note 6.

B. Public Health:

- ◆ *The local health sectors in developing countries are often plagued by resource constraints, under-staffing, and institutional corruption that diverts resources away from those who need them.*⁷
- ◆ *Weak governance structures that fail to ensure the delivery of aid or minimize corruption exacerbate the effects of devastating diseases, such as HIV/AIDS and malaria.*
- ◆ *Many health pandemics affect children and women disproportionately. Ensuring that women enjoy legal and political rights on par with men can help ensure a more robust response to international health pandemics.*
- ◆ *The World Health Organization (WHO) plays a critical role in coordinating efforts to contain health pandemics. However, neither WHO nor any other international health organization has enforcement powers.*
- ◆ *Dispute remains as to whether a stronger role of international organizations in containing pandemics is desirable.*
- ◆ *Collaboration between local, state and international agents may be more important than clear allocation of rights and responsibilities – which may take too long to establish.*
- ◆ *For the private sector, effective intellectual property rights protection is a pre-condition for investments in research and development for pharmaceuticals, including drugs to fight diseases that are prevalent in developing countries.*
- ◆ *Poor countries and poor people are often unable to afford the drugs produced by multinational corporations. The inherent conflict between private investments in R&D and public need for the low cost provision of life-saving drugs may require more systematic public intermediation.*

Symposium discussions on public health highlighted the mutual dependence of international and local governance structures in fighting disease and health pandemics. For example, the constitution of a particular country may vest the power to act in the international realm exclusively in the president, prime minister or foreign minister, as the case may be. In order to respond swiftly to a health pandemic, however, local agents, including non-governmental actors, will have to respond immediately to calls by the World Health Organization to take action. Discussions also highlighted the tension between business interests and the need to protect intellectual (and other) property rights of drug suppliers on the one hand, and a country's need for affordable and accessible drugs on the other. These conflicting interests cannot be resolved by protecting one or the other side – that is, domestic sovereignty against the demands of an international organization, or private property rights vs. the right

7. According to an IMF study, countries with high levels of corruption experience much higher infant mortality than others. See Daniel Kaufmann et al., *Governance Matters: From Measurement to Action*, FIN. & DEV., June 2000 at 10, <http://www.imf.org/external/pubs/ft/fandd/2000/06/kauf.htm>.

to live. Instead, the underlying interests must be recognized and governance structures developed that ensure responsiveness to pressing needs with the potential of causing irreversible harm. At the same time, precaution must be taken that the extreme case does not become a justification for watering down legal rights and entitlements. Separately, corruption and the absence of the rule of law were cited as pernicious, aggravating factors in fighting disease, with the lack of adequate governance structures impeding the delivery of services, and, in many cases, facilitating the illegal diversion of assistance aimed at the afflicted.

1. Corruption and Local Institutional Challenges

There is no doubt that resources in poor countries are scarce. With increasing aid from other countries, multilateral aid organizations or NGOs the problem of scarcity can be addressed. Yet, many organizations involved in supplying additional resources, whether food or health products have encountered formidable obstacles in ensuring that these resources reach the people in greatest need of them. Corruption that diverts the flow of aid is among the most troubling problems for international donor organizations. The Global Fund,⁸ an organization charged with fighting HIV/AIDS set out to build private/public partnerships as an alternative to formal monitoring mechanisms. The hope was that building trust would ensure aid delivery even absent such costly devices. However, according to Bartolomeo Migone, Legal Counsel of the Global Fund, a series of bad experiences, including diversion of funds, has prompted the Fund to reverse this policy and re-install more conventional monitoring and supervision mechanisms.

2. International Health Governance

To contain the danger of international health pandemics, there is an urgent need to ensure local responsiveness, as well as coordination across countries. Effective containment of potential global health pandemics may require concerted efforts to ensure efficient allocation of limited resources (vaccines, medication, health care providers, etc.) and the imposition of restrictions (quarantines) to fight the pandemics.

One approach to tackle this challenge would be for sovereign states to delegate critical decision-making powers to an international organization, such as the World Health Organization ("WHO"). Indeed, one panelist argued that such delegation is indispensable in fighting the outbreak of highly contagious diseases. Other panelists recognized the need for coordination at the international level and for clear and effective guidance by an international organization such as the WHO. However, the discussion suggested that these steps alone would be insufficient and were unlikely to be accomplished prior to

8. The Global Fund Home Page: <http://www.theglobalfund.org/en/>.

the outbreak of an international health pandemic.

The WHO depends on local institutions to learn about the outbreak of disease and to implement measures to contain it. Cooperation from national ministries of health and government – run health clinics, and private or non-governmental health care providers, will be a critical requirement. Thus, at least in times of disaster, more flexible structures are needed that ensure effective responsiveness to the disaster, even if this requires the temporary suspension of some sovereign rights.

The potential danger of contagious disease is not limited to new diseases, such as SARS or the avian flu. More conventional forms of disease, such as tuberculosis, for which treatment is already known, continue to pose new challenges when allowed to spread. Often such diseases spread among marginalized groups of the population such as prison inmates, and are particularly common in countries, like Russia, where the rights of inmates are underdeveloped. Rule of law promotion efforts that improve their rights in general might not only improve their individual health care, but help avoid the spread of highly infectious disease.

3. *Intellectual Property Rights and Public Health*

Private pharmaceutical companies play a critical role in the development of drugs and vaccines that can help treat disease, prevent their outbreak, or at least mitigate their impact. As profit maximizing entities, private corporations have a keen interest in ensuring that pharmaceuticals will be sold for an adequate price and that their intellectual property rights will be respected. Absent such protection, there is little incentive to invest the considerable resources needed to develop life saving drugs in the first instance. That said, the price finally charged for new drugs are often too high for developing countries. The tension between private profit maximization and public health interests has received much public attention in the fight against HIV/AIDS. Some countries have weakened intellectual property rights and allowed local firms to produce generic drugs. Others have reverted to compulsory licensing schemes.

As reflected in the panel discussion, these conflicting interests, each with its own merits, are not susceptible to easy resolution. Both sides desire predictability, which may favor more stable legal solutions. The private sector is most interested in a clear allocation of property rights to ensure predictability. The public sector, by contrast, wants to ensure access to drugs needed to fight or contain devastating disease when needed. If left to themselves, the two sides are unlikely to find a mutually agreeable solution. A possible solution may lie in properly designed public intervention, such as the creation of vaccine or drug funds that directly or indirectly subsidize the production and/or dissemination of drugs and vaccines to the poor.⁹

9. See, e.g., Michael Kremer, *A Purchase Commitment for Vaccines*, in GLOBAL PUBLIC

C. *Preventing Conflict and Rebuilding Societies:*

- ◆ *Reconciliation is a significant factor in successfully rebuilding societies and establishing sustainable peace. Foregoing the punishment of perpetrators in an attempt to “bribe” them into a peace process presents a tension between the rule of law and political considerations and realities.*
- ◆ *Post-conflict societies are plagued by an institutional vacuum, which is too often filled by organized crime and powerful interests that block rather than foster rebuilding efforts. The establishment of effective law-based institutions often come too late to prevent the entrenchment of such groups in society.*
- ◆ *Local knowledge in rebuilding society is not sufficiently utilized by foreign and international organizations involved in post-conflict rebuilding efforts. This can result in misallocation of resources and the fostering of corruption.*
- ◆ *The effectiveness of the international community in preventing conflict and rebuilding societies has been mixed. Multiple efforts exerted by different organizations and governments often compete with each other. Effective rebuilding efforts require multi-pronged approaches and coordination at both the international and the local level.*
- ◆ *Perpetrators of conflict can be tried either locally or in international tribunals, be they ad hoc tribunals or standing ones. The choice between these tribunals is often contested with little guidance at hand to resolve this issue in future crises.*

Security is the most fundamental condition for social and economic prosperity.¹⁰ A major source of insecurity in today's world are domestic conflicts, often fueled by ethnic tension or competition over critical resources. Symposium panel discussions focused primarily on the rule of law promotion efforts that can contribute to rebuilding conflict-torn societies and on preventing future conflicts in these societies.

GOODS FINANCING: NEW TOOLS FOR NEW CHALLENGES - A POLICY DIALOGUE, Inge Kaul et al. eds., UNDP, 2002, <http://www.undp.org/ods/monterrey-papers/kremer.pdf>.

10. Bates, *supra* note 4.

1. *Complexity of Tasks and New Strategies*

Post-conflict societies face a multitude of complex tasks that require urgent attention for stabilization and social peace. A series of recent conflicts has prompted the UN to establish its new Peace Building Commission, while the State Department of the United States has developed new strategies for ensuring a successful transition. As part of this effort, the U.S. has developed an Essential Task Matrix that identifies the most pressing tasks in a post-conflict situation and seeks to prioritize among them.¹¹ Ambassador Carlos Pascual, Coordinator for the Office of Reconstruction and Stabilization at the U.S. Department of State, explained its basic elements as being: (1) security, (2) governance and participation, (3) humanitarian assistance and social well-being, (4) economic stabilization and infrastructure and (5) justice and reconciliation.

None of these tasks can be accomplished in a single step, but require several stages of investment. For each of the categories listed, the matrix suggests an initial response, a longer-term strategy aimed at fostering transformation, and finally a strategy aimed at fostering sustainability. The first step in this staged transformation management include stabilization, that is, efforts by local and/or international forces to impose order and stop civil strife and warfare. This is the bare minimum for any state aspiring to stability and the rule of law. The second stage is aimed at addressing the root causes of the conflict, including inequality, access to critical resources, corruption and capture of public institutions. Addressing these causes is a complex task, as it may trigger a renewed outbreak of conflict when entrenched interests are sufficiently threatened by restructuring efforts. Building the rule of law is not a straightforward answer to this underlying conflict, as some constituencies will undoubtedly lose out under the new rules of the game. Nevertheless, Carlos Pascual suggested that the resultant conflict may be resolved as societies shift away from authoritarian regimes to free societies. In order to facilitate the transition a society must establish such critical institutions as an independent judiciary, an effective police force, and institutions of democratic representation. Comparative research, however, suggests that for a judiciary to become independent, a competitive political system must already be in place. Finally, according to the Matrix, to ensure strong support for such societal change, the demand for it must be generated through the strengthening of civil society. Thus, just as in the case of poverty alleviation, peace building is another example of a complex mutual dependence of elements of the rule of law with other political and economic factors.

The State Department's new approach to peace building also raises new questions as suggested by commentators from the floor. Some commentators

11. Office of the Coordinator for Reconstruction and Stabilization, U.S. Dep't of State, Post-Conflict Reconstruction Essential Tasks (2005), <http://www.state.gov/documents/organization/53464.pdf>.

criticized the strategy for ignoring local conditions and local capacities. Foreign and international forces were said to frequently move into post-conflict societies attempting to create a new order without building on existing reconciliation and peace building attempts on the ground. Experience from various countries with recent conflicts (including Nigeria, Uganda, and Sudan) suggest that little headway is made in building local capacity once the conflict has subsided. Such countries often find themselves abandoned by the international community once the basic conditions of order have been re-established. This would argue in favor of a multi-year effort to bolster institutions capable of promoting the rule of law (for example, judiciary, legal profession), long after order is seemingly re-established and the massive, post-conflict foreign relief effort vanishes.

2. Dealing with Perpetrators

Resolving conflict poses a critical rule of law challenge in the form of accountability for the conflict's main perpetrators. In an attempt to stop violence and begin the process of rebuilding societies it is not uncommon to strike a bargain with some of the perpetrators that involves their safe passage to exile thereby escaping punishment. Several commentators voiced concerns that this bargaining may be misguided and even harmful. At the Symposium, President for the International Center for Transitional Justice, Juan Mendez, stressed the important link between reconciliation and accountability, arguing that reconciliation is the result of accountability. By implication, failing to hold key perpetrators accountable may impede efforts of reconciliation.

Reconciliation efforts can take different forms. Constructing a Truth and Reconciliation Commission at the national level is one strategy that has been tried in South Africa, East Timor and other places with varying results. This indicates that the idea and institutional structure of such commissions can easily be transplanted, but that their impact will depend on local conditions such as: the willingness of critical constituencies to buy into the structure; the legitimacy of advocates of conciliation as opposed to adjudication; and the legitimacy of those serving on the commission. Other accountability and reconciliation models include ad hoc international tribunals, such as the International Criminal Tribunals set up to deal with perpetrators of crime and violence in Rwanda (ICTR)¹² and former Yugoslavia (ICTY).¹³ Finally, the International Criminal Court (ICC)¹⁴ provides a more permanent institutional setting, which may enhance the credibility and deterrence effect of international intervention. However, unresolved disputes over the jurisdiction of the ICC have resulted in several countries – most notably the U.S. – withholding their support for the Court. The U.S. position was forcefully defended at the symposium by John

12. Internet Site of the International Criminal Tribunal for Rwanda: <http://www.ictr.org>.

13. International Criminal Tribunal for the Former Yugoslavia: <http://www.un.org/icty/>.

14. International Criminal Court: <http://www.icc-cpi.int/>.

Bellinger III, Legal Adviser to the Secretary of State at the U.S. Department of State, who pointed out that efforts by the US to agree on a compromise solution were ignored, leaving the U.S. no choice but to oppose the creation of the ICC. The most contentious issue was the right of the ICC's chief prosecutor to initiate proceedings against individuals without a member state referring a case to the court.

The Symposium discussion of this issue highlighted that building the rule of law and corresponding institutions at the international level also is an inherently political process. Even though there might be common interest in a permanent criminal court at the international level, the different role countries play in world politics influences their assessment of the costs and benefits of such an institution from the perspective of their national interest. This is not fundamentally different from obstacles faced in promoting rule of law in a domestic setting. In both arenas interest groups will take sides notwithstanding the fact that this may undermine the prospects of building the rule of law, which would be in their collective interests.

3. Rebuilding the Rule of Law at the Local Level

Fostering reconciliation and rebuilding the rule of law is not limited to punishing instigators of violence. The root causes of violent conflict often lie in poverty and inequality exacerbated by ethnic or religious divides. Gaps in the rule of law further facilitate discrimination and human rights abuse. Poor governance and inadequate law enforcement may also create a vacuum in which criminal elements thrive and in turn challenge the state. In some cases this escalates into full-scale conflict, fueled by the criminal activity that provides organized criminal groups with the resources necessary to procure weapons. Moreover, criminal groups can have a strong stake in sustaining conflict and the chaos it entails, as these conditions further facilitate criminal activity, including very lucrative trafficking in arms, drugs, and people.

Against this backdrop, re-establishing the rule of law in conflict-torn societies poses unique challenges. As Jonathon Fanton, President of the John D. and Catherine T. MacArthur Foundation and moderator of the session, alluded in his opening remarks, law and legislation may play a rather ambiguous role in the breakdown of law and order. One group in society may use law to entrench its own position while denying equal rights to opponents. This abuse of law may have even triggered the original outbreak of violence. Such a legacy makes it difficult to count on the credibility of law as a means for re-establishing peace and security. In others contexts, legal institutions may be too weak to deal with crime or conflict as it arises, further weakening the population's trust in the legal institutions that control the rebuilding process. As noted above, such difficulties militate for long-term, sustained peace-building and rule of law-promotion programs in post-conflict settings.

D. Terrorism and International Security:

- ◆ *Weak or failing states without the rule of law increase the possibility of generating terrorist activities that may affect people and countries around the globe*
- ◆ *The fight against terrorism today takes essentially two forms: war and criminal law enforcement. The former may entail combat and warfare potentially triggering application of the laws of war. The latter relies on law enforcement efforts at the national and international level and treats terrorists as criminals.*
- ◆ *The different approaches entail varying costs and benefits for the countries employing them. On the one hand, criminal law enforcement appears to place greater constraints on states fighting terrorists. On the other hand, opinions in the communities from which terrorist emerge will be greatly influenced where war-like means are used to fight terrorism.*

1. The Rule of Law and the Terrorist Threat

The panel on the relationship between the rule of law and terrorism and international security demonstrated that the response to a particular phenomenon – such as terrorism – depends very much on how one perceives and analyzes the problem. This also affects the assessment of the rule of law in the context of this debate. At one extreme, the rule of law may be perceived as an unwarranted constraint on the state's powers to fight a threat. Alternatively, it may be regarded as an essential tool in undermining the support basis for terrorists and as such a necessary and indeed welcome constraint on state power.

The panelists agreed that failing and weak states enable the organization of groups that use terrorist tactics to advance their ideas. Yet, they also pointed out that strong democratic states are also vulnerable to terrorist attacks and to the organization of terrorist activities on their territory. This is well illustrated by the terrorist movements in the late 1970s in Germany and Italy, and, in recent years, by the fact that cells committed to terrorist methods have emerged in the U.S., Germany, the U.K., and Spain. By implication, rule of law is not a guarantee against terrorism. Nor is rule of law a "silver bullet" to deal with the terrorist threats, as was explained by Graham Allison, the Director of the Belfer Center for Science and International Affairs and a Douglas Dillon Professor of Government at the Kennedy School of Government at Harvard University.

Much of the panel's discussion was devoted to the debate over the most appropriate means for responding to terrorist attacks: criminal adjudication or warfare. Those advocating criminal adjudication, such as Ambassador Hans Correll, the former Under Secretary General for Legal Affairs and Legal Counsel of the United Nations, pointed out that warfare is appropriate in dealing with states subject to the international laws of warfare. They also suggested that because terrorism is a tactic used by groups that can re-invent themselves, a war

against terrorism by definition cannot be won. By contrast, those advocating warfare, including Senator Graham Allison, pointed out that in light of the magnitude of the terrorist threat a state must have all possible means at its disposal to respond to the threat.

This debate suggests that the framing of the issue will influence the means chosen to address the threat. Nonetheless, whether war or law enforcement is the preferred framing of the issue, rule of law principles place constraints on the means available to counter the threat. The international law on warfare establishes rules for dealing with prisoners of war, for example. Law enforcement is bound by domestic rules of due process and fair hearings. A critical question therefore was whether these constraints should be relaxed in order to allow governments greater leeway in combating the terrorist threat. The dilemma is clear: relaxing existing constraints could weaken the rule of law, and ultimately destroy the very principles that ought to be defended. However, upholding the rule of law without any adjustment to account for the nature of the threat that governing systems face, may weaken the response and thereby also threaten the survival of the system itself. If the rule of law were a simple mechanism that could easily be switched on and off where needed, the temporary weakening of constraints might not give rise to much concern. As explained above, however, a viable rule of law system depends on the vigilance of the citizenry, which in turn requires that it believes and supports the basic principles of the rule of law. Weakening these principles may change the rule of law culture and thereby change a system more fundamentally than might be predicted.

2. Dealing with the Terrorist Threat: Lessons Learned

While terrorist tactics have been extensively used in recent years, in particular by radical Islamic groups, such tactics are not new. The Irish Republican Army, the Italian Red Brigades and the Baader-Mainhoff Group in Germany in the 1970s are important examples of groups that have used such tactics in the past – and most notably, in strong states with well developed rule of law. Louise Richardson, Executive Dean at the Radcliffe Institute, delivered findings from a comparative research project on the relationship between democracy and terrorism.¹⁵ She argued that a state's response to a terrorist attack and its treatment of the terrorist perpetrators it captures are important factors in dealing successfully with the terrorist threat. Richardson reasoned that terrorists aim to provoke governments, including governments that generally adhere to rule of law principles, into over-reaction. This is an important recruitment tool, because any over-reaction can be interpreted as revealing the "true fascist" side of the government. This in turn nurtures sympathizers, from

15. See generally DEMOCRACY AND TERRORISM: THE ROOTS OF TERRORISM, VOL. 1 (Louise Richardson, ed., Routledge, 2006).

among whom future terrorists can be recruited. Richardson also pointed out that the use of courts to resolve disputes that give rise to the use of terrorist tactics in the first place, may help in tipping the sympathy in favor of a rule-based resolution as opposed to a violent one. Furthermore, the subversive minority that may feel that it will loose out unless it reverts to terrorist tactics must be assured that other means are not only available, but that they will actually provide an acceptable resolution.

Some of these lessons may be transferable to the current wave of terrorist attacks, others may not. Asked about the major lessons learned since 9/11, Louise Richardson replied that the most important lesson is the ability to learn from success as well as failure. Specifically, the US seems to recognize that terrorism cannot be fought through military means alone. Rather, perpetrators who use terrorist means should be removed from their communities. Efforts should be made to win the hearts and minds of the people who remain in those communities so that they do not support terrorist activity. An example was the generous relief efforts of the American people in response to the tsunami in South East Asia. According to Richardson, in Indonesia in particular, public opinion about the United States increased substantially following these events, while support for Bin Laden plummeted.

This experience suggests that opinions on counter-terror activities as held by those who would benefit under a functioning rule of law, is critical. Their perceptions develop as they witness actions taken by those who promote the rule of law, the United States in particular. Thus, promoting the rule of law abroad while violating it at home will be considered hypocrisy. Worse still, the contradiction may weaken the appeal of the rule of law, as its promotion may be regarded only as yet another device to promote American interests.

PART III: RULE OF LAW AND ECONOMIC DEVELOPMENT

Societies that can ensure that they meet the fundamental social needs of the people may still find that economic growth and development are difficult to achieve. There is a vast literature in development economics that seeks to identify relevant factors for economic growth.¹⁶ Over the past twenty years, the consensus that “institutions” are important for economic growth and development has received substantial support.¹⁷ The definition of institutions is often broad, encompassing both formal and informal institutions. The prevalence of corruption is an indicator of institutional weakness and correlates

16. See ROBERT J. BARRO, DETERMINANTS OF ECONOMIC GROWTH - A CROSS-COUNTRY EMPIRICAL STUDY, (1998) (for a standard approach to identify growth factors). Many of the models identified in cross-country studies, however, fail to predict results for individual countries' growth prospects. See IN SEARCH OF PROSPERITY: ANALYTICAL NARRATIVES ON ECONOMIC GROWTH (Dani Rodrik, ed., 2003).

17. See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990).

with low scores for integrity of the judiciary and the bureaucracy. Corruption further sparks fears of expropriation.¹⁸

Formal law is often used as an alternative measure for the quality of legal institutions. For example, a selected number of specific legal indicators is used to assess the quality of shareholder or creditor rights.¹⁹ The value of measuring the laws on the books, however, is disputed. Many commentators have suggested that implementation of the laws is a more critical gauge and that the quality of formal legal indicators may be secondary.²⁰ Moreover, some studies have shown that transplanting legal rules and blue prints from one country to another fails to produce effective institutions.²¹ These results cannot be explained simply by a time lag between legal reforms and their actual enforcement. Instead, these studies suggest that absent local participation and demand, enforcement is unlikely to catch up.

Impressive growth has been achieved by countries without standard laws and legal institutions in place,²² a theme that was reflected in some of the panel discussions. A possible explanation for observed deviations from the close relation between rule of law and economic development is that early stages of economic development may not be as dependent on a well-established rule of law system as later ones. An alternative explanation is that the attributes typically associated with the rule of law, such as an independent judiciary and other institutions that generate predictability and accountability, may be provided by other governance mechanisms, such as administrative guidance, business-government partnerships, or state sponsored mediation.²³ Examples include the spectacular growth of the East Asian Tigers and Dragons in the second half of the twentieth century,²⁴ and more recently China's growth experience.²⁵ These experiences notwithstanding, several multilateral and bilateral aid organizations advocate convergence on a specific set of rules for the

18. Stephen Knack and Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, ECON. AND POL. Nov. 1994, at 207-27; Paolo Mauro, *Corruption and Growth*, 110 Q. J. OF ECON., 681 (1995).

19. See Rafael La Porta et al., *Law and Finance*, JOURNAL OF POL. ECON. 106, 1113-55 (1998) (using six indicators of minority shareholder protection and four indicators of creditor rights protection to assess investor protection in forty-nine countries).

20. Joseph E. Stiglitz, *Whither Reform? - Ten Years of the Transition*, Paper Presented at the Annual World Bank Conference on Development Economics (April 30, 1999).

21. Dan Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EURO. ECON. REV. 165 (2003).

22. Franklin Allen et al., *Law, Finance, and Economic Growth in China* (Wharton Financial Institutions Center, Working Paper No. 02-44, 2005); KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960-1995* (1999).

23. For an extensive review of non-legal governance mechanisms during the high growth period in Asia, see Pistor and Wellons, *supra* note 22.

24. Pistor & Wellons, *supra* note 22.

25. Allen, *supra* note 22.

protection of property rights, corporate governance, bankruptcy, and the like.²⁶ Similarly, the World Bank's "Doing Business" report ranks countries on pre-defined indicators, many of which are formal, legal indicators or closely associated with the operation of legal institutions in the West.²⁷

Arguably, these objective indicators may be superior to perception indices that survey business people and ask them about the subjective ranking of countries on a one to ten "rule of law" or "judicial efficiency" scale. However, they might be confusing form with substance. Ultimately what matters is whether contracts, property rights and other entitlements are enforced impartially in a fair and transparent fashion, not whether a country subscribes to a particular version of a corporate code or court organization.

The Symposium investigated the nexus between economic growth and development through the eyes of foreign investors and multilateral aid organizations. Roberto Dañino, the World Bank's former General Counsel, suggested that competition for scarce capital fosters convergence of countries around the globe on basic rule of law principles. As a result, countries should and do eventually adopt a legal framework conducive to foreign investors. According to panelist John Bohn, the Chairman of the Board of Directors of the Center for International Private Enterprise, the rule of law even "magnifies" economic development, mostly by way of encouraging foreign capital inflows. Although this notion formed the backdrop for the discussion, other panelists did point to a paradox when comparing foreign investment in Russia and China. While Russia has closely followed Western advice and has built a formal legal system that meets most of the so-called "best practice" standards advocated by the IMF, the World Bank, and the EBRD, among others,²⁸ China still lags far behind on those indicators. Yet, not only have growth rates in China been considerably higher than in Russia, but foreign investors have greater confidence that "deals will get done" in China than in Russia. Thus, law on the books alone may not be the best predictor for stability and predictability. Both of these indicators can also be assured by regimes that do not meet rule of law

26. The International Monetary Fund's program on creating an international financial architecture includes benchmarking countries against a set of "best practice rules" compiled by staff members. World Bank, International Financial Architecture: An Update on World Bank Group Activities (2001), <http://www.worldbank.org/ifa/IFAUupdate1101.pdf>.

27. The World Bank advertises this program as follows: "The Doing Business database provides objective measures of business regulations and their enforcement. The Doing Business indicators are comparable across 155 economies. They indicate the regulatory costs of business and can be used to analyze specific regulations that enhance or constrain investment, productivity and growth." Home Page, Doing Business, The World Bank Group, <http://www.doingbusiness.org/> (last visited June 23, 2006).

28. Several studies have pointed out that Russia performs remarkably well on these benchmarks, but lacks behind in outcomes such as financial market development indicators. See, e.g., Bernard Black, et al., *Russian Privatization and Corporate Governance: What Went Wrong?* 52 Stan. L. Rev. 1731 (2000). See also Katharina Pistor, et al., *Law and Finance in Transition Economies*, 8 ECON. OF TRANSITION 325 (2000).

standards. An extensive literature has demonstrated the importance of long term business networks to sustain trade and investment.²⁹ Some commentators advocated for lower expectations that all countries would converge on a common understanding of the rule of law, pointing out that the perception of the importance of law and its enforcement may continue to diverge in some parts of the world.

There was substantial agreement among panelists that the private sector, and in particular multinational corporations, should continue to play an even greater role in promoting rule of law development. To this end, some MNCs engage in a dialogue with local lawmaking and law enforcement agencies trying to convince them of the relevance of rule of law. For example, Nancy Anderson, Vice President and Deputy General Counsel of Microsoft, explained that Microsoft Corporation seeks to convey to local policy makers that they share a common interest in promoting a vibrant local economy. To further such goals, MNCs and government agents in the host country should collaborate on critical aspects of law making (for example, protection of property rights) and law enforcement (for example, identifying and prosecuting individuals violating laws by placing internet worms and viruses). Panelists emphasized that improving the implementation of laws is at least as important as promoting “good laws.”

Ambassador Thomas Pickering, the Senior Vice President of International Relations for The Boeing Company, a former U.S. Under-Secretary of State and former Ambassador to Russia, emphasized that Russia has built an impressive arsenal of laws over the past decade, but that implementation lags behind substantially. He suggested that smaller sized companies are more adversely affected by the lack of the rule of law than larger ones. For example, large corporations, such as Boeing, have sufficient bargaining power – not only because of the capital, technology and expertise they bring, but also because of the number of employees they hire locally – thus ensuring that their interests are heard. Smaller companies, by contrast, are more likely to be taken advantage of on an uneven playing field. Thus they are the ones who benefit most from advancing the rule of law locally. As they have little bargaining power to advance their interest, they are most likely to avoid markets that do not afford them legal protection.

Sam Fried, a Senior Vice President and General Counsel for Limited Brands, Inc., suggested that advancing formal laws and law enforcement is not the only strategy MNCs should consider when investing abroad. Non-governmental organizations are particularly important

29. Allen, *supra* note 22; Avner Greif, *Impersonal Exchange and the Origins of Markets: From the Community Responsibility System to Individual Legal Responsibility in Pre-Modern Europe*, in *COMMUNITIES AND MARKETS IN ECONOMIC DEVELOPMENT*, (Masahiko Aoki & Yujiro Hayami, eds. 2001); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

constituencies that can help MNCs better acquaint themselves with local conditions. They can even resolve likely disputes through negotiation and collaboration before they arise. If MNCs take their role seriously, they will engage in capacity building on the ground, as it is broadly understood. This would include helping to build civil society, not only public institutions. His advice was for each MNC to build partnerships with local NGOs as an important way of ensuring medium to long term stability for their investment strategy.

Questions from the floor pointed out the correlation between countries with a high natural resource endowment, which should indicate wealth and prosperity and the contradictory poor development of the rule of law in those countries. The so-called “resource curse” is well supported by empirical studies showing that countries with strong natural resource endowments tend to be significantly poorer and more corrupt than countries with little or no valuable natural resources.³⁰

Where governments are unlikely to promote the rule of law, greater responsibility might fall on corporations, including MNCs. Hans Correll suggested that corporations should embrace corporate social responsibility by building local capacity and promoting trust in public as well as private institutions. Comments from the floor questioned the link between labor rights and the rule of law, pointing out that the panel had focused almost exclusively on the importance of the rule of law for the flow of capital. They pointed out that business all too often ignores human rights concerns and limits the notion of rule of law to protecting foreign investors.

A. *Business and the Rule of Law:*

- ◆ *Rule of law offers much desired predictability and stability to multinational corporations and domestic businesses alike.*
- ◆ *The absence of rule of law does not imply that no investment takes place. It will, however, take different forms.*
- ◆ *Multinational corporations are profit maximizing entities. They will invest in helping build the rule of law in their host countries if and when it is in their self-interest and in the interests of their shareholders.*
- ◆ *These investments can take different forms, including influencing legislation in host countries, promoting bilateral investment treaties, supporting efforts in strengthening law enforcement, and building partnerships with local non-governmental organizations.*

30. Jeffrey D. Sachs & Andrew Warner, *The Big Push, Natural Resource Boom and Growth*, 59 J. OF DEV. ECON. 43 (1999).

1. *Legislative Foundations*

Corruption has been at the forefront of international development policy making only for the past ten years, owing, in significant measure, to the leadership of former World Bank President James Wolfensohn. Corrupt practices are, of course, age old, and it has been well known that systemic corruption impedes economic growth and development.

Attempts to curb corrupt practices are often triggered by scandals that reveal the extent of corrupt practices, which previously escaped closer scrutiny. When the U.S. enacted the Foreign Corrupt Practices Act (FCPA) in 1977, which holds U.S. citizens and corporations liable for bribing foreign officials, it responded to the disclosure of a series of major corruption scandals, involving, among others, United Brands.³¹ It took other countries in the developed world decades to catch up with the U.S. In fact, many countries accepted and even encouraged corrupt practices abroad by allowing their corporations to deduct bribery expenses from their taxable income. Finally, in 1997, the Organization for Economic Cooperation and Development (OECD), along with five non-member countries adopted a Convention on Combating Bribery of Foreign Officials in International Business Transactions. The Convention entered into force in February of 1999.³² In December 2003, the United Nations added another convention to the international instruments aimed at curbing corruption, the United Nations Convention Against Corruption.³³ This Convention entered into force in December 2005 after thirty countries had ratified it. There are currently 140 signatories and forty-seven parties to the Convention.

The impact of these international conventions in practice is still unclear. The OECD Convention triggered legislative change in many OECD countries, but actual enforcement has remained low. One panelist suggested that at the time of the Symposium thirty-seven enforcement cases based on legislation enacted based on the OECD Convention were pending across the thirty-nine states that are parties to the Convention, or about one case per country. This is further evidence of the common discrepancy between legislative activism and the lack of implementation or enforcement. In fact, one panelist referred to a legislative "Convention Congestion."

31. Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379 (2005).

32. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, available at http://www.oecd.org/document/21/0,2340,en_2649_37447_2017813_1_1_1_37447,00.html#text.

33. United Nations Convention against Corruption, Dec. 11, 2003, 43 I.L.M. 37, available at http://www.unodc.org/unodc/en/crime_convention_corruption.html.

B. Containing Corruption:

- ◆ *Corruption can have devastating consequences for societies. In extreme cases, it can cause injury and death, for example, when safety standards for buildings and roads are evaded by side payments.*
- ◆ *Systemic corruption undermines the political process and its legitimacy as those with connections and cash resources can buy political outcomes.*
- ◆ *Systemic corruption is more common in societies with weak legal institutions. These problems are often exacerbated when outsiders (foreign firms, for example) succumb to bribing officials in order to secure outcomes that benefit their interests. Nonetheless, corruption is also prevalent in developed countries with high levels of rule of law, although the probability of being caught and sanctioned severely for engaging in such practices tends to be higher.*
- ◆ *Corruption can be found at the highest levels of government as well as in multilateral organizations, aid agencies, and similar organizations.*
- ◆ *Corruption can equally affect the judiciary. Judicial corruption is particularly problematic as it affects a core institution needed in the fight against corruption.*
- ◆ *Corruption cannot be eliminated, but it can be reduced. While international conventions may signal intent to eliminate it, actual enforcement is critical. Well trained judges, prosecutors and police forces at the local level are critical actors in improving enforcement.*

1. Enforcement Practices and Strategies

Reducing corruption requires, among other things, specific enforcement actions to be taken against all parties that engage in corrupt practices. This includes, first and foremost the briber (entrepreneur, corporate representative) and the bribed official. However, Eva Joly, the Assistant Secretary – General of Norway’s Ministry of Justice and a former Investigating Judge in France, pointed out that the most lucrative corrupt transactions could not be undertaken without the expertise and help of intermediaries, including multinational banks that harbor accounts used to launder or park money from such transactions. The panel discussed who should take the lead on enforcement actions. Glenn T. Ware, former Senior Legal Advisor to the World Bank’s Department of Internal Integrity, suggested that the home countries of MNCs need to come to the fore. By contrast, Eva Joly suggested that effective enforcement is more likely to come from the host countries of MNCs, primarily because enforcement agencies in the MNC’s home country might not take actions against firms in their jurisdiction, instead putting the blame on officials in the host country. This may be changing as member states of the OECD, for example, have committed to

prosecute firm representatives for bribing foreign officials. As noted above, however, enforcement has not been robust. Even the host countries have primarily focused on prosecuting officials who accepted bribes, not representatives of foreign firms that offered them. By way of example, Joly described the prosecution of three former presidents of Costa Rica for having accepted bribes by the French multinational Alcatel. In contrast, not a single action had been taken against the company in either Costa Rica or in France. Again, this may be changing as the global fight against corruption strengthens the hands of law enforcement officials in countries around the world.

Effective enforcement strategies require legal backing. Daniel Lipsic, former Deputy Prime Minister and Minister of Justice of the Slovak Republic, pointed out a tension between the effective prosecution of corrupt practices on the one hand, and on the other, legal limitations constraining the powers of the executive, including law enforcement activities. The Slovak Republic, for example, amended its Criminal Procedure Code in 2003 to permit “sting operations,” where law enforcement agents are permitted to use deception to catch a person committing a crime. Frequently this involves a law enforcement agent participating in a staged “crime”, that is, by bribing or taking a bribe. He reported that in a recent case a high level judge was caught in the act of accepting bribes by way of such a sting operation. The constitutionality of the law that authorized this tactic has now been challenged and the case is pending at the country’s constitutional court. Other recent legal changes described by Lipsic include the introduction of “crown witness” rules in the fight against corruption. On the institutional side, the Slovak Republic established a special unit in charge of corruption within the Ministry of Justice and another within the general office of the prosecutor.³⁴ According to Lipsic, creating new institutions staffed with well trained professionals is more effective than attempting reform within existing institutions.

2. The Role of the Private Sector

The private sector may also play a role in combating corruption. Jonathan P. Graham, Vice President of Litigation & Legal Policy for General Electric Company, explained that MNCs can pursue two strategies. First, they may refrain from investing in countries with high levels of corruption, thus depriving them of much needed capital, expertise, and development potential. He noted that GE currently invests in over 130 countries around the globe. Still, the company refrains from investments in countries where corruption levels were deemed to be excessive. The major reason given for staying away from countries with high levels of corruption was that corruption creates an uneven

34. For details for anti-corruption measures developed in the Slovak Republic see The Ministry of Justice of the Slovak Republic, Fight Against Corruption, <http://www.justice.gov.sk/a/wfn.aspx?pg=r6&htm=r6/r6comcor.htm>.

playing field and undermines predictability of outcomes.

The second strategy MNCs and domestic companies have at their disposal is the implementation of compliance programs within corporations. GE's compliance programs encourage anonymous reporting by whistle blowers, sanction violators by firing them and make public dismissals for corruption in an attempt to deter such behavior. Transparency International, a non-governmental organization that has spearheaded the fight against corruption, together with Social Accountability International, have developed "Business Principles for Countering Bribery."³⁵ The Principles advise companies to adopt a program suited to its size, business, and operations. A number of guidelines are spelled out, such as one prohibition against offering bribes to advance business interests and another against making party or charitable contributions that may be deemed bribes in disguise. Devising the appropriate governance structure and monitoring its implementation is left to the company's board of directors.

3. Combating Corruption in International Organizations

More recently, a number of international organizations have subjected themselves to a review in an effort to reduce corrupt practices within them. An important example is the World Bank, which set up a Department of Institutional Integrity in 1999. This was part of the anti-corruption campaign launched by the former President of the World Bank, James Wolfensohn. Staff for this unit was recruited from US prosecutorial offices. They investigated over 2000 cases of corruption over the past six years. Glenn Ware, who participated in this effort as Legal Advisor to the Department of Institutional Integrity, suggested that the investigated cases were no different from cases of corruption and fraud found elsewhere. By implication, the means to fight them can be learned and transferred from places where they have been successfully employed in the past, provided that such efforts are backed by the leadership in the relevant organizations. The World Bank must recognize that corruption is a common phenomenon and thus likely to occur in any organization including its own. Each project and each program grant should be reviewed for its vulnerability to corruption, fraud, and similar schemes. Due diligence studies should be undertaken in order to identify the ultimate beneficiaries of such grants and to assure that they are eligible in the first place. He pointed out that in many of the investigated cases the ultimate beneficiary of World Bank loans was not even known, making it difficult to trace the money once released. Finally, Ware encouraged multinational aid organizations to collaborate and to share information about corrupt practices involving the use of aid money. Many of these measures have been advocated by Transparency International ("TI") for

35. For details see Transparency International, *Business Principles for Countering Bribery*, http://www.transparency.org/global_priorities/private_sector/business_principles (last visited June 24, 2006).

years. TI has developed a set of “tool kits”, some of them targeted at particular transactions (that is, government procurement), others focusing on corruption in politics, health, education, and even sports.³⁶

PART IV: CONSTITUENCIES INVOLVED IN BUILDING THE RULE OF LAW

As stated in the introduction, building the rule of law is a goal that is shared by numerous constituencies. It is no longer a question resolved between rulers and ruled within a given jurisdiction, but includes business, non-governmental organization, as well as bilateral and multilateral donor organizations. This signals broad support for the principles of fairness, due process, and equity that are embodied in the rule of law. However, these multiple constituencies can create additional challenges. There is substantial overlap and sometimes conflicting advice. Moreover the allocation of resources to local and international civil society organizations (CSOs), as well as the use of local and foreign expertise to develop investment strategies may create conflict among various non-state constituencies. This conflict is less of a problem for the private sector whose activities are more focused on specific investment strategies. This is, in part, because its notion of the rule of law is limited to security for investment, property rights, and contract enforcement. However, as panel discussion underscored, civil society and multinational organizations have broader concerns. In particular, both the Panel on Civil Society, and the panel on Multinational Organizations and Governments emphasized that in order to promote the rule of law either domestically or abroad, the overlap must be addressed. Of equal importance, rule of law donors and implementing organizations must improve their mechanisms for coordination.

A. The Private Sector's Contribution to Building the Rule of Law

The panelists stressed once more that building the rule of law is in the inherent self-interest of multinational corporations in their search for safe and predictable investment environments. William Neukom, the Chair of Preston Gates & Ellis LLP and former General Counsel for the Microsoft Corporation, asserted that rule-based systems of self-governance backed by an independent judiciary capable of enforcing contracts, property rights, and human rights, are important ingredients for the rule of law. He stressed that these principles are not only compatible with corporate interests, but are even desirable from their perspective. At the very least, corporations can realize reputational benefits by actively engaging host governments in discussion on these issues.

While in general agreeing with the notion that rule of law investments

36. For details see Transparency International Global Priorities, http://www.transparency.org/global_priorities.

advance the reputation of multinationals, Thomas Gottschalk, the Executive Vice President for Law and Public Policy, and General Counsel of General Motors, suggested that the reputation effect might be contingent on how people around the globe perceive the legitimacy of the rule of law agenda. With the reputation of the U.S. government and U.S. corporations declining, especially but not exclusively in the Islamic world, insistence on what might appear to be U.S. centric world views could be counter productive. John Scriven, a Senior Vice President, General Secretary and Company Secretary at ABB Ltd., supported Gottschalk in arguing that profit maximizing entities cannot afford to attach themselves to a particular imperative at a particular point in time. Instead they must be flexible and develop long-term strategies. Moreover, as multinational investors, they must be culturally sensitive.

Panelists discussed specific strategies that multinational corporations have pursued in advancing the rule of law, including: (1) placing economic pressure on particular regimes, such as South Africa under apartheid; (2) subscribing to broadly accepted principles, such as the Sullivan Principles, an initiative to promote voluntary acceptance of basic standards of social responsibility;³⁷ (3) accommodating religious beliefs of company employees, even if it is contrary to state policy (such as praying by an employee in China); and (4) collaborating with government officials in developing new legislation and improving enforcement practices. In contrast, panelists expressed concern regarding strategies for forcing corporations to abide by certain principles, such as boycotts and other external pressures, as this was deemed at odds with their need for flexibility. The Business Principles for Countering Bribery,³⁸ which were developed by a steering committee comprised of representatives from business, civil society organizations, multilaterals and academia, suggest that the most powerful response to these problems is self-governance by business according to broadly framed rule of law principles.

B. CSOs' Contribution to Building the Rule of Law

In recent years there has been a proliferation of organizations at the domestic and international level that pursue certain policy goals relating to the rule of law (For example the promotion of human rights, environmental protection, civil and political rights, and access to justice). A widely used catch phrase for these various organizations is Civil Society Organizations (CSOs) or non-governmental organizations. They include professional organizations, such as bar and judges associations, advocacy groups, interest groups and development assistance organizations. The goal of CSOs is to complement the political process. They organize people with similar goals and try to influence political processes and private decision making through a variety of measures

37. Global Sullivan Principle: <http://www.thesullivanfoundation.org/gsp/default.asp>.

38. *Supra* note 35.

including public information campaigns, investigating misconduct by private and public actors, and enforcement actions, such as boycotts. CSOs may even initiate litigation.

CSOs are typically funded by a mix of private donations (namely, individual and corporate), foundations, other non-governmental organizations, and bilateral or multilateral donor programs. Not surprisingly, their objectives and strategies differ depending on their primary constituencies, their objectives, and their primary source of funding.

Local and international CSOs active in developing countries often pursue broadly similar goals, but their strategies may differ significantly depending both on who they are and the constituencies whom they ultimately serve. This point was illustrated by an exchange between Joy Ezeilo, the Executive Director of Women's Aid Collective, Nigeria, and Mark Ellis, the Executive Director from the International Bar Association. Joy Ezeilo suggested that throughout Africa CSOs have switched from confrontational tactics vis-à-vis governments to a more collaborative practice and that this has enhanced their ability to achieve their goals. By contrast, Mark Ellis insisted that the essence of CSOs is to hold governments accountable. He insisted that to achieve this goal CSOs must remain separate from government and adopt more arms-length practices.

The discussion also revealed that adversarial strategies are dependent on a legal and institutional infrastructure that is often not in place. In particular, litigation can only be used to hold governments accountable where relevant legislation is supported by a sufficiently independent and impartial judiciary. James Goldston, the Executive Director of the Open Society Justice Initiative, emphasized that shortcomings at the local level can sometimes be overcome by supra-national institutions. An example is the European Court of Human Rights in Strasbourg, to which citizens from member states of the Council of Europe have access – although such recourse can be slow in coming, due to the lengthy nature of such proceedings.³⁹

Local and international CSOs often compete against each other in developing countries, if not for funds, then for access to government officials and participation in the development of programs and their implementation. Joy Ezeilo explained that the current Nigerian government has a strong bias in favor of foreign CSOs. While the reasons are not entirely clear, funding and expertise gained in other contexts might play a role. Her concern, however, was that foreign or international CSOs are often unfamiliar with local circumstances. Moreover, local knowledge, capacity, and talent is frequently ignored in the process of building institutions, which may affect the success of policy goals common to both local and international CSOs.

The importance of local constituencies and home grown strategies for sustainable development was also stressed by Michael Posner, the Executive

39. European Court of Human Rights: <http://www.echr.coe.int/ECHR>.

Director of Human Rights First. He criticized donors in particular for short term horizons, which imply that policy strategies funded by them tend to focus on specific measurable outcomes, and not necessarily on sustainable, foundational change.

In many countries, however, local CSOs have little leverage vis-à-vis governments. Sanjaarusen Oyen a Parliamentary Representative of Great Hural, Mongolia, pointed out that many governments have few incentives to listen to local CSOs. This affects their standing in local society, as organizations lacking both a clear mandate and a record of tangible success can generate little support. Finally, local CSOs often lack funding. Governments can hamper the development of a viable CSO sector by making donation to these organizations unattractive. In Mongolia, for example, donations to non-governmental organizations in general, are not tax deductible.

Commentators from the floor suggested that in many countries CSOs are not only ignored but that governments have taken measures to crack down on them. One example given was Uzbekistan, where repeated enforcement action against NGOs was said to have discouraged donors from providing continued support. These comments suggest that civil society and CSOs are not substitutes for rule of law as a constraint on government actions. Their very existence and scope of permissible operation depends on an environment that is conducive to self-organization, freedom of expression and political activism.

Government regulation, including tax regulation, can play a crucial role in shaping the role that CSOs can possibly play in a given society. In fact, an issue of increasing concern is the regulation of foreign or internationally funded CSOs. How one might assess this phenomenon depends very much on the purposes the relevant CSO pursues and the identity of its sponsors. The recent attempt by Russia to limit the operation of CSOs with foreign funding has generated much criticism. The major concern is that without such sponsorship CSOs with human rights, environmental, rule of law, and similar agendas are unlikely to survive in today's Russia.⁴⁰

C. Multilateral and Bilateral Aid Organizations as Contributors to the Rule of Law

Multilateral and bilateral aid organizations have spent billions of dollars on promoting legal reforms and the rule of law over the past decade.⁴¹ The first law

40. The Russian government, of course defends the measure by pointing out that CSOs could also be used as a front for fundamentalist or politically radical groups. Nikolas K. Gvosdev, *Russia's NGOs: It's Not So Simple*, INTERNATIONAL HERALD TRIBUNE, Dec. 8, 2005, <http://www.iht.com/articles/2005/12/08/opinion/edgvosdev.php>.

41. The World Bank alone has spent \$2.9 billion on over 300 projects. *Supra* note 1. Over the past three years USAID, the U.S. government aid agency has appropriated between \$10 million and \$16 million each year for rule of law, democracy, and governance projects. USAID: Office of Democracy and Governance, Budget,

and development movement in the post war era focused primarily on Latin America and was sponsored by government agencies as well as private foundations, such as the Ford Foundation.⁴² After the fall of the Berlin Wall, a second wave of rule of law projects was launched with the goal of ensuring a successful transition of the former socialist countries to democracy and market based economies. In the aftermath of 9/11 the regional focus has shifted towards the Middle East. At the Symposium, U.S. Congressman Jim Kolbe explained that this event galvanized substantial support in the U.S. Congress for the promotion of the rule of law. Congress recognized that failed states and lack of the rule of law in some parts of the world could have disastrous consequences for the U.S.

In many cases multiple agencies set up programs for advancing the rule of law in a country that they target for such reforms. This can sometimes lead to duplications of efforts, or even to contradictory advice. Carol Bellamy, President and CEO of World Learning and former Executive Director of UNICEF, stressed the need for better coordination of multiple efforts. The Nordic countries were cited to as an example of a consortium of bilateral donors who coordinate amongst themselves to share information and collaborate on major aid programs. Bellamy suggested that the United Nations already provided opportunities for such coordination along with other major multi-lateral donors and that its role in this arena could be expanded.

By contrast, Congressman Kolbe noted that substantial coordination may also come from individual governments, in particular the United States. He cited the example of the Bush administration, which has extended substantial efforts to commit major multi-lateral organizations, such as the World Bank, the IMF, the European Bank for Reconstruction and Development, and the Asian Development Bank, to converge on certain policy goals. In particular, since 9/11 the Bush administration has emphasized the need to improve law enforcement efforts in the fight against terrorism. Part of this strategy is to advocate grant distribution as opposed to loans to promote capacity building in law enforcement—investments that are unlikely to create short term revenue that would allow countries to easily pay back these loans.

Some panelists advocated a better division of labor among various aid organizations. Congressman Kolbe suggested that international organizations, as opposed to national governments, may be particularly well placed for rule of law assistance. He defined this assistance as including training programs for judges, prosecutors, advocates, police, law enforcement officers, and the like; assistance

http://www.usaid.gov/policy/budget/cbj2006/cent_progs/central_dcha_dg.html.

42. For details on the first law and development movement, see David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062 (1974). For a more positive assessment of this movement, compare Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. OF INT'L L. 470 (1995) (reviewing LAW AND DEVELOPMENT, VOL. 2, LEGAL CULTURES, Anthony Carty, ed.).

in drafting criminal and civil codes; the transfer of expertise and personnel to support these training programs, and support for establishing an independent judiciary.

PART V: CONCLUDING REMARKS

The summary of the debates that took place at the Symposium highlights the costs and benefits of using the rule of law umbrella to analyze, discuss, and develop solutions for a host of different development issues. There is little doubt that the absence of constraints on executive power and the lack of institutions able to ensure responsible governance contribute to severe poverty. The absence further entrenches already defunct institutions that fail to provide basic public health or security and which are unable to promote economic growth and development. That, however, does not suggest that the absence of rule of law is causal, nor that improving rule of law will ensure resolution of the underlying issues. What is needed, therefore, is a multi-pronged approach that links rule of law strategies to the specific social, political and economic problems different societies face. Creating trust in law and legal institutions is not something that can be administered like a vaccine, but requires engagement with critical constituencies at the local level.

A. The Rule of Law's Multiple Meanings:

- ◆ *The aspirations of justice and fairness associated with the rule of law are widely shared, notwithstanding the fact that the meaning of the rule of law is difficult to define.*
- ◆ *Participants of the Symposium associate the rule of law with different institutions and different outcomes.*
- ◆ *In part this reflects different experiences with law and legal institutions as well as with the agencies that promote rule of law in countries around the globe. In part it reflects the specific interests of core constituencies for building the rule of law, including governments, civil society organizations, business, and donor agencies.*

1. Differences across Countries

At the country level, the greatest difference appears to exist between countries with a long tradition of the rule of law on the one hand, and, on the other, countries where the rule of law remains only an aspiration. In the former, the rule of law has become almost standardized, with specific institutional features, including an independent judiciary, an independent and fairly autonomous private bar, and a set of formal rules that are announced in advance and enforced impartially. In the latter countries, the precise institutional form of the rule of law is still in the making. As a result, strategies adopted by local advocates of the rule of law may differ from those promoted by their foreign and

international counterparts.

Put simply, countries with advanced rule of law systems place a lot of emphasis on the autonomy and neutrality of law and legal institutions that have come to support the rule of law. This has often led to the assumption that similar institutions replicated elsewhere will perform similar functions. By contrast, countries in the midst of building the rule of law tend to experience rule of law promotion primarily as politically and socially contested. Moreover, they may associate rule of law with different institutions – a domestic prioritization of the most urgent obstacles to enforcing the rule of law. These priorities reflect local perceptions of the strength of various rule of law institutions and local preferences for addressing institutional needs.

2. *Differences Across Constituencies*

Different constituencies also differ in their understanding of the rule of law. Representatives from the private sector focused on stability and predictability of host countries' legal regimes and their commitment to enforce contracts and protect property rights. From this perspective, the rule of law serves to ensure safe investment and the enforcement of contracts. Multilateral and bilateral aid agencies also tend to regard rule of law as a means to further another agenda. Economic growth and development, including a country's integration into world markets is one, and international security is another. Priorities may change over time and as a result investments in specific rule of law building strategies (for example, strengthening criminal law and criminal law enforcement as opposed to protecting private contracts and property rights) change as well.

Differences in the meaning and understanding of the rule of law can also be found between different types of civil society organizations (CSOs). International CSOs (as well as multilateral aid organizations) benefit from using similar strategies across different countries. They tend to advocate universal principles and universal responses to problems. By contrast, local CSOs seek solutions to the specific problems in the environment they operate in, and may be unaware of strategies used in addressing similar problems in neighboring countries. They may be reluctant to promote boundaries between civil society and the state – something that is anathema to many international CSOs that view CSOs as counterparts to, not partners with, the state.

3. *Rule of Law: A Means or an End?*

Rule of law is a fundamental aspiration of mankind, and as such cannot be reduced to a means to obtain other ends—poverty alleviation, a functioning health care system, peace and security, etc. Still, the discussions at the Symposium suggest that it is critical to keep such ends in perspective when embarking on strategies to build the rule of law. At the very least, these ends can serve as a benchmark for assessing the presence or absence of the rule of law.

Equally important, the discussions have made clear that not all constituencies willing to partake in advancing the rule of law globally will do so without qualifying this aim by pointing to the specific ends they are trying to achieve at the same time. Representatives from the corporate sector, for example, were explicit about the fact that what they need is predictability and security to protect their investments. They will promote the rule of law to achieve these ends, but their enthusiasm for rule of law principles is dampened whenever it puts them at odds with their profit maximizing interests. Similarly, the official objective of multi-lateral organizations, such as the World Bank, is economic growth and development. These organizations do not have a mandate to intervene in political processes of the countries they advise. For such institutions, rule of law strategies must be defined as strategies for promoting economic growth and development. Yet, the relation between economic growth and development and the rule of law is complex and the direction of causality between the two remains unclear. Broad empirical patterns suggest that countries with high levels of rule of law also enjoy economic prosperity,⁴³ but this does not prove the direction of causality or show that policies aimed at economic development and building the rule of law are always re-enforcing.

Given that many rule of law projects seek to achieve other goals in addition to establishing the rule of law in itself, their multiple objectives should be made transparent. This may benefit the rule of law agenda overall, as it will counter the suspicion that rule of law is used as a “Trojan horse”⁴⁴ to advance other interests.

D. Future Strategies

The most important contribution of this Symposium was that it brought together people and organizations who share a deep belief in the importance of the rule of law, most with years of experience in rule of law programming from countries and communities around the globe. The Symposium created a forum for debate between these different stakeholders, which furthered their mutual understanding of each other and each others’ goals. It also exemplified that these kinds of exchanges are indispensable for advancing our understanding of what it takes to build the rule of law worldwide. While the temptation is great to distill a list of items, or building blocks, that will promote the rule of law anywhere and for any subject matter, such an approach is unlikely to have a major impact. As U.S. Supreme Court Justice Sandra Day O’Connor put it in her concluding remarks, we can fairly easily identify the absence of the rule of law: “we know it when we see it.” What has proved much harder is to develop strategies that not

43. Knack & Keefer, *supra* note 19.

44. Matthew Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of U.S.-Sponsored “Rule of Law” Reform Projects in the People’s Republic of China*, 18 UCLA PACIFIC BASIN L. J. 64 (2000).

only signal some superficial commitment to rule of law principles, but actually make a difference in practice. For this to happen, rule of law strategies must be rooted in the societies that shall benefit from them, and this requires local knowledge and contributions from key constituencies on the ground.

Much could be gained by ensuring that various constituencies with a shared interest in building the rule of law cooperate in this endeavor. Fostering future debates and facilitating the exchange of information between business and civil society organizations, international CSOs and local ones, donor agencies and local stakeholders appear to be among the most important contributions that organizations such as the American Bar Association can make to advancing the rule of law.