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**PROFESSIONS WITHOUT BORDERS:  
GLOBAL ETHICS AND THE INTERNATIONAL RULE OF LAW**

**PUBLIC LECTURE**

**QUEENSLAND UNIVERSITY OF TECHNOLOGY**

**August 19, 2009**

**Professor Charles Sampford**

**Director, Institute for Ethics, Governance and Law (IEGL)**

A joint initiative of the United Nations University, Griffith University and Queensland University of Technology in Association with the Australian National University and the Center for Asian Integrity

## **Professor Charles Sampford**

At Melbourne University, Charles Sampford graduated at the top of his class in each of politics, philosophy and law, gaining a 'double first' in Arts and the Supreme Court Prize in Law, proceeding to a DPhil in Law from Oxford in 1984. In 1991 he was invited to come to Queensland as Foundation Dean of Law at Griffith University establishing a Law School hailed by Sir Ninian Stephen as a 'revolution in legal education.' In 1999, he was appointed Foundation Director of the Key Centre for Ethics, Law, Justice and Governance (the only Australian centre in law or governance to receive centre funding from the Australian Research Council). In September 2004, he became the Director of IEGL (the Institute for Ethics, Governance and Law, a joint initiative of the United Nations University, Griffith, QUT and ANU). At the same time he took on the role of Convenor of the Australian Research Council funded Governance Research Network.

Foreign fellowships include the Visiting Senior Research Fellow at St John's College Oxford (1997) and a Senior Fulbright Award to Harvard University at the Program for Ethics and the Professions (2000).

Professor Sampford has written some ninety articles and chapters in Australian and foreign journals and has completed twenty one books and edited collections for international publishers including Oxford University Press, Blackwell, Routledge, Cavendish and Ashgate. During the 1980s, he concentrated on jurisprudence, constitutional law and legal education. The bulk of his research since 1990 has been in the areas of applied ethics, integrity systems, the rule of law and the role of values in international affairs. In June 2008, his work was recognized by the peak Australian Research funding body (the Australian Research Council) who invited the 20 researchers they thought had most clearly 'made a difference' to the inaugural Graeme Clarke Outcomes Forum held at Parliament House Canberra. Prof Sampford was one of only five researchers invited from the humanities and social sciences.

This year, he was invited to speak at the United Nations on building the International Rule of Law and to join a small group led by Philippe Sands to draft a code of ethics for international lawyers – both events occurring in June. This public lecture encompasses insights arising from each.

## **ABSTRACT**

The emergence of strong sovereign states after the Treaty of Westphalia turned two of the most cosmopolitan professions (law and arms) into two of the least cosmopolitan. Sovereign states determined the content of the law within their borders – including which, if any, ecclesiastical law was to be applied; what form of economic regulation was adopted; and what, if any, international law applied. Similarly, states sought to ensure that all military force was at their disposal in national armies. The erosion of sovereignty in a post-Westphalian world may significantly reverse these processes.

The erosion of sovereignty is likely to have profound consequences for the legal profession and the ethics of how, and for what ends, it is practised. Lawyers have played a major role in the civilization of sovereign states through the articulation and institutionalisation of key governance values – starting with the rule of law. An increasingly global profession must take on similar tasks. The same could be said of the military.

This essay will review the concept of an international rule of law and its relationship to domestic conceptions and outline the task of building the international rule of law and the role that lawyers can and should play in it.

## INTRODUCTION

“The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The cost will be a great deal of hard work, both in and out of government particularly in the universities of the world. Plainly one foundation stone of this structure is the International Court of Justice ... [and] the obligatory jurisdiction of that Court. ... One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But ... if an international controversy leads to armed conflict, everyone loses.” President Dwight D Eisenhower <sup>1</sup>

Those who believe that good governance should start at home and extend abroad will easily agree but may be surprised at the source of the quote and be more optimistic about its achievement. In this lecture, I will argue that the emergence of strong sovereign states after the Treaty of Westphalia turned two of the most cosmopolitan professions, the law and the military, into the least cosmopolitan. Sovereign states determined the content of the law within their borders – including what elements of ecclesiastical law, law merchant and international law applied. Similarly, states sought to ensure that all military force was at their disposal in national armies. The erosion of sovereignty in a post-Westphalian world may significantly reverse this process.

The erosion of sovereignty is likely to have profound consequences for the legal profession and the ethics of how, and for what ends, it is practised. Lawyers have played a major role in the civilization of sovereign states through the articulation and institutionalisation of key governance values – starting with the rule of law. An increasingly global profession must take on similar tasks – and may find unexpected allies within the profession of arms. This lecture apply these ideas to the rule of law, reviewing the concept of an international rule of law and its relationship to domestic conceptions and

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<sup>1</sup> D. Eisenhower (1959) *Remarks Upon Receiving an Honorary Degree of Doctor of Laws at Delhi University* December 11, 1959 <<http://www.eisenhowermemorial.org/speeches/1959>>. Those who are surprised by the source of the quote should recall that this soldier turned politician used federal troops to protect a black student in Little Rock and warned of the military industrial complex. In Delhi, the old warrior who had masterminded the 6 June Normandy landings of the ‘United Nations’ (a phrase used in newspapers on that day) made his plea for law not war.

outline the task of building the international rule of law and the role that lawyers and soldiers can and should play in it.<sup>2</sup>

## WESTPHALIAN STATES AND TWO COSMOPOLITAN PROFESSIONS

### Pepo, Bologna and pre-Westphalian professions

The gradual evolution of the institutions that gave rise to universities means that there is no precise date for when particular institutions became ‘universities’ and which can claim the mantle of the ‘first’.<sup>3</sup> Some ancient bodies might claim as much right to call themselves ‘universities’ as the eleventh and twelfth century European centres of learning in Bologna, Paris and Oxford. China’s Nanjing (c200), Morocco’s Al-karouine (859) and Egypt’s Al Azar (975) could claim to be the oldest continuing universities while India’s Odantapuri (c550 BC to c1040 AD) and Jalanda (c450 BC to 1193 AD) have respectable claim to be the earliest institutions that could be called universities. Although predated by a medical school at Salerno, the institution with the claim to be the first university in Europe is the University of Bologna and there is evidence of law lectures being given by the monk Pepo as early as 1076.<sup>4</sup> Universities and university law teaching thus predated the modern state by nearly six centuries (and predating the joint stock company, which they have latterly been encouraged to emulate, by nearly eight centuries). They were originally among the most cosmopolitan of institutions.

The students of the time learnt Roman Law, Canon Law and, as it developed, the Law Merchant.<sup>5</sup> Such law was not made by territorial sovereigns but was developed by jurists, priests and traders and covered most of Mediaeval Europe. Indeed, the re-emergence of international trade involved issues which the existing local laws were not equipped to address but which the preserved Roman law could. Accordingly, the legal education gained by students at Bologna and, later, Paris, Oxford and other mediaeval universities allowed them to work for any of the Princes of Western Europe and to argue in many courts – making the profession of law highly cosmopolitan. There was no ‘dingo fence’ in

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<sup>2</sup> In so doing, it will expand on views expressed in C. Sampford, “Challenges to the Concepts of ‘Sovereignty’ and ‘Intervention’,” closing keynote World Congress on Legal and Social Philosophy, 1999, published in T. Campbell and B.M. Leiser (eds), *Human Rights in Philosophy and Practice*, Aldershot: Ashgate, 2001 pp. 335–391; C. Sampford, ‘What’s a Lawyer doing in a nice place like this? Lawyers and applied ethics’, *Legal Ethics* 1, 1998; C. Sampford, ‘Get New Lawyers’, *Legal Ethics* 6, 2003, 185–205; C. Sampford, ‘More and More Lawyers But Still No Judges’, *Legal Ethics* 8, 2005, 16–22; and C. Sampford, *Retrospectivity and the Rule of Law*, Oxford: OUP, 2006.

<sup>3</sup> See [http://en.wikipedia.org/wiki/List\\_of\\_oldest\\_universities\\_in\\_continuous\\_operation](http://en.wikipedia.org/wiki/List_of_oldest_universities_in_continuous_operation) for Wikipedia’s discussion of the issue with the claims of Nanjing and Academy of Gundishapur in Iran as well as University of Al-Karaouine in Morocco and Al Azar in Cairo.

<sup>4</sup> C. Phillipson ‘Andrea Alciati and His Predecessors’ *Journal of the Society of Comparative Legislation* New Series 13(2), 1913, pp. 245–264.

<sup>5</sup> For a discussion generally see: W Mitchell, *An Essay on the Early History of the Law Merchant*, Cambridge: University Press, 1904.

mediaeval Europe. Indeed, most professions were cosmopolitan – not just the oldest profession but also the most venerated profession – medicine. This applied not only to medicine and law but also the profession of arms where there was a claimed transnational affinity between knights and a code of chivalry setting out how one could and could not fight. Most soldiers did not fight directly for kings but for local lords or as mercenaries following ‘captains’ of ‘military bands’ or ‘military companies’. They might be part of armies organized by kings. But they might also fight against kings or in civil wars – or for foreign princes as individuals or groups who would fight in return for land or money.

However, the rise of strong sovereign states in the seventeenth century turned these two, most cosmopolitan, professions into two of the least cosmopolitan. Those who like a convenient date look to the Treaty of Westphalia in 1648, which provided the basis for state sovereignty. These transitions arguably commenced long before Westphalia and were never fully completed 300 years later when the United Nations (UN) Charter enshrined key aspects of the Westphalian system.<sup>6</sup>

### **The Westphalian Legal Profession**

The claim of sovereign states to determine the content of the law within their borders – including which, if any, ecclesiastical law, what form of economic regulation and what, if any, international law was to apply – meant that those who sought to study law would study the law of a particular sovereign state. Admission to practice was determined by domestic institutions – Courts, Inns of Court and various forms of apprenticeship and professional examination. In common law countries, universities were not initially engaged in educating lawyers for such practice. English law was not even taught at Oxford until 1758. However, after six centuries, even Oxford came around to teaching primarily English laws.

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<sup>6</sup> For example Chapter 1, Article 2, principles 1 and 7: “The Organization is based on the principle of the sovereign equality of all its Members” and “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII”. The concept of universal standards provided increased support for the human rights instruments which accompanied the Charter. The preamble of the *Universal Declaration of Human Rights* (UDHR), G.A. res. 217A (III), U.N. Doc A/810 71 (1948), explains that human rights are a “common standard of achievement for all peoples and all nations”. Article II of the UDHR explains the universal application of human rights by stating: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the State or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.”

The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) both support the notion of universality in their preambles when they state that nations are obliged to give “universal respect for, and observance of, human rights and freedoms”.

Two other developments profoundly affected the law and lawyering:

1. The rise of printing, which allowed legislation and case law to be disseminated more widely and in far greater detail than had ever been possible.
2. The decline of feudal land tenure, the gradual decline in the importance of land in European economies and the extension of the market led to the idea that landholding typically involved an ‘owner’ with sole dominion over it.<sup>7</sup>

Over some 300 years, these developments came to be seen as so entrenched that they were perceived to be natural, and the legal pluralism of pre-Westphalian Europe seemed contrary to the very nature of law. However, the last 10–15 years have seen the emergence of trends that involve profound challenges to the nature of law in Westphalian sovereign states. The challenges to sovereignty include the rise of transnational law – including international law, free trade treaties, the extra territorial reach of United States (US) law and the development of universal jurisdiction.

The rise of international and transnational organizations in the public, corporate and voluntary sectors has also increased the move towards pluralism. The growth of the UN and the other pillars of the UN system (the International Monetary Fund (IMF) and World Bank) have led to a profusion of international organizations for global public purposes. The International Court of Justice (ICJ), the International Criminal Court (ICC) and now the World Trade Organization (WTO) are international judicial institutions capable of enforcing an increasing volume of international law and universal jurisdiction allows domestic courts to apply international law in certain circumstances. While the WTO has real ‘teeth’, the growth of transnational supply chains and global corporations led to calls to establish internationally acceptable norms to bind corporations to international human rights norms. In response to the growth of corporations and their increased recognition as actors under public international law, the UN established the Global Compact.<sup>8</sup> The Global Compact is a corporate social responsibility scheme where corporations agree to be bound by ten principles in return for the perception of being a good corporate citizen. This scheme is the largest corporate citizenship group in

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<sup>7</sup> This development is in sharp contrast to feudal law when land was at the centre of life and likely to be subject to a range of rights. In a sense, it was ‘too important’ to be simply owned by one person.

<sup>8</sup> The UN General Assembly on 5 December 2007 unanimously adopted a Resolution which supported the work of the UNGC Office: United Nations General Assembly, 62nd sess, 3 December 2007, Agenda item 61, Res Towards Global Partnerships; United Nations Global Compact; ‘UN General Assembly Renews and Strengthens Global Compact Mandate’, *Compact Quarterly* 12, 2007; See for a comprehensive discussion: A. Rasche, ‘A Necessary Supplement’ – What the United Nations Global Compact Is and Is Not, *Business & Society* 48, 2009.

the world with approximately 40,000 stakeholders across 100 nations.<sup>9</sup> Despite the current limitations on the enforcement of international law, states have created regulatory vehicles to hold non-state actors accountable for unethical business practices. The Organisation for Economic Cooperation and Development (OECD) Guidelines for example, provide voluntary guidance for corporations in their international affairs and are enforced by member states.<sup>10</sup> While these guidelines have limited impact upon many corporations to which those guidelines are directed, they do represent moves by states to impose universal standards across jurisdictions.<sup>11</sup> There is no barrier to OECD member States agreeing to implement similar ethical guidelines for the way lawyers conduct themselves in international affairs and they should be encouraged to do so.

In the not-for-profit sector, the growth of international and transnational NGOs from the Red Cross to Greenpeace and Transparency International has given such NGOs a larger place in the global community than in most sovereign states. On the other hand, institutionalized religion has a more limited place than in pre-Westphalian Europe, despite attempts by fundamentalists in the ‘middle east’ and ‘mid-west’ whose aspirations for states dominated by particular religions are distinctly pre-Westphalian.<sup>12</sup>

More generally, the challenges of globalization, involving the movement of people, goods, services and ideas across boundaries, have increased the growth of a global community. One important aspect of this is the emergence of the internet, which has created substantial difficulties for states that desire to regulate their citizens’ access to information.<sup>13</sup>

The issue of sovereignty has been substantially challenged by the environmental problems facing the global community. Arguably, the greater ease of movement of organisms that damage flora, fauna and

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<sup>9</sup> United Nations Global Compact, *Annual Review 2006* 2, 2007. The UN General Assembly on 5 December 2007 unanimously adopted a Resolution which supported the work of the UNGC Office: United Nations General Assembly, 62nd sess, 3 December 2007, Agenda item 61, Res *Towards Global Partnerships; United Nations Global Compact*; ‘UN General Assembly Renews and Strengthens Global Compact Mandate’ *Compact Quarterly* 12, 2007.

<sup>10</sup> S. Cooney, ‘Improving regulatory strategies for dealing with endemic labour abuses’ SJD, Columbia University, 2005, pp. 155–158; S. Cooney, ‘A Broader Role for the Commonwealth in Eradicating Foreign Sweatshops?’ *Melbourne University Law Review* 28, 291, 2004, pp. 315–316.

<sup>11</sup> For a criticism of the OECD Guidelines for Multi-National Enterprises (2000) see: J. Ruggie, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights’ Report of the Special Representative of the Secretary-General 2008.

<sup>12</sup> The caliphate predated Westphalia by 800 years and the establishment of religiously defined colonies predated it by 30 years.

<sup>13</sup> See for a discussion on attempts to regulate the internet: S. Deva, ‘Corporate complicity in internet censorship in China: Who cares for the Global Compact or the global online freedom act?’ *George Washington International Law Review* 39, 2007, 255.



people and the unintended effects on the environment of human activity, are leading to an awareness that the land is, once again, too important to be the subject of the private dominion of individual citizens. The perception that the environment should be regarded as a global issue arguably gained traction with the Convention on Climate Change and has obtained increased recognition with the Kyoto Protocol.<sup>14</sup> The Kyoto Protocol ‘creates significant responsibilities for the participating countries, and brings together many of the most industrialized countries of the world to limit gas emissions in an unprecedented way’.<sup>15</sup>

Sovereignty is also challenged by the flow of debt (toxic or otherwise), political ideology (toxic and otherwise), capital (mostly legitimate but including the proceeds of corruption) and viruses of varying degrees of virulence. None of these problems can be addressed by sovereign states attempting to act alone within their borders – though they can contribute to global solutions.

Most of these trends will intensify over the next few decades and could lead to fundamental changes to the nature, practice, structure and content of law over the professional lifetimes of those students we are currently teaching. By the time that students entering laws schools this year (2009) retire in the mid twenty-first century, the law and the legal profession may be as different from its Westphalian sovereign paradigm as that paradigm was to the world of Pepo’s students.

### **The Westphalian Profession of Arms**

The profession of arms was also transformed by the rise of the nation state. The European feudal system involved direct loyalty to local lords rather than to princes, kings or, in the Holy Roman Empire, the Emperor. Outside of the feudal system, mercenaries had been a common feature<sup>16</sup> – particularly in pre-Westphalian Europe where soldiers’ loyalties were often to their immediate captain rather than to a sovereign.

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<sup>14</sup> United Nations Framework Convention on Climate Change, opened for signature on 4 June 1992, 31 ILM 849 (entered into force on 21 March 1994); Kyoto Protocol to the United Nations Framework Convention on Climate Change, opened for signature 16 March 1998 (entered into force on 16 February 2005); See for discussion of the impact: D. G. Victor, *The Collapse of the Kyoto Protocol and the Struggle to Slow Global Warming*, New York: Princeton University Press, 2001..

<sup>15</sup> H. D. Shumaker, ‘The Economic Effects of the European Union Carbon Dioxide Emission Quota on the New Member States of the European Union: Can They Become Equal Economic Partners of the European Union While Complying with the 2008–2012 Quota?’ *Pennsylvania State Environmental Law Review* 17, 2008, 99.

<sup>16</sup> D. Stinnett, ‘Regulating the Privatization of War: How to Stop Private Military Firms From Committing Human Rights Abuses’ *Boston College International and Comparative Law Review* 28, 211, 2005, 213–216; The main instruments banning mercenary activities are the Additional Protocols to the Geneva Conventions of 12 August 1949 (Protocol I) 42 and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN Mercenary Convention) U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (1989) (entered into force Oct. 20, 2001).

The growth of sovereign States resulted in standing armies that claimed the loyalties of their soldiers directly, rather than through their lords or captains. States claimed a monopoly of legitimate violence. If the soldiers' loyalty and duty were to the nation state, it was inappropriate for them to give their loyalty to, and fight for, one part of the state against another, risking the newly established order which it was the prime responsibility of the state to engender for the protection of its citizenry. Professional soldiers saw themselves as maintaining order rather than contributing to disorder. Similarly, it was also totally inappropriate for a soldier to fight for another state. These principles were not always followed. Occasionally, the military would break up and join opposing sides in a civil war – something that was seen as the ultimate tragedy for a professional military force. More often, the military would remain unified in suppressing insurgency – or unified in overthrowing governments in coups d'état – one of the curses of the modern state. On the external front, some states continued to recruit mercenaries, but they were generally looked down upon as not real soldiers.<sup>17</sup> The use of mercenaries became less popular and in the twentieth century there were national and international steps taken to outlaw the use of private military forces.<sup>18</sup>

The forces of globalization are changing the profession of arms as surely as the profession of law. The last 20 years has seen the rise of private military forces associated with the US military, corporations and criminal gangs. The largest remaining forms of private military forces exist in private military companies (PMCs). These PMCs can provide training, security or direct military support. The 'Sandline affair' involved an attempt to bypass the Papua New Guinea military in suppressing a secessionist movement.<sup>19</sup> Where PMCs perpetrate human rights abuses within a sovereign State on behalf of that State or an invading state, these forces have largely been immune from prosecution. More recently, the international community has been examining vehicles to hold PMCs responsible under international law.<sup>20</sup>

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<sup>17</sup> While some would argue that the Ghurkas are a potentially contradictory example, there were attempts to avoid considering them as mercenaries and their rights were never as extensive as Britain's citizen soldiers.

<sup>18</sup> W. Singer, 'Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security', *INTL SEC.* 26 186, 188–89, 2001/02, 191.

<sup>19</sup> S. Dinnen, R. May and A. Regan (eds) *Challenging the State: The Sandline Affair in Papua New Guinea*, ANU Canberra: NCDS and Department of Political and Social Change, RSPAS, 1997; S. Dorney, *The Sandline affair: politics and mercenaries and the Bougainville Crisis*, Sydney: ABC Books for the Australian Broadcasting Corporation, 1998.

<sup>20</sup> D. Morgan, 'Professional Military Firms under International Law' *Chicago Journal of International Law* 9, 2008, 213; D. Ridlon, 'Contractors or Illegal Combatants? The Status of Armed Contractors in Iraq' *The Air Force Law Review* 62, 2008, 199.

While the monopoly of legitimate force was a matter of definition, in most states, most of the time, the military forces of the state could prevail over any and all other coercive forces ranged against them. For mainstream military forces, the development of the laws of war has entrenched codes of behaviour that can now be enforced by the International Criminal Court. The increasing range and intensity of cooperation between military forces through participation in each other's training programs, joint exercises and UN deployments are reinforcing the sense that soldiers are part of a common global profession of arms. Indeed, their common code of conduct is far more advanced being distilled into a number of international agreements – with the four Geneva Conventions and the three amendment protocols the most significant.<sup>21</sup>

## **BUILDING GLOBAL PROFESSIONS AS IMPORTANT INSTITUTIONS IN A GLOBALIZING WORLD**

### **Global values and global institutions**

The trends towards globalizing the legal and military professions and others are important. Indeed, given the absence of any equivalent to national governments within the international order, such professions may need to play a disproportionate role in building and sustaining that international order. The basis for this argument is a narrative that has much influenced my thinking over the last ten years. Good governance requires the articulation of governance values (for example, liberty, equality, citizenship, community, democracy, human rights, the rule of law and environmental sustainability)<sup>22</sup> and the institutions that can realize those values. Since the seventeenth century, governance debates have centred on sovereign states rather than relations between them. Late seventeenth century states were generally highly authoritarian and justified as such. Hobbes argued that rational people would mutually agree to subject themselves to an all-powerful sovereign to avoid a 'state of nature' in which the life of man would be "poor, nasty, brutish and short".<sup>23</sup>

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<sup>21</sup> First Geneva Convention 'For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (first adopted in 1864, last revision in 1949); Second Geneva Convention 'for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea' (first adopted in 1906); Third Geneva Convention 'relative to the Treatment of Prisoners of War' (first adopted in 1929, last revision in 1949); Fourth Geneva Convention 'relative to the Protection of Civilian Persons in Time of War' (first adopted in 1949, based on parts of the 1907 Hague Convention IV); Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts; Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts; Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Adoption of an Additional Distinctive Emblem.

<sup>22</sup> Though, not as recently as might be imagined, nineteenth century environmentalists sought to clean up the Thames and protect the countryside via the National Trust.

<sup>23</sup> T. Hobbes, *Leviathan*, Cambridge: Cambridge University Press, 1991 p. 89.

Once internal order had been restored, this social contract did not seem such a good bargain. The eighteenth century Enlightenment sought to civilise these authoritarian states by holding them to a set of more refined and ambitious values – notably liberty, equality, citizenship, human rights, democracy and the rule of law. Some of these values were adaptations of classical city state ideals to the much larger polities of the time. Nineteenth century thinkers extended the range of rights championed and added concern for environment and for practical and social equality.

Most importantly, the key to the Enlightenment governance project was a ‘Feurbachian’ reversal of the way rulers and ruled related to each other. Before the enlightenment ‘subjects’ had to demonstrate their allegiance and loyalty to their ‘sovereign’. The enlightenment proclaimed that ‘governments’ had to justify their existence to ‘citizens’ who chose them. Once the reversal of the relationship was suggested, it was very hard to go back.

Values are rarely self-implementing: they require institutions to realise them. Institutional innovations included an independent judiciary exercising judicial review of the executive, representative institutions, bicameral parliaments, federal division of functions, government and civil society watchdogs, universal education, questioning media and ‘responsible’ (or ‘parliamentary’) government.<sup>24</sup> This development of governance values and the institutions to realize them can be seen as an ‘enlightenment project’.

Debates have rightly continued over the precise meaning and relative importance of these governance values and the best institutional means of achieving them. However, the centre of gravity in governance debates has remained the sovereign state with the ‘enlightenment project’ becoming a ‘UN project’ in which all the peoples of the world might become members of strong sovereign states securing their citizen’s universal human rights.

This ‘UN project’ has been shaken by the ‘globalizing’ flow of ideas, people, goods and services flooding over international borders and weakening many sovereign states. Liberal democratic values were formed *in and for* strong states. Citizenship, democracy, welfare, and community have clear meaning *within* sovereign states but lack apparent application in a broader, more diffuse, globalized world. The institutions that sustain, promote and realize those values are very much state-based. The rights, duties and ‘sense of belonging’ that citizenship carries are attached to state institutions.

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<sup>24</sup> A feature shared by all long standing democracies other than the United States.

Democracy is realized through citizen participation in national and sub-national legislatures – and loses mileage if the real power and range of choice open to those legislatures is restricted. Welfare rights like education and healthcare are only implemented through the institutions of strong, sovereign (and wealthy) states – and even their capacity to do so is increasingly questioned.

Two common responses are to abandon inconvenient governance values such as democracy and welfare or to resist globalization and strengthen the state. I have long argued for a third approach because globalization exposes a flaw in the ‘enlightenment project’ and later ‘UN project.’<sup>25</sup> How can universal rights be secured by geographically limited entities? Why should the welfare rights of the citizens of some states be a tiny fraction of the welfare rights of others? This approach suggests a fundamental rethink of our governance values and the mix of institutions that can achieve them – a ‘global enlightenment’ in which, as in the eighteenth century, the ideals will come first and the practical institutional solutions will come later.<sup>26</sup> As in the eighteenth century, when city-state values and institutions were re-worked and re-combined for nation states, sovereign state values and institutions may need re-working and recombining.

I have argued that the institutional arrangements that are most likely to emerge and which are most likely to secure such values will not resemble ‘sovereign states writ large’. It is more likely to look like pre-Westphalian Europe. States and multi-lateral institutions will be important but other institutions – corporations, superannuation funds,<sup>27</sup> professions and NGOs may play a larger role.<sup>28</sup> In this light, I will be considering the roles of the legal and soldierly professions in a future order and I will suggest that lawyers and the military should see themselves as part of an international profession, respecting international values.

## **Towards global professions**

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<sup>25</sup> C. Sampford, “Challenges to the Concepts of ‘Sovereignty’ and ‘Intervention’,” closing keynote World Congress on Legal and Social Philosophy, 1999, published in T. Campbell and B.M. Leiser (eds), *Human Rights in Philosophy and Practice*, Aldershot: Ashgate, 2001 pp. 335–391.

<sup>26</sup> While deferring the institutional issues, I would emphasize that this does not amount to an argument for global government – the sovereign state writ large. A more likely result is a mix of institutions reflecting both pre-Westphalian Europe and the modern ideal of an integrity system made up of public, corporate and NGO bodies.

<sup>27</sup> Especially if driven to engage in sustainable investment that meets the values and interests of their unit holders who have longer term interests than the investment managers.

<sup>28</sup> There is also likely to be a place for unions or faith based organisations – though I am not sure that their role will be larger or smaller. It is relevant to observe that faith based NGOs have been involved in pressuring corporations to date on good corporate citizenship: L. Allen, ‘Religion and Corporate Social Responsibility: the Interfaith Centre on Corporate Responsibility and the Corporate Withdrawal Movement from Burma’, PhD Thesis, Boston University, 2003.

I suggest that the legal profession is, and should be, breaking free of its Westphalian shackles. Professions are not bound by their employers, let alone their states. This principle is the whole point of an independent profession.<sup>29</sup> The concept of a profession involves a group who develops and deploys a body of knowledge and skills for a public purpose. Such knowledge and skills can be used for good or ill – for the ostensible purpose which justifies the powers and privileges of the relevant profession or abused for other purposes. As argued elsewhere,<sup>30</sup> the justification of a profession (indeed, institutions generally) should be in terms of the values it furthers on behalf of the community in which it operates. Those values provide the core for ethical standard setting (both aspirational and disciplinary), legal regulation and institutional reform.

The importance of ethical guidelines is axiomatic in the case of the military – whose knowledge and skills may involve the deployment of organized deadly force against other states in defiance of international law or deployed against the state itself (and generally the human rights of its citizens) in a coup d’etat. The oft-asked question about the difference between a government and a band of robbers is repeated in asking the difference between the army and an organized group of violent gangsters. The answer cannot simply lie in following orders of the civilian ‘commander in chief’ as to which groups of people are to be killed en masse as that does not guarantee that the military is more than a reliable accomplice. The answer must lie in the values the military forces claim to espouse, the codes of honour and ethics they develop to realize those values, the commitment to that code and the institutional means that they provide in order to make that realization probable – including mechanisms for reviewing the actions of soldiers and applying appropriate sanctions.

While lawyers cannot directly deploy lethal force, if they are not bound by ethical restraints they can provide advice, which can result in spectacular individual and social harm. Where lawyers give advice on the legality of wars or torture, the consequences can be catastrophic for those who suffer invasion and/or torture. The fact that those who sought selective legal advice may leave office with their reputations shattered is small consolation and an insufficient deterrent.

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<sup>29</sup> In describing the profession as ‘independent’, this does not mean that it is entirely self-regulating. Zacharias’ essay in this volume points out the central role played by legislation and, especially, the judiciary. However, the main impetus for enunciating and developing legal ethics and the structure and role of the profession comes from lawyers with many of the regulatory and most of the disciplinary decisions in the hands of the judicial branch of the profession.

<sup>30</sup> See C. Sampford, ‘Law, Institutions and the Public Private Divide’ invited keynote address Australasian Law Teachers Association Conference, Canberra, September 1990; C. Sampford and C. Parker, ‘Legal Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design’ in S. Parker and C. Sampford, (eds) *Legal Ethics and Legal Practice: Contemporary Issues*, Oxford: Oxford University Press, 1995, p.11.

While the abuse of the knowledge and skills of lawyers is not as spectacular as the deployment of military force, it is potentially insidious if the knowledge and skills of lawyers are used to deny justice. Sometimes globalization makes this task easier – when lawyers forum-shop for jurisdictions wherein their clients can engage in lawful practices, which would be regarded as criminal in their home state.<sup>31</sup> A similar question arises with regard to the difference between a lawyer and a ‘spin-doctor’ – saying whatever suits the client’s interest and, in effect, making lawyers figuratively rather than literally ‘guns for hire’. I have previously argued that, where the client refuses to have disputes heard in a court of competent jurisdiction, there is a temptation for clients to seek, and lawyers to give, advice they want to hear. Under such conditions, they are not acting as lawyers but as spin-doctors, no better than the much despised Jamie Shea who was lent by Prime Minister Blair to NATO during the Kosovo conflict. Egregious examples include some of those who provided opinions to governments on the legality of the Kosovo and Iraq wars<sup>32</sup> and the treatment of prisoners.<sup>33</sup> As with the military, the answer for lawyers must lie in values, ethics, commitment and the institutional means for keeping lawyers to their task.

In both cases, the professionals act, with very few exceptions, on instructions by the commander-in-chief or client. However, they do so in an institutional context designed to further the core values of that profession and reduce the likelihood that the professionals’ knowledge and skills will be abused. In the case of the military in western states, the core values are the protection of the civil population and constitutional authority from external attack and, rarely, internal insurrection. For lawyers, the core values are the rule of law, due process, and human rights – sometimes packaged under an overall value of doing justice according to law. For the military, it is civilian control by constitutional authority (only using force when legally permitted) and that force should be used against citizens under very strict rules and specific safeguards. However, there is considerable overlap. The core values of the military reflect core values for lawyers. Likewise, the rule of law and human rights can be central to some conceptions of the role of the military. Hon Mike Kelly, Parliamentary Secretary for Defence, had argued that the military would be more likely to be successful if it subjected itself to the rule of law

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<sup>31</sup> For a discussion of where this has occurred in relation to bribery and medical trials see: P. Ala'I, 'The Legacy of Geographical Morality and Colonialism: a Historical Assessment of the Current Crusade against Corruption' *Vanderbilt Journal of Transnational Law* 33, 2000, 877; D. Fidler, "'Geographical Morality'" Revisited: International Relations, International Law, and the Controversy over Placebo-Controlled HIV Clinical Trials in Developing Countries' *Harvard International Law Journal* 42, 2001, 299.

<sup>32</sup> See C. Sampford, 'Get New Lawyers', *Legal Ethics* 6, 2003, 185–205; C. Sampford, 'More and More Lawyers But Still No Judges' *Legal Ethics* 8, 2005, 16–22.

<sup>33</sup> The subject of numerous papers in the 2006 and 2008 International Legal Ethics Conferences.

in interventions because others knew when force would be used and when it would not.<sup>34</sup> In a workshop on ‘Reconceiving the Rule of Law in a Globalizing World’ in 2001, he argued that the Australian army was the largest human rights organization in Australia because it did more to further human rights through its peacekeeping operations than any other organization.

I emphasize *furthering* core values of the relevant profession. It is not sufficient for a profession to avoid actions that compromise their core values. Professions take a lead role in promoting certain values. Lawyers were critical in developing and proselytizing the rule of law and the institutional mechanisms to make it effective within strong sovereign states. The military have taken a lead role in the strongest democracies in emphasizing their subordination to the Constitution, to law and to constitutional authority. Lawyers and soldiers should now do the same in international affairs, recognizing that the profession of arms may be an ally. The rest of the lecture discusses how this concept might be understood and refined and how it might be strengthened, emphasising the role of the globalizing professions of arms and law.

## **REFINING OUR UNDERSTANDING THE RULE OF LAW IN INTERNATIONAL AFFAIRS**

### **The ‘Domestic’ Rule of Law: A Contested Concept with Multiple Dimensions**

The rule of law is a majestic phrase with many largely reinforcing and supportive meanings. It stands for a fundamental value or ideal, an ethic for lawyers and officials, the basic principles of constitutionalism and a set of institutions that supports its attainment. While these multiple meanings and dimensions may occasionally serve to confuse, each of them are vital in achieving the others. The partial achievement of each supports the fuller achievement of all.

Some of the most popular definitions mix an expression of the normative ideal with the institutional prerequisites for the achievement of that ideal. Developing ideas found in Hayek, Fuller and others, Joseph Raz listed eight basic principles: (1) laws should be prospective, open and clear; (2) laws should be relatively stable; (3) law making should be guided by open, stable, clear and general rules; (4) independence of the judiciary must be guaranteed; (5) principles of natural justice should be observed;

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<sup>34</sup> Discussions with the then Lt Col Kelly in 1999 during our work on an ARC linkage grant on ‘Preserving and Restoring the Rule of Law in the Asia Pacific’.



(6) courts should have review powers (of the exercise of power by others); (7) courts should be easily accessible; (8) discretion of crime-policing agencies should not be perverted.<sup>35</sup>

### *The Rule of Law as a fundamental Governance Value*

The rule of law is now seen as one of the fundamental values underlying modern states – along with human rights, democracy and the famous trinity of *liberté, égalité, fraternité*. It was not always so. The Treaty of Westphalia was, in many senses a tyrants’ charter – made by and for the absolutist rulers of the day. It recognized a set of formally independent and equal states whose sovereigns were recognized on the basis of their ability to effectively control the territory of a state. Their brutal suppression of the former rulers they displaced and others who did not accept their right to rule was an indication of sovereignty rather than a disqualification for it. As discussed above, *philosophes*, lawyers and revolutionaries sought to impose a series of enlightened governance values on authoritarian states. The rule of law was the first of these values and many states were substantially *rechstaats* long before they saw even a modicum of democracy and human rights. The rule of law is not only the longest standing of enlightenment values; it is generally the least controversial and is arguably the most fundamental.

### *The Rule of Law as an Ethic for Officials*

The rule of law is a central ethical principle for judges and the legal profession more generally. The profession’s central goal is the effective operation of law so that official power is exercised predictably and according to pre-determined rules. The rule of law is also central to most officials including civil servants, the military and, at root, elected officials – power is held in trust to be used only to the extent permitted and for the purposes authorized.

The rule of law has an illustrious history in Europe, the US and many Commonwealth countries. The recent lack of support by the US and the United Kingdom<sup>36</sup> may cause concern for some but it is important to recognize that the US, similar to most P5 members, has a very high degree of compliance with treaties and has been pressing for an enforceable rules-based system in global trade. While more

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<sup>35</sup> J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979; Chesterman summarizes these eight principles into three broad principles: S. Chesterman, ‘An International Rule of Law?’ *The American Journal of Comparative Law* 56, 331. 2008, 342. M. Aronson and B. Dyer, *Judicial Review of Administrative Action*, second edition, NSW: LBC Information Services, 2000, chapter 1.

<sup>36</sup> From the United States termination of, and refusal to accept, the compulsory jurisdiction of the International Court of Justice in 1986 to the British engagement in the Iraq war despite the clearest advice from their most senior international lawyers.

politicians openly argue that the US should ignore international law in the use of force, the legality of American interventions are strongly asserted – indicating that they seem to think that this is important politically and in the court of public opinion.

### *The Rule of Law as a basic Constitutional Principle*

The rule of law underlies and is supported by basic constitutional principles such as constitutional rule and the separation of powers. However, it does not require a formal or written constitution and the concept clearly pre-dates such instruments. What the rule of law does seem to require is a separation of judicial power from legislative and executive power and a means of determining what texts are recognized as laws.

### *The Rule of Law as a set of institutions*

Those who value the rule of law recognize that it can never operate effectively as a purely normative phenomenon (be it value, ethic or principle). It requires institutions to make it effective.

- a. If we are to know what law must rule, it is necessary to have an institution or set of institutions that are sources for authoritative texts. Legislatures are the most common but *grundnorms* can, and generally do, recognize other sources.
- b. There is a need for an institution that provides authoritative interpretations of the meaning of those texts in particular circumstances.

Other institutions that can reinforce the rule of law include an independent bar, independent prosecutorial services and, to an extent, police forces. Institutions such as the ombudsmen and independent commissions against corruption can make the laws more effective and ensure that powers are used for the purposes for which they are entrusted.

### *The Rule of Law and nascent Integrity Systems*

Since the late 1990s, it has become increasingly accepted that the way to avoid corruption and other abuses of power require an ‘integrity system’ – a set of norms (formal and informal), institutions and practices that serve to promote integrity and inhibit corruption. All effective integrity systems involve some basic institutional arrangements associated with the rule of law – especially courts and a legal profession that are not indebted to the holders of political power and can review the actions of powerful institutions to determine whether or not they are within power. These institutions are the oldest and longest standing elements of the integrity systems of western states.

These meanings are now well developed, widely supported and generally achieved in the domestic affairs of most modern democracies and several autocracies. They are mutually supportive so that the partial achievement of each supports the fuller achievement of all. They are far less developed in international affairs and face obstacles that lead some to doubt the possibility of an international rule of law or international law itself.

### **Apparent Difficulties in Developing and Operationalizing an International Rule of Law**

There are many difficulties in achieving the above meanings and dimensions of the rule of law in the international sphere. I will not go into detail of previous conceptual work done by myself and my colleagues on reconceiving the rule of law in a more global world. Much of this can be found in a collection of essays and the last chapter of my most recent monograph.<sup>37</sup> The general conclusion of this work is that the rule of law transfers conceptually very well across cultures and into the international sphere. Chesterman set out three possible meanings of the international rule of law – the application of rule of law principles to states and other subjects of international law, priority of international law over other forms of law and the direct application of international law to individuals.<sup>38</sup> I have adopted the first mentioned.

### *Fundamental Values*

The concept of the rule of law used here is derived from the domestic law and the differences between domestic and international law may lead some to query its applicability. The problem is not so much one of conceptualization but of commitment. Low expectations about the effectiveness of international law may undermine its perceived legitimacy and the willingness of international actors to take it seriously. In particular, concern is expressed about the commitment of the US and its allies to international law over the last 20 years. Despite recent aberrations, Australia and the US have long been supporters of a rules based international system on a bi-partisan basis. The quotation from President Eisenhower, referred to at the beginning of this lecture, is more representative of the long term views of Australians and Americans than the 24 years from Reagan's repudiation of the ICJ to the electorate's repudiation of George W. Bush. Even during those 24 years, the US claimed to act in conformity to international law and some of us have argued that it is in their interests to do so. With the greater realization of the limits of American military and economic power, unilateral action in

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<sup>37</sup> S. Zifcak, (ed.) *Reconceiving the Rule of Law*, London: Routledge, 2005, especially the lead essay, C. Sampford, 'Reconceiving the Rule of Law for a Globalizing World' and the last chapter of C. Sampford, *Retrospectivity and the Rule of Law*, Oxford: UP, 2006.

<sup>38</sup> S. Chesterman, 'An International Rule of Law?' *The American Journal of Comparative Law* 56, 331. 2008, 342.

contravention of international law may become more difficult and less attractive. The alternate view is that the US should seek to rebuild and then strengthen international law as insurance for the time when their military power is equalled or surpassed.

### *Ethics for officials*

The above problems of commitment to the international rule of law lessen the likelihood that international law will be at the forefront of the ethical considerations of lawyers and officials. Lawyer's ethics, formed around the laws and institutions of nation states, may not show the same respect for international law as domestic law. Indeed, Anglo-Saxon systems of legal ethics are based on the duties to courts.<sup>39</sup> Where that domestic law reflects and advances other important ideals, lawyers may have much greater attachment to domestic law.

### *Constitutional principles*

The limited reach and scope of international law mean that some may doubt the applicability of familiar constitutional principles on the UN. This aspect is reinforced by the lack of familiar institutions such as legislatures and executives and the fact that the institutions that operate internationally are often hybrids, compromises and historical oddities.

### *The limitations of international law*

International law emerges via different means (there is no real equivalent to a legislature), applies to states rather than citizens, has a radically different extent and lacks an all powerful sovereign body to enforce it. However, most international law is followed most of the time despite the lack of a sovereign power with the monopoly of legitimate force. In fact, all laws are followed for a number of reasons – of which the nature and certainty of sanctions for breach is but one, and for most actors not the primary one.

### *Institutions*

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<sup>39</sup> While duties to clients are important, both kinds of duties are determined by courts and a lawyer's ethical duties are based on being 'officers of the court'. As the duty to client is ultimately determined by the court, it is not surprising duties to court take priority over duties to clients to the extent that there is a conflict. To me, there should be no conflict if the relevant duties are properly construed. In my view, the duty to the client is part of the lawyer's duty to courts and the administration of justice. Lawyers representing clients in an adversary system are doing their duty to the court by ensuring that justice is done via a vigorous contestation of issues in front of that court. See Sampford, C. and Parker, C. "Legal Ethics: Legal Regulation, Ethical Standard Setting and Institutional Design" in Parker, S. and Sampford, C. (eds) *Legal Ethics and Legal Practice: Contemporary Issues* Oxford University Press, Oxford, 1995

The largest problems for the international rule of law lie in the lack of institutions that create, interpret and enforce international law. This lack of effective institutionalization inhibits the development of the rule of law in its other senses. The lack of a legislature is not a fundamental problem for the rule of law. It makes change difficult but all that is needed is a set of clearly agreed sources, the means by which those sources generate authoritative legal texts, and the hierarchy of sources in cases of conflict.

There is a court which can provide authoritative interpretations of those texts and of any conflicts between them. What is more, the ICJ is harder to stack than the highest courts of any other jurisdiction in the world. The problem is, of course, the lack of compulsory jurisdiction and the limited number of cases that can therefore be heard before it.<sup>40</sup> This makes it much harder for the law to give clear guidance to those who want to be bound. The lack of an effective court that sits regularly also makes it difficult to develop and enforce ethical codes for international lawyers.

Despite these problems, lawyers have attempted to develop voluntary international codes of ethics. One such effort was finalized on 10 October 2008 by the International Bar Association's Anti-Money Laundering Legislation Implementation Group in consultation with members of the American Bar Association and the Council of Bars and Law Societies of Europe. The international anti-money laundering guidance issued for the legal profession sets out voluntary guidance on adopting a risk-based approach to managing the occurrence of money laundering, including monitoring processes and training for lawyers. The International Bar Association has a two page 'International Code of Ethics',<sup>41</sup> and the Union Internationale des Avocats has developed the "Turin Principles for the Legal Profession in the 21<sup>st</sup> Century" (2002). The only area with developed codes that are authorized and (in theory at least) enforced by courts are in the International Court of Justice and the various ad hoc criminal tribunals for the Rwanda, Sierra Leone and the Former Yugoslavia. During 2008, two more ambitious projects were commenced. One is led by Philippe Sands and supported by the NYU/UCL Project on International Courts and Tribunals (PICT).<sup>42</sup> It aims to develop a code of ethics for lawyers engaged in

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<sup>40</sup> If States do not agree to be bound by the ICJ, then the ICJ has no jurisdiction even over such crimes such as genocide. The voluntary nature of the ICJ even over breaches of *Jus Cogens* was emphasized by *Democratic Republic of the Congo v Rwanda* (2002), *request for the indication of provisional measures order*, ICJ 12610, 40. In this case the parties accepted the *Genocide Convention* stated laws of the *jus cogens*. The majority held that genocide enjoyed preemptory status; nevertheless, they held the ICJ Justice did not have jurisdiction to consider an action against a State which had not agreed to be subject to the court's jurisdiction, pp. 71–72.

<sup>41</sup> First adopted in 1956, last amended in 1988

<sup>42</sup> See [www.pict.org](http://www.pict.org)

the practice of international law, and its first meeting was held in London on June 12 2009.<sup>43</sup> The other project, entitled Building the Rule of Law in International Affairs, is led by Professors Thakur, Chesterman and myself supported by IEGL, the Center for International Governance Innovation (CIGI) and the United Nations University (UNU) is funded by an Australian Research Council Linkage grant. At the time of writing, its first workshop is set for 19–20 October and will examine ethical supports for building the rule of law in international affairs. The two projects are collaborating, with the leaders of each project being invited to the workshops run by the other.

## **ROLE OF THE LEGAL PROFESSION IN DEVELOPING THE INTERNATIONAL RULE OF LAW**

One could conclude that, in many areas where the rule of law seems most needed, it is as distant as it would have seemed to those living under the largely absolutist regimes that emerged in Western Europe after the Treaty of Westphalia. The fact that the heroic efforts by lawyers and revolutionaries over several centuries led to a remarkable transformation in those states may offer little comfort. The international community cannot wait that long and cannot sustain the violent struggles that were often necessary for the rule of law to emerge domestically. However, the rule of law is a very strong domestic ideal on which we can build and support. An ideal that is not only endorsed, but in many cases sincerely so, by various leaders' summits. To make the attainment of an international rule of law realistic, there needs to be coordinated action to address some of the institutional limitations of international law. Lawyers can and should take a lead in such action – just as they did in the development of the domestic rule of law and the institutions that underpin it. This is not the time or place to set out a comprehensive strategy for building the rule of law in international affairs to match the rule of law in domestic affairs (something we hope to be closer to at the end of the above-mentioned projects). However, I will suggest some things lawyers may do and the reasons they may find unexpected allies in the military.

### **Developing and Promoting the Rule of Law as a fundamental governance value in international affairs**

Just as lawyers were major contributors to the development and promotion of the rule of law in domestic affairs, so they should be in international affairs. However, they should not be so narrow lawyers but as lawyers who understand the philosophical, political and economic issues it raises.

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<sup>43</sup> The meeting was attended by Profs Philippe Sands, Laurence de Chazournes (co-chairs), Judge Jean-Pierre Cot, Lord Jonathan Mance, Alexis Martinez, Judge Thomas Mensah, Prof Charles Sampford and Professor Alfred H Soons

Indeed, they should recognize that the rule of law was developed at a time when those disciplines had not yet become distinct. While mastering these disciplines in their entirety is not a realistic goal for individuals, it is for groups of lawyers who respect those disciplines and bring their insights to bear.

If the rule of law becomes a fundamental value of the profession and a value that it uses to justify the profession, lawyers need to reflect carefully and debate publicly its meaning, value and relationship to the nature of the profession and its work to a global community.

### **Ethical Standard setting through codes**

Lawyers can contribute to the articulation of more specific codes for lawyers and others – not least the military who are, as we have seen, potential allies in building the international rule of law. Lawyers should begin by developing a code of ethics for international lawyers and lawyers operating across borders. However, this should not be done in isolation. One of the most important underpinnings of the rule of law in modern states is the importance it plays in the ethics of key participants. Lawyers have ‘duties to the court’ or, more generally, to ‘the law’ or ‘justice’. Civil servants are concerned with ensuring that all action taken in the name of the state has legal authority. More generally, the rule of law is an ethic for the wielders of power – to exercise powers they have for the purposes that are entrusted to them. Codes need to be developed for:

- International lawyers; International judges and tribunal members; and international civil servants. Such codes cover a variety of issues but centrally concern how entrusted power is handled and a commitment to international law and the rule of law in international as well as national affairs.
- Member states and their delegates to General Assembly (GA), United Nations Security Council (UNSC) and international bodies (analogous to codes of ethics for parliamentarians in domestic systems).
- Military forces which are acting under UN authority and military forces engaging in international action – reflecting the same kind of respect for international law and particularly the UN Charter that they are expected to show for domestic laws and domestic constitutions.

The nature of the code development would vary depending on the work already undertaken and completed by others. In all cases, the code development should consider the dilemmas, apparent and real conflicts of duties, as well as the pressures and temptations of practice that may lead participants to ‘read down’ their ethical duties. However, the focus of the work will vary depending on the codes and

principles already in place and the degree to which those codes and principles are controversial. For example:

- where there are rival codes or principles, it is very important to tease out the reasons for disagreement and make suggestions; and
- where most of the relevant ethics codes are domestic (for example, practicing lawyers and, to a lesser extent judges), it is important to deal with issues involving the extension of existing codes, potential conflict between codes, the relationship between the duties to domestic courts and clients and relevant duties to international courts and clients.

In all cases, the relationships between the codes must be considered carefully by examining the ways in which they may unintentionally conflict and ways in which they may be mutually supportive (for example, in the complementarity of the ethics of judges and advocates).

Once relevant international codes for lawyers acting and advising in international matters are developed, their principles should be incorporated into domestic legal ethics codes so that respect for international law and the rule of law in international affairs is built into the codes by which most lawyers practice. Similar domestic implementation should be followed in professional civil service codes and military ethics.

### **Other forms of ethical Standard setting**

The creation of codes is a high priority for a number of reasons.

- There is a current opportunity to do so with the Project on International Courts and Tribunals (PICT) project and there is a great deal of disquiet about the ‘torture memos’ discussed elsewhere in this volume.
- The creation of an international code will emphasize the responsibilities of international lawyers to the international legal system separately from their responsibilities as lawyers within their domestic jurisdictions.
- Such codes can provide inputs for those who want to reform the domestic legal ethics codes following the torture memos.

While the creation of codes is a high priority and is a natural activity for lawyers, it should be recognized that this does not exhaust the ethics of this or any other profession. If legal ethics were co-extensive with codes of ethics, two counter intuitive consequences would follow. First, it would mean



that there would be no sense in complimenting or criticizing the ethics codes. Second, it would make no sense to criticize the ethics of some and praise others. It would be pointless to compliment Lord Goldsmith for the first advice and to criticize him for the second advice. It would also be pointless for to refer to the temptation for clients to seek, and lawyers to give, the advice the client wants to hear rather than the advice the client should hear if they are facing court. If the client has no intention of accepting the jurisdiction of a court of competent jurisdiction, they should make it clear that they will not give such advice or, if they do, they will not be acting as lawyers and there should be no privilege.

Before there are codes, people can debate what kind of conduct they admire as ethical and which they criticize as unethical. They can advocate new rules to bolster these normative claims. Even where there are codes in place, they generally set minimum standards of behaviour. There is room to articulate and practice according to what the proponents believe to be higher standards. These will help set standards even while they are supererogatory. While they may affect code development, there will always be room for such higher standards, and they are part of a dynamic profession.

### **Legal Regulation and Institutional Development**

In all cases, the pressures for and against compliance should be considered. While the initial focus of code development would involve the clarification of ethical standards for those subject to the pressure, and those who may be applying the pressure, suggestions would also be made for institutional changes that remove or reduce dilemmas, temptations and pressures for unethical behaviour.

Simultaneously, the legal profession should be actively involved in strengthening institutions that will support the international rule of law and the participation of all states in it. Lawyers made tremendous contributions to the institutionalization of the rule of law domestically – not always succeeding and risking occasional death or imprisonment.

1. Urge all countries to (re-)commit to compulsory jurisdiction of the ICJ to any country that accepts.<sup>44</sup>
2. Urge all states to commit to the use of force only subject to international law, with countries only going to war if there is a public statement by the most senior relevant legal authority (for example, Attorney-General or Solicitor-General) that, in their independent judgement, the war

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<sup>44</sup> As had the American Bar Association on several occasions.

is legal and that the government is prepared to accept the compulsory jurisdiction of the ICJ in any case brought against it.

3. If governments refuse to accept the jurisdiction of courts of competent jurisdiction, the legal profession must recognize the temptation to seek and the temptation to give, legal advice the client wants to hear – especially if that advice is published. The profession must be very clear that lawyers should not give way to that temptation on fear of disbarment.
4. Such states should be treated in the same way as other delinquent clients who seek to evade courts of competent jurisdiction (generally by fleeing it)
5. Lawyer-client confidentiality might be erased where the government is not prepared to defend its action in the ICJ – especially where they are likely to attack the court. The lawyer’s duty to law and the system of justice mean that they must report the planned commission of a crime. Note that it is hard to see any argument for privilege if the client does not intend that the matter go to a court of competent jurisdiction given that the point of privilege is to determine what may not be discovered or heard in court.
6. Legal advice not tied to what a court of competent jurisdiction would find is not legal advice but spin.
  - a. Professional bodies should not recognize it as part of legal practice and define it as conduct outside of legal practice which brings the profession into disrepute and should not be recognized as legal advice.
  - b. Not protected by professional indemnity insurance
  - c. Refer any substandard advice on going to war, torture etc. to relevant professional tribunals and the courts who oversee the ethics of lawyers in their own jurisdictions.
  - d. Urge international tribunals to require those who appear before them to abide by codes of ethics for lawyers engaging in international practice and advice – disbarring them from appearance before international tribunals and declaring that they are not entitled to refer to themselves as international lawyers. In so doing, international tribunals start to take on the kind of supervisory role assumed by domestic courts in Anglo-Saxon systems.
  - e. Develop formal legal rules to ensure civil and criminal accountability for at least the worst such examples (e.g. the torture memos).
7. Move to define the crime of aggression under the Rome Statute so that politicians who start wars are as liable for breaches of *ius ad bellam* as soldiers are for breaches of *ius in bello*.

8. Control Private Military Companies – set out enforceable rules for their operation and criminalize those who do not commit to it.
9. Campaign for the Security Council to subject itself to judicial review in the ICJ.
10. Refuse to accept lawyers or judges in serious breach of their ethical duties to international conferences or other gatherings of the profession – a matter of naming and shaming.
11. Follow a similar practice with military leaders who breach their ethical duties.<sup>45</sup>

While most of these goals require the action of politicians, lawyers should take the lead in identifying the legal and institutional changes required. In many cases, the relevant leaders will be lawyer-politicians.

### **ROLE OF THE MILITARY IN DEVELOPING THE INTERNATIONAL RULE OF LAW**

I will not spend as much time on the role of the military as my research and expertise lies primarily in the profession of which I am a part. However, the following points may be helpful.

As emphasized throughout this lecture, lawyers should seek suitable allies within the military. During the lead up to the Iraq war, two of those most implicated, in what seems to most international lawyers to be a serious breach of international law, were lawyers turned prime ministers. Prime Minister Blair appears to have been instrumental in persuading Lord Goldsmith to produce a short and misleading opinion claiming the proposed war would be legal, omitting the caveats in his original advice.<sup>46</sup> On 6 March 2003, Prime Minister Howard told the Australian parliament that there was ample legal authority for the war although virtually no legal authorities supported it.<sup>47</sup> Some members of the military behaved much more creditably. Admiral Sir Michael Boyce, the Chief of the UK armed forces, refused to cross the Kuwait border without written legal advice that the war was legal.<sup>48</sup> If the lawyers providing written advice for public consumption had been prepared to acknowledge the limited support their arguments had and the unlikelihood of being able to succeed in a court of competent jurisdiction, the British military may have stopped the war.

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<sup>45</sup> This list incorporates most of the suggestions made in Sampford, C. “Get New Lawyers”, 6 *Legal Ethics* 2003

<sup>46</sup> R. Whitaker, ‘The Crawford Deal: did Blair sign up for war at Bush's Texas ranch in April 2002?’ *The Independent* 27 February 2005.

<sup>47</sup> C. Sampford ‘More and More Lawyers But Still No Judges’ 8 *Legal Ethics* 16–22, 2005.

<sup>48</sup> A. Barnett and M. Bright, ‘British military chief reveals new legal fears over Iraq war’, *Observer*, May 1, 2005.

Later in the Iraq war, it was serving soldiers who first reported and then leaked what had happened at Abu Ghraib.

While soldiers who are also lawyers may play an important role in this, it is the respect for international law by other soldiers that is determinative. In the Kosovo and Iraq wars, JAG officers in the armed forces advised against some targeting. The differential response of different militaries indicates the importance of their role and the extent to which the adherence to international law is built into their ethics and the way they see themselves serving their countries. In the Iraq war, this respect for JAG advice could have been motivated by an awareness of the ICC and the possibility of criminal conviction. However, the differential response in the Kosovo war indicates a difference in ethics of different militaries.

The idea of professional obligation is deeply entrenched in the military – so deep that they are prepared to die for it – something other professions are rarely called upon to do. But this is cross fertilized by the fact that a number of military officers are members of two professions – with engineers and doctors being more numerous than lawyers. While being a member of two professions may be potentially confusing, it is more likely to help them develop codes in underdeveloped areas. Some cross fertilization between professions in the military may assist.

## **CONCLUSION**

This lecture endorses the idea that the rule of law should become as fundamental a governance value within the international community as it is within sovereign states. The legal profession should take a lead in developing our understanding of that value and the ethical and institutional means of realizing that value. The military are a potential ally and Americans have traditionally been, and hopefully will again become, natural allies in this process. Our good work in the twentieth century has been tarnished by a poor end to the 20<sup>th</sup> century and a poor start to the twenty-first. However, those who are either unduly optimistic or pessimistic of major institutional change might do well to recognize that history is a ‘long game’. But the way that long game will play out is not a matter of prediction but of action. What lawyers and soldiers do during the next 50 years will be crucial to how it plays out. Lawyers were critical to the crystallization of the rule of law in 17<sup>th</sup> century England – soldiers all but undid it and a bloody civil war almost destroyed the country. This century – or more likely quarter century – we are playing for much bigger stakes. The international rule of law has been sufficiently conceptualized. This is the time when the international rule of law may be articulated, advocated and institutionalized. But

we cannot afford a global civil war along the way. This is why the international rule of law must be a key goal of the newly cosmopolitan and globalizing legal profession – and the increasingly cosmopolitan profession of arms must go along with them – not just to avoid conviction in the ICC but because of their conviction that internationally, as well as domestically, their use of force must be lawful.

If it happens it will be because the lawyers of today act with high principle and they are joined by the  
It is our time and even more the time of those who are now leaving law schools

Ten years ago, I was asked to deliver the final keynote the World Congress on Legal and Social Philosophy held in the World Trade Centre. I was asked to talk about sovereignty and intervention and I spent a good deal of time talking about the international rule of law. I drew a link between domestic and international rule of law and suggested that it was a great tragedy that the US, so long a leader in articulating and practising the domestic rule of law was setting such a bad example in the international rule of law. When I described illegal bombing from 15,000 feet was a new ‘high crime and misdemeanour’ I was told I must be a Republican. Had my interlocutor known of Eisenhower’s quote, he might have pressed me. But the answer is that the rule of law is neither Republican nor Democrat, Liberal or Labour, Left or Right. It is a fundamental governance value, a basic rule of the game – indeed it is the commitment to the idea that the game HAS rules.

The one really worrying trend is the abandonment of the rule of law by some who consider themselves conservative – or the oxymoronic category of ‘neo-conservative’. The corollary of that is that the argument for the rule of law has so often to be run by the left and those genuine conservatives who fight for it are often against those who call themselves conservatives and that those conservatives who fight for it are treated as if they are left wing radicals.

Let us hope that the implosion of the oxymoronic ‘neo-conservatism’ allows conservative, liberal and social democratic lawyers can make common cause on the rule of law – and take a lead in its realisation internationally as well as democratically – bringing with them the profession of arms and the vocation of politics.