# PROMOTING THE RULE OF LAW: A VALUE APART

**Colonel P.J. Olson**

May 2005

# ABSTRACT

Iterations of Canadian foreign, defence and security policy since the end of the Cold War have increasingly referred to the projection or promotion of Canadian values abroad as a means of advancing both Canadian and international interests. Among the values most often cited are democracy, the respect for human rights and the rule of law. This "values approach" has been the subject of considerable criticism. It is seen by some as deceptive, conceited and of little utility and has been described by them in the most uncomplimentary language. The purpose of this paper is to demonstrate that, in respect of the rule of law, the criticism has to a large extent been misplaced. The rule of law is demonstrably a genuine Canadian value and its promotion abroad can have positive effects on both security and economic interests in Canada and internationally. The paper also posits that the rule of law is most effectively promoted in its "minimalist version", that is, without the imposition of other values onto the basic concept of the rule of law.

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## Promoting the Rule of Law – A Value Apart

## Introduction

The promotion of Canadian values internationally, including the rule of law, has become an increasingly prominent theme in the articulation of Canadian foreign and defence policy since the end of the Cold War.  Also, increasingly, the articulation of these policies has tended to link these values with certain identified goals or interests, such as increasing Canada's voice in the international arena and enhancing both domestic and international security. One example of this appeared in the 1995 foreign policy paper *Canada and the World*:  "Canadian values, and their projection abroad, are key to the achievement of prosperity within Canada and to the protection of global security."[1]  A more recent and more specific articulation of this theme was evident in 2004 in *Securing an Open Society:  Canada's National Security Policy:*

> The Government will … enhance Canada's capacity for helping restore peace, order and good government in failed and failing states.  Beyond offsetting direct threats to Canada, the assistance we provide to these countries is an expression of our values.[2]

Even more recently, in the Finance Minister's 2005 Budget Plan, a few words of preview of the forthcoming international policy review were provided:  "Budget 2005

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[1] Canada. Department of Foreign Affairs and International Trade, *Canada and the World* (Ottawa: Canada Communications Group, 1995), 34.

[2] Canada. Privy Council Office, *Securing an Open Society:  Canada's National Security Policy* (Ottawa: Canada Communications Group), 50.

begins the process of transforming this international policy review into actions that will more effectively reflect Canadian values across the globe."[3]

This "values approach", however, has been the subject of severe criticism. Denis Stairs, for example, characterizes such articulations as "hypocrisy in the language of statecraft", "comforting rhetoric" and a "misguided sense of moral superiority"[4]. Inherent in such critique is the proposition that it is both folly and misleading to link "Canadian values" to strategic interests in foreign, defence and security policy. Suggestions that there is merit in promoting them abroad are seen as rhetorical rather than realistic.

This paper contends that in terms of the rule of law specifically, such criticism is overly simplistic and even misdirected. Pursuit of the rule of law abroad may properly be viewed as the pursuit of concrete interests, especially in the modern security environment. In support of this thesis, this paper will explore the nature of the objections expressed in respect of the values approach and examine the validity of their application to the rule of law in particular. In doing so, it will become apparent that the critics have overlooked that the rule of law is a value unlike others, that it has an historical basis in Canadian foreign policy, as well as in the international society, and that it has utility for the future in responding to the modern security environment.

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[3] Canada. Department of Finance. *Budget 2005 - Budget Plan*, 3

[4] Denis Stairs, "Myths, Morals and Reality in Canadian Defence Policy", *International Journal* 58, no.2 (Spring 2003): 251.

## The "Rule of Law"

Before embarking on a discussion of the merits of the critiques of the values approach, with respect to the rule of law in particular, it will first be necessary to outline what is meant by the term "the rule of law". The Preamble to the *Canadian Charter of Rights and Freedoms*, which comprises a part of Canada's Constitution, states that "Canada is founded upon principles that recognize the supremacy of God and the rule of law…"[5]. The phrase "rule of law", however, is not defined in the Constitution. In interpreting the rule of law in the domestic constitutional context, the Supreme Court of Canada has stated that it is composed of three elements: first, "the rule of law provides that the law is supreme over the acts of both government and private persons"; second, "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order"; and third, "the exercise of all public power must find its ultimate source in legal rule."[6] "At its most basic level", the Court has stated, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."[7]

Although the rule of law, in the international context, has been referred to directly as a pre-eminent Canadian value in the *1994 Defence White Paper*, in *Canada and the*

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[5] *The Constitution Act, 1982, (The Canadian Charter of Rights and Freedoms, Preamble)*

[6] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at pp. 747-52.

[7] *Reference re Certain Questions Relating to the Secession of Quebec from Canada*, [1998] 2 S.C.R 217, at paragraph 70.

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*World* in 1995, and the *Canada's National Security Policy* in 2004, it is only in the 1995 foreign policy paper in that an attempt is to articulate the its nature. According to that document,

> The rule of law is the essence of civilized behaviour both within and among nations. Clearly defined rules allow us to plan commitments and activities with reasonable certainty that our expectations about the surrounding environment will not be upset by arbitrary and erratic changes. Perhaps even more importantly, agreed rules help to diminish the capacity of those with the greatest raw influence to bend society – and the international community – to their own ends. Rule-making helps to redress power imbalances.[8]

It appears, then, that in the Canadian understanding of the value, or principle, of the rule of law, the fundamentals are the same in both the domestic and international context: relationships between individuals and the state, and indeed between states, should be governed by rules that apply to all equally and are designed to prevent arbitrary action and to promote predictability, stability and order. It is significant that this view of the rule of law coincides with what is known as the "minimalist" theory. There are, as would be surmised, different interpretations, or visions, of what the concept of the rule of law comprises, two of the most prominent of which are the minimalist or "thin" theory and the maximalist or "thick" theory. The minimalist theory is essentially that described above. The maximalist versions, as Randall Peerenboom notes:

> begin with the basic elements of a thin concept of rule of law but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, etc.), forms of government (democratic, single party socialism, etc.) or conceptions of human rights (liberal, communitarian, 'Asian values' etc.). Thick conceptions of rule of law can be

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[8] *Canada and the World*, 36.

further subdivided according to the particular substantive elements that are favored.[9]

The distinction between these two versions of the rule of law is significant for the purpose of the argument advanced in this paper. If the Canadian theory of the rule of law to be promoted abroad is the minimalist version, as appears to be the case, it has significantly greater "portability". It is more (but obviously not completely) culturally neutral. The more basic, minimalist version is more objective in nature and as such, more difficult to reject. Which state would suggest that it does not value order and stability and a system of clear, consistent and predictable laws? Which "failed or failing" state would deny that it aspires to attain or re-establish such attributes?

## Objections to the Values Approach to Foreign, Defence and Security Policy

As indicated earlier, some critics have not been kind to the articulation of policy espousing promotion of Canadian values abroad. Denis Stairs expresses his objections in the following manner:

> It may be timely … for Canadians to ask themselves, in sober spirit whether they really want to rationalize their foreign policies on the basis of what they and their leaders assert are their values, as opposed to what they *know* (to the extent that anyone is capable of knowing such things at all) are their interests[10] … [and]… Canadians would do well to receive the government's account of the foundations of its foreign policy with a considerable dose of healthy scepticism and to avoid

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[9] Randall Peerenboom, *China's Long March toward the Rule of Law* (Cambridge: Cambridge University Press, 2002), 3.

[10] Stairs, "Myths, Morals and Reality in Canadian Defence Policy", 251.

falling into the trap of thinking that their foreign policy behaviour is driven by their virtue and not by appetites of a baser kind.[11]

Scott Robertson has similarly eschewed the values approach. He suggests that a "foreign policy built on platitudes or Canadian conceits may be comforting, but it will not, as recent events have manifestly made clear, ensure the protection and promotion of our strategic interests".[12]

It may be noted, too, that such criticism emanates not only from Canadian sources. Rob de Wijk suggests that

> The concepts of democracy, respect for human rights, the free-market economy, pluralism, the rule of law, and social modernization are deeply rooted in Western culture and are the product of a civilization that developed over centuries. Universal pretensions and a feeling of superiority are not alien to Western culture.[13]

From these statements, fairly representative of the prevailing criticism of the values approach, can be derived the following central objections. First, the values that the government espouses are suspect; can Canadian values truly be identified for the purposes of foreign, defence and security policy? Secondly, linking these values to interests is an illegitimate exercise, essentially a form of subterfuge to lull Canadians to believing that policy is motivated by altruism rather than by self-interest. And, thirdly, talk of actually promoting these values abroad, in other states, is conceit – there is no real

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[11] *Ibid.*, 256.

[12] Scot Robertson, "Finding a Way: National Security and Defence Policy for a New Liberal Leadership", *Policy Options 25, no. 1* (December 2003/January 2004): 56.

[13] Rob de Wijk, "The Limits of Military Power", *The Washington Quarterly* 25, no. 1 (Winter 2002), 89.

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utility in such a notion. Finally, it is also evident from such critique is that the commentators have not distinguished between the various values at play; this is a significant failing in their commentary and, as will be demonstrated, does not advance the critical assessment of the value of promoting the rule of law in particular. The remainder of this paper will address these issues.

**The Rule of Law as a Canadian Value**

In *A National Security Framework for Canada*, Macnamara and Fitz-Gerald suggest that the first step in developing a national security framework is a statement of national interests, also referred to as "values and goals", and that these "can be derived from existing policy and constitutional documents".[14] If this approach is accepted, the rule of law must surely qualify as a Canadian value. As mentioned earlier, the Canadian Constitution states that Canada was founded on principles that recognize the supremacy of the rule of law. Although the preamble to the *Charter of Rights* containing this statement was enacted in 1982, its reference to the rule of law as a founding principle is not mere revisionism. The original iteration of Canada's Constitution, the *British North America Act*, in 1867 referred to the notion of "peace, order and good government", a concept fundamentally similar to the rule of law, in its minimalist version. Although he does not describe it as value *per se*, in discussing how the behaviour of policy-makers is shaped by the domestic environment, Kim Richard Nossal notes that in political systems such as Canada's, "relations between governors and the governed are conditioned by

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[14] W.D.Macnamara and Ann Fitz-Gerald, "A National Security Framework for Canada". *Institute for Research on Public Policy* 3, no. 10 (October 2002): 22.

normative considerations of liberal democratic theory" which include, among other things, "the paramountcy of constitutionalism and the rule of law".[15] As well, as will be illustrated later in this paper, the government articulation of the rule of law as a fundamental value predates the 1982 *Charter of Rights* by many decades.

Following the Macnamara and Fitz-Gerald approach further, an examination of government policy articulation to derive Canadian values also reveals that the 1987 Defence White Paper, *Challenge and Commitment*, characterized the international environment as one "dominated by a rivalry between East and West … two groups of nations, each led by a superpower" that are in conflict in their view of the conduct of politics, economic structures and social order.  In addition, the White Paper indicates, the two superpowers were divided by their values, including their different views on "personal freedom, importance of rule of law and the proper relationship of the individual to the society." [16] The tenor of the White Paper indicated that not only was rule of law a value cherished more by West than East, but that it was in fact a value so intrinsic that the belief in the necessity to defend it was one of the bonds between Western states.   The 1994 *Defence White Paper* took a less philosophical or ideological stance, simply stating that "Canadians believe that the rule of law must govern relations between states".[17]  One year later, the foreign policy statement, *Canada and the World*, more directly identified

[15] Kim Richard Nossal, *The Politics of Canadian Foreign Policy* (Scarborough: Prentice-Hall Canada Inc., 1997) 95

[16] Canada. Department of National Defence, *Challenge and Commitment – A Defence Policy for Canada* (Ottawa: Minister of Supply and Services Canada, 1987), 5.

[17] Canada. Department of National Defence, *1994 Defence White Paper* (Ottawa: Minister of Supply and Services Canada), 12.

Canadian values as "respect for democracy, the rule of law, human rights and the environment"[18]. Notably, by 2004, *Canada's National Security Policy* identified the "key Canadian values" as "democracy, human rights, respect for the rule of law, and pluralism"[19] The first three of these values are also repeated in *Canada's International Policy Statement*, released in April, 2005.[20] That the rule of law retained its profile in these policies is not surprising, and is based on more than its reference in the 1982 amendment to the Constitution. It can be clearly traced back for more than a half century as one of the constants of Canadian foreign policy articulation.

In 1947, Louis St. Laurent, then the Secretary of State for External Affairs, delivered a seminal speech on the Principles of Canadian Foreign Policy in which he identified five key values, accepted by Canadians, as governing the conduct of foreign relations: national unity, political liberty, the rule of law in national and international affairs, the values of a Christian Civilization, and the acceptance of international responsibility consistent with Canada's concept of its role in world affairs. [21] Two years later, the preamble to the Washington Treaty, establishing the North Atlantic Treaty Organization (NATO), to which Canada was an original signatory, indicated that its Parties "are determined to safeguard the freedom, common heritage and civilization of their peoples, founded on the principles of democracy, individual liberty and the rule of

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[18] *Canada and the World*, 11.

[19] *Canada and the World*, Prime Minister's introduction; see also page 1.

[20] Canada, Foreign Affairs Canada, *Canada's International Policy Statement*, Overview (Ottawa: Canada Communications Group, 2005), 4 and 11.

[21] Louis St. Laurent, "The Foundation of Canadian Policy in World Affairs", (Statements and Speeches No.47/2), (Ottawa: Information Division, Department of External Affairs, 1947), 4-6.

law".[22]    For the purpose of identifying the rule of law as a *bona fide* Canadian value, it is

significant to note that, between 1947 and 2004, it was the *only* expressed Canadian value

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In 1981, Secretary of State for External Affairs, Mark MacGuigan, in a speech on "Canada, China and the Rule of Law", described the concept as "a universal phenomenon", based on the "notion of objective legal norms binding on everybody – on ruler and ruled alike" and one "which protects citizens from arbitrary action by the state"[25].   Applying the MacNamara and Fitz-gerald approach then, the rule of law would appear not only to be a value consistently expressed over many years as a key element of both Canadian society and foreign policy, but is also the value most consistently referred to.

Moreover, even if one applies an approach other than that suggested by Macnamara and Fitzgerald, and looks not only at what the government suggests is a value, but at the individual values of the state's people, one can view the rule of law as a fundamental feature of Canadian society.  In his study of the diverging values of Canada and the United States, Michael Adams suggests that values are the "basic learned motivators of human behaviour".[26]   Values, according to Adams, are evidence of "beliefs that both determine and reflect our responses to the world as we struggle to meet such basic psychological and sociological needs as biological survival, connection with our close kinship groups, and our species' predilection for organizing socially in hierarchical and status-defined groups."[27]  In short, values are beliefs held by individuals and are sufficiently strong to motivate them to act and to organize themselves in a certain

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[25] The Honourable Mark MacGuigan, "Canada, China and the Rule of Law",  (Statements and Speeches No. 81/23), (Ottawa:  Bureau of Information, Department of External Affairs), 1.

[26] Michael Adams, *Fire and Ice – The United States, Canada and the Myth of Converging Values* (Toronto: Penguin Canada, 2003), 6.

[27] *Ibid*., 146-147.

manner. The rule of law, in its minimalist version, is such a value. There can be little argument that Canadians' most basic expectation of their government is that it will provide order and stability and that the system of law that it maintains is one that is applied equally to both individuals and government and that it will be enforced in a fair, rather than arbitrary manner.[28]

Michael Ignatieff, in discussing the related constitutional concept of peace, order and good government, notes that it is those three constitutional commitments in the Canadian political culture that help hold together, in Canada, this "heterogeneous population without common origin spread across 5000 miles of inhospitable terrain."[29] The same can be said of the rule of law. While Canadians may comprise a diverse population with diverse beliefs, their fundamental expectations that order, stability, and a society governed by law will prevail are firmly held, have been firmly held for generations, and certainly govern their relations with each other and with the state.

This point is explored in *The House of Difference – Cultural Politics and National Identity in Canada* in which Eva Mackey discusses the concept of a "dominant culture" created and maintained over time. She posits that in Canada, as elsewhere, a "central system of practices, meanings and values" achieve dominance when they become "common sense in everyday life".[30] Applying this approach, she concludes that the "core

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[28] It has been suggested by a number of colleagues that this may be the case in any state. That is certainly a valid observation, but the fact that a value is held by many other states does not detract from the fact that it is also a constant within the Canadian way of life.

[29] Michael Ignatieff, "Peace, Order and Good Government: A Foreign Policy Agenda for Canada" )March 12, 2004), 5-6; available from: http://ww.dfait-maeci.gc.ca/department/skelton/peace_order-en.asp.

[30] Eva Mackey, The House of Difference – Cultural Politics and National Identity in Canada, (Toronto: University of Toronto Press, Inc., 2002), xvii.

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culture of Canada … is based on respect for common institutions and universal rules, rights and laws".[31]   The historical circumstances that have created the environment in which respect for law and public authority are cultural norms, and in which order and equality are fundamental expectations held by Canadians of their government, have been well described by many commentators.[32]  For the purposes of this paper, it suffices to point out that the rule of law is an everyday feature of Canadian life and, in Adams' concept, motivates the behaviour of individuals and their institutions.   More than any transitory belief or tradition, the rule of law binds Canadians to a common vision of their society.

The rule of law, as expressed by government policy in its minimalist version, and as applied in Canadian society, is a concept  that, on its face, is virtually axiomatic in its appeal to Canadians.  In this sense, it is distinguished from other commonly expressed values, such as democracy, which may be understood in a number of ways, the environment, which may come into conflict with other values or goals, such as prosperity, and pluralism which is not, despite the best intentions, a universally accepted notion.  Even human rights, as a value, is highly subjective and means different things at different times to different people.[33]  These other expressed values, in short, are more

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[31] *Ibid*., 156-157.

[32] See for example, Eli Mandel and David Taras, eds., *A Passion for Identity – Introduction to Canadian Studies* (Toronto: Methuen Publications, 1987); and Adams, *Fire and Ice – The United States, Canada and the Myth of Converging Values.*

[33] The distinction between the rule of law and other values identified  in policy for promotion abroad will be discussed in greater detail later, in the context of describing why the rule of law is likely more easily transferred internationally than certain other values.

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readily politicized domestically than the concept of the rule of law and therefore are less universal in their understanding and acceptance.

Critics of the values approach, such as Stairs, do not only question the identification and authenticity of Canadian values, they also decry what they consider an attempt by government to mask the pursuit of "baser" interests with talk of pursuing values. A closer examination of the manner in which governments have expressed the relationship between the rule of law as a value and these "baser" Canadian interests, does not support that particular criticism. On the contrary, successive Canadian governments appear to have been markedly frank in identifying the rule of law as a not just a value, pursued for altruistic motives, but as a 'tool in the toolbox' of foreign policy pursuits.

## Linking Values to Interests – The Rule of Law as "Technique"

As a colleague has aptly pointed out, there is considerable difficulty in trying to distinguish between "values" and "interests" and it is complicated by the use of other terms, almost interchangeably, such as principles, goals, aims and policy themes.[34] As indicated above, Macnamara and Fitz-Gerald link "national interests" with "values and goals". Kim Richard Nossal goes so far as to suggest that, in recent policy iteration "Canada's values *became* Canada's foreign policy objectives but those foreign policy objectives were no longer driven by Canada's *interests*. On the contrary: the

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[34] Colonel Claude Wauthier, "National Values and National Interests" (Toronto: Canadian Forces College National Security Studies Seminar Paper, 2005).

government moved to make the very idea of *national interests* in foreign policy as invisible as possible."[35]

Regardless of these difficulties, the rule of law as a value seems to be in something of a class of its own. As indicated earlier, it has consistently been labelled a "value" for almost 60 years of policy iteration and its fundamental and enduring nature seems certainly to distinguish it from beliefs, trends or interests that may be more transitory in nature. Aiding the understanding of the relation between rule of law as a value and more direct and immediate Canadian interests, is the consistent trend, both recently and historically, of applying the rule of law as a tool to pursue specific ends, or interests. And, contrary to what some critics have suggested, in respect of the rule of law at least, there has been little attempt to conceal its use as a technique to pursue certain direct interests.

In *Canada and the World*, a direct link is made between the rule of law and economic interests or the goal of domestic prosperity:

> Advanced, trade-reliant countries, such as Canada, lead in the creation of a system of international rules to govern the collective behaviour of states because they see binding rules as providing the best basis for the widest cooperation and for protection against unilateralism.[36]

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[35] Kim Richard Nossal, "The World We Want – The Purposeful Confusion of Values, Goals and Interests in Canadian Foreign Policy"; online paper available from: http://www.cdfai.org.

[36] *Canada and the World*, 5.

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Similarly, the foreign policy statement noted that the objective of promoting prosperity and employment requires, among other things, "an open, fair and predictable set of rules governing trade and investment".[37]    In addition to economic interests, the rule of law is identified as a means of achieving Canadian objectives relating to security  "through rules-based regimes of arms control regimes and conflict resolution," and through international agreements on the protection of UN personnel, including peacekeepers.[38] These iterations of the value of rule of law as a "technique" are more grounded in realism than the critics have acknowledged in their attack on the values approach. As well, the statements clearly reflect that rule of law, as a value, is not being promoted for merely altruistic purposes.   Instead, promotion of the rule of law is a means to a desired end.


        In *Canada's National Security Policy*, promotion of the rule of law is linked to both Canadian and international security as a means of countering terrorism and organized crime groups that "can exploit weak or corrupt governing structures" in failed and failing states.[39]    In the context of Canada's security and reconstruction efforts in Afghanistan, efforts related to restoration of the rule of law, former Minister of National Defence John McCallum was equally direct in identifying the convergence between rule of law as a value and a technique. He suggested that "the mission speaks both to Canadians' altruism -  our desire to help others – and to our self-interest – our desire to

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[37] *Ibid.*, 10.

[38] *Ibid*., 36.

[39] *Canada's National Security Policy*, 7;  This aspect of the rule of law will be discussed in greater detail in the section dealing with the modern security environment.

put down terrorism and enhance our domestic security".[40]  The dual reference to altruism

and self-interest is reminiscent of a passage from  the statement in *Canada's National*

*Security Policy* relating to Canada's "capacity for helping restore peace, order and good

government in failed and failing states".  That Policy suggests that "[b]eyond offsetting

direct threats to Canada, the assistance we provide to these countries is an expression of

our values."[41]  These types of references to altruism are, of course, fodder for the critics

of the values approach; however, in concentrating on such rhetoric, they appear to have

been distracted from the underlying utility of a value such as the rule of law.


Promoting the rule of law as a means of pursuing specific goals, and speaking

directly of it as a technique for doing so, is not new.  In the immediate post-Second

World War years, the drafters of the Charter of the United Nations, which included

Canada, saw the rule of law was seen as a means of regulating the relations between

states in such manner as to prevent recurrence of armed conflict.[42]   In his analysis of

Canadian participation in designing the Charter, Tom Keating suggests that

> Underlying the persistent references to functional representation in many
> Canadian statements was a commitment to a system of rules that would govern
> international behaviour.  International organizations were favoured not simply
> because they would enhance Canadian influence or offer a wider range of tasks
> for an expanding corps of diplomats; they were viewed as a way of entrenching a

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[40]  Canada. Department of Foreign Affairs and International Trade, "Building Bridges in Afghanistan",
*Canada World View* 20 (Autumn 2003): 3.

[41] *Canada's National Security Policy*, 50.

[42] In particular, articles 2, 39-42, and 51 of the UN Charter sought to codify rules governing the use of force
between states.  In this manner, it was hoped that state conduct would be regulated, and therefore
more predictable, and that it would be understood in advance that a breach of the rules would lead
to certain consequences by other states.

more stable and secure international order that would both support Canadian interests and provide an ongoing site in which Canadians could operate.[43]

Moreover, the promotion of the rule of law as a technique, or a tool of Canadian foreign policy, has not historically been limited to the advancement of international peace and security. There is ample evidence that, during the Cold War years, senior Canadian officials also recognized that concrete Canadian *domestic* interests were possible beneficiaries of international rule of law. A brief example, relating to Canada's economic and sovereignty interests as a coastal state, serves to illustrate this.

As indicated earlier, in 1959 Prime Minister John Diefenbaker delivered a speech entitled "The Rule of Law in International Affairs". While the speech applauded the manner in which the rule of law, primarily through the United Nations and its various bodies, contributes to the maintenance of international peace and security, the Prime Minister also took the opportunity to refer to Canada's efforts at the previous year's Geneva Conference to further develop the law of sea to clarify issues of coastal sovereignty and fisheries control, issues that would be apparent to all as relating to concrete Canadian interests. Ten years later, the Secretary of State for External Affairs, Mitchell Sharp, delivered an identically titled speech, much of which was dedicated to the discussion of law of the sea and the regulation of territorial jurisdiction over coastal waters and sea-beds. He showed no reluctance in identifying Canada's national interest in this matter as the reason for advancing international regulation in this area. Mr. Sharp unabashedly acknowledged that "[a]s a country with one of the world's largest coast-lines and with a continental shelf roughly equal to 40 per cent of its land mass, Canada can

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[43] Tom Keating, *Canada and World Order*, 2nd edition (Don Mills: Oxford University Press, 2002), 28.

understand and share the enthusiasm which has been generated" by initiatives to develop

law of the sea in this area.[44]  A similar approach was evident when Secretary of State

Mark MacGuigan spoke on "Canada, China and the Rule of Law" in (then) Peking in

1981.  In this speech, he observed that Canada and China each possess one of the world's

longest coastlines.  Then, again, a direct link was made between Canada's interests in this

regard and its efforts to advance the rule of law to protect those interests.    Mr.

MacGuigan noted that "Canada and China have also been effective partners in the

elaboration of the emerging new law of the sea.  We have contributed to the state practice

and the evolution of customary law, which now recognizes, for instance, the 12-mile

territorial sea and the 200-mile economic zone."[45]


Canadian policy iteration, over the past few decades, then, does not appear to

suggest that the rule of law, as a value, has being pursued on a strictly altruistic basis.  On

the contrary, promotion of the international rule of law, that is, the regulation of the

conduct of affairs between states in a predictable and ordered manner by rules applicable

to all states, was spoken of openly as a means of advancing certain interests, both

internationally and domestically.


What *has* changed recently is the emphasis in policy articulation on *how* the rule

of law will be employed as a policy tool.  Since the end of the Cold War, Canadian

foreign, defence and security policy articulations have emphasized the promotion of the

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[44] The Honourable Mitchell Sharp, "The Rule of Law in International Affairs", (Statements
and Speeches No. 69/6) (Ottawa: Information Division, Department of External Affairs), 5

[45] MacGuigan, "Canada, China and the Rule of Law", 2

rule of law abroad, not just within the international legal framework, but rather more directly within states where its absence may affect Canadian interests - apparently, both economic and security interests.  Consequently, even if it is possible to demonstrate that the rule of law is a *bona fide* Canadian value, and that it has, in its international form, historically been linked to the pursuit of concrete interests rather than mere altruism, the issue remains as to whether its promotion as a value in individual states is a useful approach to foreign, defence and security policy.

## Promoting the Rule of Law Abroad Domestically:  An Approach for the Modern Security Environment

The third, and perhaps most significant criticism of the values approach is that promotion of Canadian values abroad is little more than what Stairs has characterized as a "pulpit diplomacy" and  "self-indulgent expressions of moralism"[46].  Impliedly, it has no real utility.  However, again, when one examines the expressed value of the rule of law on its own, separate from the other values often articulated, these characterizations appear to be misplaced.    This may be demonstrated by a review of the modern security environment and an examination of how the rule of law is perceived to be of relevance in adapting to it.

As indicated earlier, the concept of promoting international rule of law as a means of advancing both domestic and international interests is not new.  While the concept of

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[46] Denis Stairs and Dan Middlemiss, "Continental Security" in *Centre for Foreign Policy Studies – Continental Security and Canada-U.S. Relations* (Halifax: Dalhousie University, 2003), 38-39.

promoting the rule of law directly in foreign states is also not actually new, it has certainly been dormant during the Cold War era.   As has often been pointed out, the link made between the domestic constitutional order within states and international order was expressed by Immanuel Kant over two hundred years ago.[47]   In the Canadian context, it was also recognized in St Laurent's 1947 speech.   St. Laurent observed that the then recent "hideous example" of fascist states, in which governments set themselves above the law, had implications for international peace.[48]   That is, the absence of rule of law *domestically* in one or two nations can have negative effects in a global context.

It was not until the end of the Cold War that Canadian foreign policy iteration spoke directly about promoting values, such as the rule of law, beyond the international forum into individual states.  This is not surprising for a number of reasons.  First, during the Cold War, an era characterized by fierce protection of Western and Eastern spheres of influence, such a notion would have inflamed, rather than assisted in resolving conflict.  Secondly, talk of promoting, or essentially "exporting" Canadian values to other states would have been inappropriate given the imperative of the principle of state sovereignty, an imperative guarded by the UN Charter.[49]   Indication in a state's defence policy, for example, that it intended to promote its values abroad would have been offensive to this imperative.  However, this situation has evolved as state sovereignty, for a number of

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[47]  F. O. Hampson, *et al*, *Madness in the Multitude – Human Security and World Disorder* (Don Mills: Oxford University Press, 2002), 2.

[48] St. Laurent, "The Foundation of Canadian Policy in World Affairs", 5,

[49] *Charter of the United Nations*, articles 2(4) and 2(7).

reasons, has become less absolute.[50]     Thirdly, one would not have expected the

articulation of plans to promote domestic national values in other states, as a means of

promoting its own security, for the simple reason that this would not have been seen an

effective strategy in the Cold War security environment.   As late as the 1987 Defence

White Paper, it was still considered that the "principle direct threat to Canada continues

to be a nuclear attack on North America by the Soviet Union."[51]   The threat to Canada

was not from distant, isolated states wrestling with domestic constitutional crises and

other forms of political and social disorder.


However, with the end of the Cold War, the security environment changed

dramatically. Increasingly, the main threat to the security of states, including Canada, is

not considered to be from a major confrontation between states.   The modern security

environment is characterized instead by the interrelated themes of asymmetric threats, the

dilemmas posed by failed and failing states, and trends towards globalization.

Accordingly, some shift in strategy was necessary.   In Canada, contrary to the critics'

remonstrations, the shift in emphasis that led to a re-evaluation of the application of the

rule of law, as both a value and a tool, was not due to Canadian naivety or conceit.   It

may instead be seen as a strategic response to the changing global security environment.


*A Changing Security Environment -  A Changing Role for the Rule of Law:*

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[50] Developments in international law, such as international human rights conventions, the establishment of
        courts such as the International Criminal Tribunals for Yugoslavia and Rwanda and the
        International Criminal Court, and the growing practice toward international humanitarian
        intervention, are often cited as evidence of modification of state sovereignty to a less absolute
        form.

[51] *Challenge and Commitment*, 10.

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"Victory over the Union of Soviet Socialist Republics and its illiberal dogma",
suggest Bland and Mahoney, "exposed a world-wide scourge of terror, warfare, genocide,
and the rule by thugs and dictators".[52]  It is a dramatic statement, but one that accurately
reflects some new challenges for Canada and indeed the international community.   Van
Creveld, in the *Transformation of War,* also points to the increased asymmetry in the
modern world.  He posits that, in the future, wars will not be fought by armies but rather
by "groups whom we today call terrorists, guerrillas, bandits and robbers."[53]

The security challenges in the modern era are not, however, confined to types of
violence identified by Bland and Mahoney, perpetrated by the non-state actors identified
by Van Creveld.  Other factors, such as significant global demographic trends will also
increasingly contribute to instability.  In the future, the largest rises in population are
expected in developing regions, Africa, Asia and Latin America.[54]  The number of cities
with over one million inhabitants is increasing but the necessary infrastructure, such as
public health services, is not developing in a corresponding manner; migrations of people
for both economic and environmental reasons are expected to increase; and within the
next ten to twenty years, urban populations will, in the developing world, outnumber
urban ones for the first time.[55]   In this type of environment, it has been pointed out,

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[52] Douglas L. Bland and Sean M. Maloney, *Campaigns for International Security* (Montreal & Kingston: McGill-Queen's University Press, 2004), x.

[53] Martin Van Creveld, *The Transformation of War* (New York: Free Press, 1991), 197.

[54] Paul Kennedy, "Global Challenges at the Beginning of the Twenty-First Century" in *Global Trends and Global Governance* (London: Development and Peace Foundation, 2002), 1-5.

[55] Frederick M. Burkle, Jr., "Complex Emergencies and Military Capabilities" in *From Civil Strife to Civil*

'security is being redefined' as it is not only military resources that must be brought to bear to deal with the emerging challenges.[56]  As early as 1994, the Defence White Paper recognized the "often fruitless struggles of collective security organizations to cope with the challenges of the new era."[57]

The post-Cold War environment, one commentator has noted, is "a global crisis in search of a paradigm".[58]  Obviously, there is no single paradigm, or strategy, that will resolve the world's problems and one could agree with the critics who suggest that it is idealism at its most dangerous to pursue a course based on altruism and moralism.

For Canada to be concerned about such transnational trends as terrorism, organized crime, health epidemics, illicit migrations, devastating ecological changes, and shortages of life-sustaining commodities, however, is not altruism.   Nor is it altruism to seek new approaches, such as promotion of the rule of law, to deal in the longer term with such trends. As David Dewitt notes, Canada is a "highly penetrated country"; it is directly affected and influenced by global events and is penetrated by peoples, ideas, finance, capital, technology and culture.  He also notes that whereas national defence has traditionally concentrated on threats to state boundaries, international security is "more

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*Society – Civil and Military Responsibilities in Disrupted States* (Tokyo:  The United Nations University Press, 2002), 99.

[56] *Ibid*., 100.

[57] 1994 White Paper, 3.

[58] Josef Nef, "The Ethics of Vulnerability:  A Development Perspective for Foreign Policy" in *Ethics and Security in Canadian Foreign Policy* (Vancouver: UBC Press, 2001), 17.

inchoate" and involves challenges that are often more indirect and distant.[59]   The line

between national defence and international security in the modern era has blurred

significantly.   The term "out of area", Dewitt suggests, "no longer has meaning".[60]

In this context, the human security concept, as adopted by former Minister of

Foreign Affairs and International Trade Lloyd Axworthy, is compelling.  In his address to

the 51st United Nations General Assembly in 1996, Axworthy noted that human security

entails more than the absence of military threat:

> At a minimum, human security requires that basic needs are met, but it also
> acknowledges that sustained economic development, human rights and
> fundamental freedoms, the rule of law, good governance, sustainable development
> and social equity are as important to global peace as arms control and
> disarmament.[61]

Although references to the human security concept appear less in vogue in 2005

than they were just a few years ago, the central point that the concept captures remains

every bit as relevant.  "Human security", it has been explained, "seeks to expand the

security agenda to enable states to address more fully the global problems caused by

increasing levels of interdependence".[62]   So, while the concept of human security may,

from a very shallow examination, seem a moralistic or altruistic concept, it very much

reflects the reality that challenges in the modern security environment cannot be so easily

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[59] David B. Dewitt, "Future Directions in Canadian Security Policy" in *Canada and the New World Order:
    Facing the New Millennium* (Toronto: Irwin Publishers, 2002), 87.

[60] *Ibid*., 93.

[61] Lloyd Axworthy, "Canada and Human Security: The Need for Leadership", *International Journal* 52,
    no.2 (Spring 1997): 184.

[62] Rosalind Irwin, ed., *Ethics and Security in Canadian Foreign Policy* (Vancouver: UBC Press, 2001), 5.

isolated, geographically or conceptually.  This is, as described in *Canada and the World*, one of the "negative aspects of greater global integration."[63]

In an environment where direct threats of violence may come from actors other than states, and where indirect threats, creating local, regional and international instability, may arise as a result of economic, ecological, and demographic crises, any new security strategy must consequently involve some combination of the capability to apply force and the capability to support, re-establish and maintain institutions that foster

power. Order in a balance of power depends on the extent of disagreement amongst the major powers, the willingness of the largest powers to underwrite it, and on the willingness of other states to agree on rules and norms.[64]

One could argue that in the modern security environment, the realist model is, at least for the immediate future, less compelling a predictor of global stability. The world is currently in what is described as a unipolar phase: only one superpower remains. As well, significant inroads have been made, through international institutions and international law, to establish rules and norms that have reduced, but of course not eliminated, the risk of confrontation between the major powers. The United Nations Charter establishes prohibitions on aggressive action; collective security agreements exist to deter such action; and the International Criminal Court has been created with jurisdiction, albeit somewhat limited, to enforce certain breaches of international law, including the crime of aggression. These measures are obviously far from perfect and by no means guarantee international peace and security. However, in the modern security environment, the "anarchy" in the relations betweens states has been reduced sufficiently that anarchy in that context is currently not the primary concern. The "anarchy" has become more localized; it is the disorder *within* states, not *between* states, that presents the greatest threat to stability.

Francis Fukyama expresses this more directly: "The fact is that the chief threats to us and to the world order come today from weak, collapsed or failed states. Weak or absent government institutions in developing countries form the threat linking terrorism,

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[64] Barry Buzan, *An Introduction to Strategic Studies: Military Technology and International Relations*, (New York: St Martin's Press, 1987), 6.

refugees, AIDS, and global poverty."[65]   Fukyama, in short, endorses the "root cause"

theory of the asymmetric threats that pose challenges for which adaptive strategies, such

a promotion of the rule of law, are required.

Under the "root cause" theory, a state's inability to maintain law, order, a viable

economy and the necessary infrastructure to deliver essential services, gives rise to a

number of problems, and threats, which extend beyond the boundaries of the state.  For

example, the absence of educational and health services may exacerbate the spread of

endemic diseases which become pandemic.  Refugee migrations may exacerbate existing

civil strife, such as the case of Rwandan influxes into Zaire or Kosovar Albanians into

Macedonia, where sensitive ethnic balances are thereby threatened. [66]   And, as Van

Creveld suggests, where the ability of a state to protect its people has eroded sufficiently,

the people will "turn to other actors", such as terrorist groups or organized crime

regimes.[67]

The root cause theory predates the events of 11 September 2001.  In 1992, then

UN Secretary General Boutros-Boutros Ghali's "An Agenda for Peace" report referred to

a "new integrated approach to human security" to address "the deepest causes of conflict:

economic despair, social injustice, and political oppression."[68]   In 1996, UN Security

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[65] Francis Fukuyama, "Nation-Building 101", *The Atlantic Monthly* 293, no. 1 (January-February 2004),
159.

[66] Paul F. Diehl, "The International Community and Disrupted States" in *From Civil Strife to Civil Society
– Civil and Military Responsibilities in Disrupted States*, 35.

[67] van Creveld, *The Transformation of War*, 196-199.

[68] Rama Mani, "The Rule of Law or Rule of Might/": Restoring Legal Justice in the Aftermath of Conflict"

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Council Resolution 1076 noted that "the continuation of the conflict in Afghanistan provides a fertile ground for terrorism and drug trafficking which destabilize the region and beyond."[69]   The Report of the International Commission on Intervention and State Sovereignty – *The Responsibility to Protect*, suggests that the root cause theory is, in fact, entrenched in the UN Charter, article 55, which, according to the Report,

> explicitly recognizes that solutions to  international economic, social, health and related problems; international, cultural and educational cooperation; and universal respect for human rights are all essential for  'the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.'[70]

It is evident that Canada officially subscribes to the root cause theory and further, that it considers that promotion of the rule of law is one of cures that may be applied to the ills at hand.   The "human security" concept espoused by Mr. Axworthy is an indication of acceptance of this notion during the 1990's.   In 2004, there were at least two official statements referring to the rule of law as a means of addressing the root causes.  The *Canadian National Security Policy* suggested that:

> [o]ur knowledge and experience in the hard tasks of fostering democracy, pluralism and the rule of law are also a means for Canada to play a significant role in the struggle against terrorism.  They provide us with a rich set of assets we can deploy in failed or failing states to assist in removing the conditions for extremists to operate and gather support.  Our security interests and our international policy goals work hand in hand.[71]

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in *Regeneration of War Torn Societies* (New York: St. Martin's Press, 2000), 17.

[69] Nico Schrijver, "September 11 and the Challenges to International Law" in *Terrorism and the UN* (Indiana: Indiana University Press, 2004), 59.

[70] International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 22.

[71] *Canada's National Security Policy*, 2.

More recently, in the Governor-General's October 2004 Speech from the Throne, there was a direct reference, in the context of the proposed creation of the "Canada Corps" to this concept. "Poverty, despair and violence", she observed, "are usually rooted in failed institutions of basic governance and rule of law."[72]

As indicated earlier, the belief, or at least the articulation in policy, that the promotion of Canadian values abroad is a valid exercise has been received with considerable scepticism among certain critics. However, in order to assess the utility of the notion of promoting the rule of law abroad, one has to look beyond the rhetoric of policy iteration and distinguish the rule of law from other purported values, and distinguish the Canadian approach to rule of law from that of other states. One commentator has observed, for example, that in the context of assisting in failed or failings states, the rule of law, despite its close ties to concepts such as democracy and capitalism, "stands apart as a nonideological, even technical, solution".[73] In broad terms, its technical application has been seen, particularly since the end of the Cold War, in two major domains: nation-building efforts that have often been some part of international peace operations; and economic reconstruction efforts and efforts to assist in adapting to economic globalization.

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[72] Governor-General of Canada Speech from the Throne, October 2004; available from
http://www.pm.gc.ca/eng/sft-ddt.asp.

[73] Thomas Carothers, "Rule of Law Revival", *Foreign Affairs* 77, no.2 (March/April 1998), 99.

*a. Nation-building and Rule of Law*

Michael Ignatieff has described an "emerging crisis of state order" in the way that certain states, such as Afghanistan and Somalia, have become so weak that terrorist groups use their territories as a base and that others actively sponsor terrorism against other states. "Canada", he suggests, "has a direct national interest in creating a state order in which no state ever, under any conditions, with any excuses or any justification is ever a harbour, shelter or protector of terrorists."[74]   Canada does not, however, possess the military power to pursue this interest with force or the threat of force.  Instead, it must seek other strategies to deal with state disorder.  One of these is support for the promotion of international law and its enforcement institutions.   Because of its historical usage in regulating international relations, promotion of the rule of law in this respect has not been subject to the same scepticism or critique as the second, and more recent, strategy of promoting the rule of law directly within other states, such as through efforts toward nation-building.

Nation-building entails, among other things, support to, or re-establishment of, a state's essential institutions:  its constitution, its judicial system, its security sector and its economic infrastructure.  Each of these may be seen as essential elements of a system based upon the rule of law and Canada has been involved in various reconstruction efforts of this nature in such places as Bosnia, Haiti and Afghanistan.  Canadian officials have recently indicated an intention to assist in the training of Iraqi soldiers, part of which training will likely include the functioning of armed forces under civil control and the

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[74] Ignatieff, "Peace, Order and Good Government: A Foreign Policy Agenda for Canada", 8.

rule of law.[75]  Nation-building through these means involves both short and long-term commitments.  Douglas Bland has noted that armed forces, in what he terms "stability campaigns", employ tactics and procedures that are "aimed not at 'winning the nation's wars'… but rather at establishing an orderly community more or less controlled by enforced rules where behaviour will become predictable."[76]  Beyond the initial imposition of order, however, he also notes that "[r]einforcing and building a harmonious community … is a task mostly outside the capabilities and demeanour of armed forces and requires the intervention of civil authorities, police, courts and skilled public administrators."[77]  Bland's assessment coincides with Lloyd Axworthy's 1997 view of "peacebuilding" which "consists of a package of initiatives to develop the social infrastructure to break the cycle of violence", and which was the rationale, according to Axworthy, for Canada's support for police and judicial training and assistance in the development of legal systems in troubled states.[78]

Because nation-building, and even one of its component parts, security sector reform, necessarily entail the remaking of state institutions, at least to some extent, these efforts are justifiably prone to suspicion that one or more states may be imposing on another their own values and cultural preferences in the process.  However, in assessing

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[75] For a discussion of means by which the Canadian Forces may support the rule of law through security sector reform, see: Ken Eyre, Jean-Jacques Blais and Anthony Anderson, "Expanding the Concept of Security Sector Reform…", *Peacekeeping and International Relations* (October-December 2001), 5.

[76] Bland and Maloney, *Campaigns for International Security*, 12.

[77] *Ibid.*, 12-13.

[78] Axworthy, "Canada and Human Security:  The Need for Leadership", 186.

Canada's approach concerning the promotion of rule of law, it is necessary to carefully distinguish it from other values, such as democracy and human rights, and from the rule of law approaches of other states. In doing so, it becomes evident that much of the criticism of the Canadian approach may be the result of some confusion in these regards.

Perhaps one of the issues of concern to the critics of the values approach is addressed by Francis Fukyama. Fukyama notes that the notion of nation-building has been the subject of criticism because it is the "cultural, social and historical ties that bind a people together as a nation" and outsiders cannot therefore "build" a nation. He also note that

> [w]hat we are really talking about is state-building – that is, creating or strengthening such government institutions as armies, police forces, judiciaries, central banks, tax collection agencies, health and education systems, and the like.[79]

In other words, it is not the exportation of values and cultural norms *per se* that is of assistance in failed and failing states when rule of law principles are deployed in nation-building; rather, it is the building of institutions that will be of direct and concrete assistance in maintaining an ordered society. One may object to this view on the basis that in assisting in the building of the institutions, one is necessarily transplanting one's own cultural ideals and norms. But, as pointed out earlier, the Canadian notion of rule of law is the "minimalist version". As Rami Mani articulates this version, "[t]he rule of law consists at minimum of clear and known rules which are objectively applied, a functioning judiciary and justice system, which guarantee to individuals a certain degree

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[79] Fukuyama, "Nation-Building 101", 159.

of freedom if they know and follow the rules."[80]  Promotion of the rule of law does not

necessarily entail the promotion of *specific* laws or institutions based on the Canadian or

any other national model.   The rule of law is a political or constitutional concept,

concerned with the governance of society;   there is room in the rule of law concept for

adapting to differing cultural norms and approaches.   In fact, a number of commentators

who support the reconstruction of the rule of law in failed and failing states are careful to

point out that beyond the initial imposition of law and order by means of military force,

the real objective is to assist in the reconstruction of systems that will be as indigenous,

and as reflective of local customs, history and tradition as possible.   William R.

Slomanson, for example, points to difficulties in the United Nations' efforts to rebuild the

judicial system in Kosovo commencing in 1991.  He observes that

> …the United Nations efforts have experienced local challenges to its credibility
> and legitimacy.  It did not incorporate resources from the local population.  As
> recommended by those with direct personal experience: 'A number of the
> problems experienced by the international community could be avoided in the
> future by using a more developed, phased approach, which ultimately allows for
> full participation by the local population, but in the short-term relies on
> international standards and expertise'.[81]

Where promotion of the rule of law may run into difficulty in this context, is

where the states involved in nation-building initiatives invest the rule of law with more

culturally-laden concepts than exist in the Canadian minimalist version.  Rama Mani has

commented extensively on this issue and notes that the "diversity of rule of law

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[80] Rama Mani, "Conflict Resolution, Justice and the Law:  Rebuilding the Rule of Law in the Aftermath of
Complex Political Emergencies", *International Peacekeeping* 5, no. 3 (Autumn 1998), 9.

[81] William R. Slomanson, *Fundamental Perspectives on International Law*, 4th ed., (San Diego: Thomson
West, 2003), 75.

programmes reflects the divergent mandates, interests and agendas of donor agencies as much as they do the needs of the country in question".  Mani also notes that rule of law "means different things to different actors and is furthered under quite different banners - human rights, development, investment, security, even drug control"[82] and concludes, correctly, that a "legal system which is not built upon local traditions and which is not congruent with history and development of the society is unlikely to take root and may prove unsustainable."[83]

That such difficulties are encountered is

in its many unusual particulars".[86]   However, as described earlier, the Canadian version

of the rule of law as set out in a variety of government policy iterations since at least the

1940's, does not contain these additional elements.   Human rights, for example, are

considered to be a distinct concept.   This is readily apparent in both *Canada and the*

*World* and *Canada's National Security Policy*, each of which listed the rule of law and

human rights separately in their iteration of four preeminent Canadian values.   It is

important to make this distinction when assessing the validity of Canadian policy that

speaks of the promotions of values abroad.   The 2004 Strategic Assessment observed, for

example, that "[n]otions of freedom and personal liberty that are a basic assumption of

Anglo-American democratic political culture do not fit so well in an environment, such as

traditional Islamic or Asian societies where communitarian values are more strongly

embraced."[87]


This has also been the subject of comment by Clarence J. Dias who refers to the

"Asian values" thesis of former Singaporean Prime Minister Lee Kuan Yew.   In the

Asian values concept, human rights must be considered in a context of the "prioritization

of social stability and public order over Western-style democracy".[88]   In short, human

rights, as a value, is by nature culturally-laden and less easily the subject of promotion

abroad.   In order to promote such a value, one has to attempt to influence the existing

cultural values of another state.   In promoting the rule of law, in the Canadian version,

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[86] *Ibid*., 97.

[87] Department of National Defence, *Strategic Assessment 2004* (Ottawa, 2004), 110.

[88] Clarence J. Dias, "Cultures and Values: Human Rights, Workers, Communities, and their
        Environments", Canadian Institute of International Affairs Conference, 1997, 1

one only has to help build *institutions* that promote order and stability, based on a system of predictable laws. The more specific values that those laws then incorporate, can be those of the host state.

Another factor that may obscure the meaning of promoting the rule of law abroad, and detract from its perceived validity, appears to be its confusion with the promotion of another stated value, democracy, in the international arena. Clearly, since the end of the Cold War, efforts to promote democracy internationally have accelerated considerably. In a document endorsed by heads of state at the NATO Istanbul Summit in June, 2003, for example, it was stated that "NATO will enhance its efforts to promote democratic values and foster democratic transformation across the Euro-Atlantic area".[89] Democratization efforts, of course, are not limited to that region and are underway in both Afghanistan and Iraq. However, as with the value of human rights, transplanting democracy in foreign soil involves more than building institutions and certainly entails much more than organizing elections.[90] It requires a fundamental shift in philosophy among a people and its governing elite. Such efforts do raise the spectre of the West attempting to remake the world in its image, despite older cultures and traditions.

In addition to an essential shift in political philosophy, efforts to transplant democracy may fail for more practical reasons. As Roland Paris has pointed out, in an already polarized society, the holding of elections and encouragement of political activity

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[89] North Atlantic Treaty Organization, *Istanbul Summit Reader's Guide* (Brussels: NATO Public Diplomacy Division, 2004), 66.

[90] Fareed Zakaria, "Elections are Not Democracy", *Newsweek*, February 7, 2005, 30.

can create even further polarization, resulting in "a number of separated, potentially hostile communities".[91]

Although the rule of law and democracy are often closely linked, they are not necessarily inseparable.  It has been observed that there are a number of newly emerged democracies in which there exist serious lapses in the application of the rule of law.[92]  It has also been noted, conversely, that there exist examples, such as Singapore and Hong Kong, where "nondemocratic, nonliberal countries … have enjoyed the rule of law"[93], although a lack of democracy does create certain obstacles to its implementation.[94]  In his detailed study, *China's Long March Toward Rule of Law*, Randall Peerenboom points to China's nondemocratic form of government and its "interpretation of rights that emphasizes stability, collective rights over individual rights and subsistence as the basic right rather than political and civil rights" but suggests that there is evidence that China is, nevertheless, in the process of transforming to "some form of the rule of law".[95]

Unfortunately, the linkage between democracy and the rule of law is prevalent.  In a 1994 Report of the UN Secretary-General entitled "Strengthening the Rule of Law", for example, a number of essential elements were identified as necessary to entrench the rule

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[91] Roland Paris, "Peacebuilding and the Limits of Liberal Institutionalism", *International Security* 22. no. 2 (Fall 1997), 75.

[92] Marc F. Plattner, "Liberalism and Democracy: Can't Have One Without the Other", Foreign Affairs 77, no. 2 (Mar/Apr 1998), 1-7.

[93] Peerenboom, *China's Long March toward Rule of Law*, 569.

[94] *Ibid*., 21.

[95] *Ibid*., 3-8.

of law;  these included, among many others, "a strong electoral system (which assures that the will of the people shall be the basis of authority for government, and periodic genuine elections)".[96]  It is noteworthy, however, that as with the value of human rights, Canadian policy, including both *Canada and the World* and *Canada's National Security Policy*, articulates democracy and the rule of law separately as values to be promoted. Such separation is essential for the success of promotion and implementation of the rule of law abroad.  As Rama Mani suggests,

> A minimalist conception of the rule of law could be consistent with a wide variety of political systems besides liberal democracy, such as a theocracy or monarchy which follow certain regular procedures in order to rule efficiently.[97]

Another of the "four key values" that *Canada's National Security Policy* suggests may be deployed in failed or failing states is that of pluralism.   The frailty of this approach is succinctly described in the 2004 Strategic Assessment:   "The North American idea of the multi-ethnic society is not warmly welcomed in Central Europe or the Balkans where national identity is still strong, and ethnic-based warfare is a recent memory."[98]  Nossal has also commented on the aspirational aspects of the promotion of values in this regard:

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[96] United Nations General Assembly, *Strengthening the Rule of Law – Report of the Secretary General,* Document A/49/512, 14 October 1994.

[97] Rama Mani, "Conflict Resolution, Justice and the Law …", 9.

[98] *Strategic Assessment 2004*, 110.

The promotion of Canadian values also means that Canadians must be committed to trying to change the minds of those hundreds of millions of people who are deeply intolerant of those who do not share their own ethnicity, religious beliefs, language, culture, nationality. It also means that Canadians must be willing to change the behaviour of those [who] are fearful or hateful of others, often with sufficient intensity that they are moved to kill or maim their enemies.[99]

Although Nossal is referring here to the promotion of values generally, his comments seem more relevant to efforts to promote values such as human rights and pluralism than to the rule of law. Efforts to promote the rule of law should seek to establish the conditions in which societies may govern themselves effectively, with the necessary institutions to mimimalize violence as a means of conflict resolution. In this context, it is more fundamental and immediate to a disrupted society's needs. It is less about imposing a Canadian standard or way of life and more about providing a society with the basic tools to re-establish stability and order.

Michael Ignatieff also concludes that "[o]ur success with making multilingualism, bilingualism, multi-ethnicity, aboriginal rights work is not necessarily or automatically transportable to other countries."[100] Our successes, such as they are, in these regards are based on Canada's unique historical experiences, including its founding by two states and its continuous population by immigrant influxes. One could agree in this regard with the critics who find an element of conceit or moralism in the suggestion that Canadian values, promoted abroad, is a solid objective within foreign, defence or security policy.

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[99] Nossal, "The World We Want?…", 9.

[100] Ignatieff, "Peace, Order and Good Government: A Foreign Policy Agenda for Canada", 9

One could also agree with critique regarding the level of commitment evident to date in nation-building efforts. As has frequently been pointed out, far-reaching institutional reform takes considerable time:  time to train the major actors within the institutions, such as the judiciary, the police, correctional agencies and bureaucrats.[101] Just as frequently, it is pointed out too, that most states are reluctant to take on long-term responsibilities in nation-building and related missions.[102]  Although nation-building exercises have been underway in Bosnia since the signing of the Dayton Agreement in 1995, such endeavours are the exception.  If rule of law promotion, in the form of nation-building, is to maintain credibility, states, including Canada, will need to demonstrate the commitment and resolve to see these efforts through in a longer term.

*b. Economic Reconstruction,  Globalization and the Rule of Law*

Another aspect of nation-building, as a means of assisting failed and failing states, as well as developing states, in alleviating or avoiding the "root causes" of the threats in the modern security environment, such as poverty and discontent, are efforts founded in the rule of law to help in the reconstruction local economies and their adaptation to the realities of globalization.  Michael Ignatieff has spoken of an "emerging crisis" in which as many as 500 million to a billion people are bypassed by globalisation due to the

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[101] Carothers, "Rule of Law Revival", 96.

[102] Diehl, "The International Community and Disrupted States", 47.

inability of their states to benefit from globalisation, technology, science and progress.[103]

Ignatieff also suggests that

> globalisation depends on the creation of stable good government. You can't have equitable distribution of the benefits of globalisation, you can't have political control of the forces of globalisation unless you have a government with the capacities and the resources to inflect the forces of globalisation in favour of your population.[104]

In order to achieve the type of "good government" with the capacity to deliver what Ignatieff suggests is required, rule of law must be achieved in two related aspects. First, it is necessary to address the "[i]nstitutionalized official corruption, nepotism, criminalised economies (that is, the illegal sale of natural and cultural resources, narcotics and arms), racketeering and black markets [which] could retard economic recovery and development"[105]. Second, it is necessary to build a rules-based market economy which permits the state to participate effectively in international commerce.

As is often pointed out, organized economic crime thrives in environments of uncertainty and upheaval, particularly where the criminal organizations are capable of capitalizing on advances in modern technology, including communications and transport, and of taking advantage of mass migrations and social inequities in dysfunctional states.[106] Combatting such activity is of course, complex. However, such efforts must

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[103] Ignatieff, "Peace, Order and Good Government: A Foreign Policy Agenda for Canada" , 8.

[104] *Ibid*., 7.

[105] Mark Plunkett, "Rebuilding the Rule of Law" in *From Civil Strife to Civil Society – Civil and Military Responsibilities in Disrupted States*, 207.

[106] Adrien Whiddett, " Policing Civil Disorder" in *From Civil Strife to Civil Society – Civil and Military*

necessarily commence with the re-establishment of effective security sector components, such as competent and incorrupt investigative bodies, a trained and impartial judiciary, and effective correctional services.   These types of efforts have been part of international peace operations and, as indicated earlier, the most concentrated and sustained efforts in this regard have been reforms in Bosnia.

Organized crime is not the only challenge, however.   In his recent study of Kyrgyszstan, a Central Asian former Soviet republic, Brian Gill noted that a central aspect of rule of law was absent:   the current legal framework constrained only the citizens and did not require the state to constrain itself.  The accountability necessary in the rule of law was missing.  As a result, he found it was normal for public officials to pay for appointments and accept bribes, and for tax and customs officials to steal money. In this environment of corruption, he observed, the investment necessary to re-establish a viable economy was deterred.[107]   In this context, Gill quotes the former US Ambassador to Turkmenistan as stating that there are three requirements for attracting foreign direct investment: "the rule of law, the rule of law and the rule of law."[108]   The rule of law will not, however, emerge unaided in a corrupt and chaotic environment.  It does require the assistance of other states through the nation-building efforts referred to earlier.

_Responsibilities in Disrupted States_, 329.

[107] Brian Gill, "Aiding the Rule of Law Abroad: The Kyrgyz Republic as a Case Study", _The Fletcher Forum of World Affairs_ 29, no. 1 (Winter 2005): 146.

[108] _Ibid._, 147.

Beyond the challenges of dealing with corruption, there are the challenges of establishing an environment in which the state can avoid, as Ignatieff notes, being by-passed by the benefits of globalisation.   Establishment of a rules-based economy is essential in this regard.  As Thomas Carothers has pointed out,

> Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third party enforcement.  Without the rule of law, major economic institutions, such as corporations, banks and labour unions would not function and the government's many involvements in the economy - regulatory mechanisms such as tax systems, customs structures, monetary policy and the like - would be unfair, opaque and inefficient.[109]

Carothers also observes that "economic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that international investors demand."[110]   Carothers' observations are supported by Peerenboom's study of China's modern transformation.   Peerenboom posits that "[o]ne of the main motivating factors behind China's turn toward rule of law has been the belief that legal reforms are necessary for economic development."[111]   He also notes that a 1997 World Bank report claimed that "countries with stable government, predictable methods of changing laws, secure  property rights, and a strong judiciary saw higher investment and growth than countries lacking in these institutions".[112] Significantly, from the perspective of efforts to promote the rule of law abroad, Peerenboom also noted that the demand for these types of rule of law reforms came from

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[109] Carothers, "Rule of Law Revival", 96

[110] *Ibid.*, 98.

[111] Peerenboom, *China's Long March toward Rule of Law*, 450.

[112] *Ibid.*, 450.

many sectors of Chinese society: government entities, administrative agencies, courts, academics, interest groups and individuals.[113] This indicates that even in a nondemocratic society, in which an open, market economy is a new concept, the value of rule of law as a practical philosophy has not only been recognized, but actively applied. Economic globalization, it appears, assists in making rule of law as a concept more universal; the same could not as easily be said of other expressed values, such as democracy, human rights and pluralism.

Of course, promotion of rule of law in other states, to assist in their economic reconstruction and to aid in their participation in the global economy, is by no means motivated only by altruism. In the Chinese context, Peerenboom noted, "[f]oreign investors, particularly multinational companies and investors from Western countries, were among the most vocal in calling for the rule of law… A system in which the rules are not made public, administrative agencies interpret regulations inconsistently, and judges are corrupt is both foreign and frightening."[114] Obviously, there are economic advantages for Canada and other developed nations in promoting investment and the emergence of stable, rules-based markets. As well, based on the "root cause" theory, international security is enhanced where dysfunctional states and economies can be recovered and reformed. However, Canadian policy has not, contrary to some critics charges of hypocrisy, been coy in linking efforts to promote the rule of law to Canadian economic interests by assisting in disrupted or developing countries. Lloyd Axworthy,

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[113] *Ibid.*, 154.

[114] *Ibid.*, 476.

writing in 1997, in words reminiscent of the foreign policy statement two years earlier,

stated

> While the trading relationship with the United States is our most significant,
> Canada has been and will continue to be active in securing new markets for
> Canadian goods and services and will remain a strong advocate for progress on
> global issues in support of economic development.  Through such initiatives as
> the Free Trade Area of the Americas … and the Asia Pacific Economic Co-
> operation …, Canada will increase its dialogue with developing countries.  From
> the perspective of building alliances with these countries, technical assistance
> from Canada – for example to those who accede to the World Trade Organization
> … - will be an increasingly useful policy instrument to strengthen an
> understanding of, and commitment to, the rules-based trading system and to
> promote Canadian ideas and influence.[115]

It should be noted, however, that Canadian, and indeed, international efforts to

promote liberal market economies, is not universally accepted as an appropriate

approach.  Roland Paris, for example, suggests that "[c]ontemporary peacebuilding

practices seem to be rooted in the false assumption … that natural evolution of

developing states is toward a market democracy".[116]  Paris also suggests that, as with

democracy, capitalism encourages conflict and competition.[117]   In response, however,

one could point to Peerenboom's study and note that a rules-based economy does not

necessarily imply full capitalism.   With respect to competition and conflict, one could

also suggest that if the state institutions, and economic infrastructure, including laws

governing banking, patents, contracts and property rights are constructed carefully, on an

appropriate timetable, the seriousness of the competition and conflict that may result will

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[115] Axworthy,  "Canada and Human Security: The Need for Leadership", 191.

[116] Roland Paris, "Peacebuilding and the Limits of Liberal Institutionalism", 57.

[117] *Ibid.*, 75.

be minimalized and mechanisms would exist to arbitrate and resolve them. Paris' arguments do, however, again underscore the necessity of applying rule of law technique in nation-building in a manner sensitive to the values, customs and history of the host state if such efforts are to be successful.

## **The Rule of Law and Soft Power**

Although Canadian interests, such as domestic and international security and the facilitation of international trade and domestic prosperity, can be fostered through the promotion of the rule of law in other states, there is perhaps another, broader strategic reason for recent policy iteration with respects to promoting such values. It is in this context that certain elements of the criticisms of the values approach have merit. In his discussion of "soft power", Joseph S. Nye, Jr. noted that the "changing nature of international politics has also made intangible forms of power more important. National cohesion, universalistic culture and international institutions are taking on added significance" and that a "state may achieve the outcomes it prefers in world politics because other states want to follow it …".[118] In the modern security environment, where traditional military power has lost some of its influence to other approaches, Canada may be "seizing the moment" to re-establish its profile as a middle power, much in the way it employed peacekeeping in previous decades.

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[118] Joseph S. Nye, Jr., "Soft Power", *Foreign Policy* 80 (Fall 1990), 164-166.

Lloyd Axworthy was clearly influenced by Nye's approach. Writing in 1997, Axworthy observed that

> A country's image is key to the use of soft power. An attractive set of values and an image as a trustworthy partner encourage other countries to consider and weigh our views. In a soft power context, Canada benefits from its status as an open, industrialized society where citizens enjoy a high quality of life and protection of their human rights.[119]

It was these same attributes that were said to have given Canada credibility in its peacekeeping efforts, particularly in the 1960's and 1970's. It had no history as a colonial power, it was seen as relatively impartial, and had a record of its own as a peaceful, ordered society. However, as Jennifer Welsh has noted, recent changes in the international environment has brought into question both Canada's role in peacekeeping and what it means to be a middle power and "has given Canada a new kind of identity crisis – one that is focused externally rather than internally."[120] Within this context, Welsh suggests, Canada has been looking for an "alternate vocation" or vision, such as soft power, which contributes to a nation's ability to influence the agenda of international institutions and political debate. The influence, in this context, according to Ms. Welsh, "derives not from the size of Canada's military but rather from the attractiveness of Canadian values: human rights, democracy, the rule of law and peaceful resolution of disputes."[121]

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[119] Axworthy, "Canada and Human Security: The Need for Leadership", 193.

[120] Jennifer Welsh, *Canada in the 21st Century: Beyond Dominion and Middle Power* (Toronto: Canadian Institute of International Affairs, 2004), 2.

[121] *Ibid*., 6.

Denis Stairs does not appear to subscribe to Canadian attempts to avail itself of soft power theory in this manner. He has suggested instead that Canadians

> may need … to consider the possibility that their rhetorical displays – delivered in a style at once tiresome and self-serving – may actually reflect their declining influence and growing incapacity in the world at large. For in foreign policy, as in some other dimensions of life, an ostentatious claim to superior virtue can be the last refuge of the impotent.[122]

Stairs would be correct, of course, if Canada did nothing but preach about its values, including the rule of law. As Ms. Welsh points out, it is "worth remembering that Nye has never advised that soft power works in a 'stand-alone' fashion" and that having attractive values is not enough; Canada must also be able to disseminate and implement them.[123] Canada has been an active participant in various nation-building activities to promote the rule of law "on the ground" and recent iterations of policy indicate that it continues to consider this as one means of addressing problems in the modern security environment. There is, nevertheless, a valid caution in the observations of Stairs and Welsh. The international understanding of nation-building and its complexities have now reached a level of sophistication such that it is impossible to ignore the requirement for long-term, committed, multi-faceted efforts to restore and maintain institutions based on the rule of law. If sufficient resources are not made available to pursue the rule of law in practical terms, beyond the immediate restoration or imposition of law and order through peace operations, efforts to achieve influence through soft power promotion of rule of law will certainly begin to sound hollow and unconvincing.

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[122] Stairs, "Myths Morals and Reality in Canadian Defence Policy", 240.

[123] Welsh, *Canada in the 21st Century: Beyond Dominion and Middle Power*, 7.

It should also be acknowledged that Canada's activities in respect of rule of law promotion within other states have not yet been of the type that demonstrate a clear ability to promote the "minimalist version." The multi-national efforts in Bosnia, for example, to train judicial officers, to restructure law enforcement agencies and retrain their officers, and to reform correctional services were part of a much more comprehensive effort of "democratization" in the Western European mode. As well, promotion of the rule of law in China, through activities such as reciprocal visits of the most senior judicial officers of each state, and support to the development of China's commercial and environmental laws, have very much been linked to efforts to promote human rights in that country. [124] The question remains as to whether Canadian officials, particularly those in political office, will have the resolve to underwrite the promotion of the rule of law in the minimalist version, in a manner which accounts for locals values, customs and traditions, where those values, customs and traditions may be offensive to certain Canadian domestic sensibilities. For example, one may expect some reluctance to assist in the establishment of a judicial system which did not recognize the rights of women to an appropriate degree.

## Conclusion

Critics of the recent "values approach" in foreign, defence and security policy have challenged the validity of the values espoused, have suggested that the government

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[124] Government of Canada, Canadian Embassy Beijing, "China-Canada Relations", available at http://www.beijing.gc.ca/bejing/en/navmain/canada/596/index.htm.

is masking its pursuit of interests behind talk of values, and have characterized the notion of promoting Canadian values abroad as nothing short of conceit, hypocrisy and moralism. In large measure, however, their critiques in these three areas have missed the mark as far as the rule of law is concerned. First, as discussed earlier in this paper, if there is a true, enduring Canadian value, it is the rule of law. Further, it is a value that is, in its minimalist version, one that has international recognition and is increasingly attractive, for practical reasons, in states where it may not have previously had a strong foothold. Second, an examination of Canadian policy iteration since post-Second World war period indicates that in the context of promoting both international rule of law, and the of rule of law in other states, Canadian officials have not been loathe to acknowledge that rule of law is useful as a technique, rather than merely as philosophy, in pursuing concrete interests. There is not compelling evidence, as has been suggested, that it has been used to mask the pursuit of "baser interests". Finally, promotion of the rule of law abroad is more than posturing and moralism – it advances Canadian security and economic interests and may, if pursued effectively, be an element of a larger "soft power" strategy.

In concentrating on the values as a group, some critics have failed to distinguish effectively between them and have failed to assess their merits individually. In doing so, they have missed a most central point: what makes the rule of law a more effective value within foreign, defence and security policy is the fact that the version of the rule of law articulated in Canadian policy is much less culturally-laden and thereby potentially more neutral and transferable than other expressed values, such as democracy, human rights

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and pluralism.   Promotion of the rule of law can advance both domestic and international interests, but it must be promoted, or "exported" in its simplest, minimalist form, divorced from other values and applied in a manner which accounts for local values, history and tradition.  Once the rhetoric is set aside, this will be one of the real challenges in the modern security environment.

It would be unfair, however, to suggest that Stairs and others have contributed nothing to the debate.  They have clearly indicated the dangers to national credibility of espousing policy that is not supported by the allocation of resources and the commitment to long-term engagement. While Canada *has* contributed to the re-establishment of the rule of law where it has been most needed in recent years, it has also, through its policy articulation, heralded that such efforts will be central to Canadian policy.  It remains to be seen whether the expressed intentions will be fully realized.   If they are not, and sufficient resources and commitment are not forthcoming, Canada and other states will not be able to sustain significant progress in promoting the rule of law abroad and will risk, what Brian Gill has called "the undesirability of leaving hollow institutions of liberalism instead of deep-seeded reforms."[125]

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[125] Gill, "Aiding the Rule of Law Abroad:  The Kyrgyz Republic as a Case Study", 151.

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