THE RULE OF LAW INITIATIVE AT THE UNITED STATES INSTITUTE OF PEACE

Charles Duryea Smith

Thank you so much, Valerie, for the invitation to join you today. I have chosen what I think is an important part of the larger subject of Peace and Democracy: The Link and the Policy Implications; it is the rule of law.

In 1984, Congress passed the United States Institute of Peace Act. In early 1986, the presidentially-appointed, Senate-confirmed Board of Directors met and hired the first staff, including me as general counsel. Four years later, in 1990, the Board created the Rule of Law Initiative and turned to me, as the lawyer on the staff, to direct it. Advocating for this program at this free-standing federal educational institution were a number of your colleagues: the board chairman, John Norton Moore, and board members Max Kampelman, Richard Schifter, and Morris Leibman, all lawyers; and historians Elspeth Rostow and Allen Weinstein. I would like to use my time today to describe the development of this program and indicate where it stands today. In so doing, I will point to certain historical changes and philosophical issues that are directly reflected in the life of the institute and this program and that may help inform our discussion today about war and peace and the role of democracy in moderating, if not ending, international war and creating more peaceful nations.

When the Institute’s Rule of Law Initiative began, George Bush was President, Mikael Gorbachev led the Soviet Union, and the Berlin Wall had fallen, but the Cold War was still not history. In hindsight, we know now that we were in the endgame of the Cold War. But no-one knew this then for sure. This is the historical context in which the United States Institute of Peace designed its Rule of Law Initiative.

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Interestingly enough, when the Board decided to establish the Rule of Law Initiative — a legal program that would focus on changes happening in both the communist world and a number of third world countries — they encountered a classic dilemma as the Cold War died: what I would term the clash between the Hans Morgenthau, Henry Kissinger power politics view of the world and the normative view of change exemplified by the law. Taking the Cold War as the post-World War II exercise of conventional power politics, one could see that normative or value-driven rule of law concerns would not be on that table. Yet, it was precisely those concerns — captured by the phrases peace with justice and peace with freedom and including civil and human rights as well as democratic forms of governance — that informed the Board’s view that a rule of law initiative was not only timely but was a necessary component of a new federal institution devoted to exploring, as stated in the Institute’s enabling act, the means to promote international peace and the resolution of conflicts among the nations and peoples of the world without recourse to violence.

So, when the Initiative was set up, I faced not only the immediate question of how to allocate enough time from my principal role as general counsel in order to get the program off its feet but also the corollary question of identifying an individual who could help get it going. I was fortunate in attracting Neil Kritz as the rule of law staffer, and today he is the director of the Rule of Law Initiative. Kritz brought energy, Washington experience, good contacts in the human rights community, and a particular view of the rule of law that influenced directly what we did together and my thoughts today on where this type of initiative might go. Specifically, Kritz has deep interest in international law and in the question of how law can play a role in developing peace out of wartime situations.¹

As we developed it, the Rule of Law Initiative has two basic parallel lines or conceptual maps. First, is the concept of negative peace: peace as the absence of war. This work evolves directly out of armed conflict. Second, is the concept of positive peace: peace as quality of life. This is what Fareed Zakaria describes as the content of liberal democracy in his recent essay in Foreign Affairs entitled The Rise of Illiberal Democracy. Along the lines of his essay, it is interesting to note that, while the Rule of Law Initiative did not establish a separate category for the electoral side of democracy-building, its programming ended up

distinct from the election programs sponsored by the United States Agency for International Development or the National Endowment for Democracy. Let me now turn to both views, negative and positive peace, and illustrate how they work in the Institute’s Rule of Law Initiative.

Negative peace, peace as the absence of war, begins out of war. Its predicate is violent conflict — whether international or within a state. It is important to keep in mind that, today, some ninety percent of violent political conflict is occurring within states, not between states. That is, the international world is essentially peaceful; domestically, the world is at war. This domestic violence includes state violence against people: the kind of violence spelled out so movingly by R.J. Rummel in *Death by Government.*2 It includes Cambodia, Haiti, Rwanda, Zaire, and it includes the lawlessness of Central America: post-conflict violence against the populace by gangs of soldiers and guerrillas uncontrolled by at best rudimentary police forces and legal institutions in El Salvador, Nicaragua, and Guatemala.

At the Institute, the most prominent negative peace project is called *Transitional Justice.* I believe that this is the project which to date has defined the Institute’s Rule of Law Initiative. Transitional justice addresses the question of how a formerly totalitarian society that is becoming democratic can judge the actions of the former government. The principle, in psychological terms, is that, unless issues of the past are brought to the surface and confronted, the country will be unable to come to grips with its history. The complementary principle is that countries emerging from totalitarian pasts need not feel isolated, as if no-one else has ever dealt with such complex problems. The project in 1995 produced a three-volume edited study, published by the United States Institute of Peace Press, entitled *Transitional Justice: How Emerging Democracies Reckon with Former Regimes.* Volume One, *General Considerations,* has a number of background essays on such subjects as criminal and non-criminal sanctions, moral responsibility, victim compensation, and commissions of inquiry. Volume Two, *Country Studies,* offers case studies of post-World War II transitional justice in twenty countries from Germany and France after Nazism to South Korea, Argentina, Uganda, Czechoslovakia, and Russia. Volume Three, *Laws, Rulings, and Reports,* includes laws and reports for commissions of inquiry and on such topics as privacy protections and prosecutions. In my mind, it is the most important because it contains original material. In draft, these volumes were used in creating the South African truth commission, among others. In addition, a number of Institute grants have supported the work of such commissions

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and their academic advisors. A principal governmental mechanism has been selective prosecutions of the most serious offenders of human rights — the torturers, the Eichmanns — and through truth commissions the creation of histories where there had been suppression and silence, as in South Africa today. I believe this represents the negative peace foundation for the rule of law. The work continues with impact and immediacy, as Neil Kritz is in Bosnia today meeting officials about steps the nations of the former Yugoslavia might take to establish a joint truth commission.

The second activity for the Rule of Law Initiative has focused on positive peace. Zakaria lists components of this under the heading liberal democracy. They include a political system marked not only by free and fair elections but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property. This latter bundle of freedoms he writes might be termed constitutional liberalism and is theoretically different and historically distinct from democracy, which he views as identified by elections, not by the content of individual liberties and protections. The Institute has supported this strand of work, the positive peace side, through grants for American scholars and practitioners assisting new democracies in constitution-drafting and in judicial development and for a range of scholars from the United States and around the world who are looking at general and quite specific issues surrounding the rule of law in theory in specific countries. In addition, individual scholars and diplomats such as Louis Sohn, Max van der Stoel, and Bereket Habte Selassie have won fellowships for a year of work at the Institute focusing on rule of law issues. It is particularly important, I think, to note the World Bank, surely an important bell-weather indicator for important change in international policies, is becoming increasingly focused on positive peace questions beyond a strictly economic appraisal of its work. Perhaps the best example of how the rule of law is taking root is the Bank’s interest in factoring problems of corruption into its lending and review policies. This recognition cannot help but make the wider range of rule of law matters increasingly central to securing a world at peace with justice and freedom.

In closing, I’m pleased to report that, as we look back on the Cold War and forward into the new millennium, the Rule of Law Initiative at the United States Institute of Peace has become an important American

actor in rule of law matters, both negative and positive peace, with special expertise on commissions.\textsuperscript{4}

\textsuperscript{4} I would recommend that any of you interested in grant or fellowship support for work in the area contact the Institute's headquarters in Washington, D.C. The phone number is (202) 457-1700.