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The ICJ, the United Nations System, and the Rule of Law

Dicey famously identified three principles which together establish the rule of law:

> "(1) the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power; (2) equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; and (3) the law of the constitution is a consequence of the rights of individuals as defined and enforced by the courts."

How then, in this national model, should an "international law of rule" look? There should be an executive reflecting popular choice, taking non-arbitrary decisions applicable to all, for the most part judicially-reviewable for constitutionality, laws known to all, applied equally to all, and independent courts to resolve legal disputes and to hold accountable violations of criminal law, itself applying the governing legal rules in a consistent manner.

One has only to state this set of propositions to see the problems. There is manifestly no world government system into which the model could most easily fit. (Interestingly, there existed, in the 1950s, an "international rule of law" movement, which saw the recently established United Nations system as a precursor to a world government and the achievement of an "international rule of law"). The UN General Assembly is indeed representative of the international community, with each state having one vote. But the "executive" of the UN consists of 15 members, 5 of whom

are “permanent” and hold a veto, and 10 of whom are broadly representative of the membership as a whole. These latter serve a rotating two-year term. Kofi Annan, among others, has pushed for a restructuring of the Security Council (for broadly “rule of law” reasons), but the many difficulties in achieving this are not yet resolved.

The realities of power, coupled with the promotion of their own interests and the protection of other favoured states, means that the decisions of the Security Council, while striving for a principled application based on Charter requirements, are subject to “the achievement of the possible”. That in turn means that Security Council decision-making is not always regarded as “applicable equally to all”. Arguments about consistency in the application of sanctions to different states said to be violating the Charter illustrate the point.

Are these decisions judicially reviewable for non-arbitrariness and for constitutionality? This is one of the great unanswered questions: The International Court of Justice is a main organ of the UN and its principal judicial organ. Whether it may judicially review the decisions of other organs, taken within the field of their allocated competence, is not yet fully determined. The issue came to the forefront in the *Lockerbie Cases*, where Libya asked the Court to find invalid certain Security Council decisions regarding sanctions in the face of a refusal to hand over to the United States or the UK the persons indicted for the downing of Pan Am Flight 103. The case was withdrawn by Libya (when the matter moved instead to a “Scottish Trial” of these persons in The Netherlands) before the matter could be resolved by the International Court.

The law that the ICJ applies is certainly known to all to whom it is applicable, being international law generally (with all the treaties, judicial decisions, and international customary law that that entails), with, of course, the Charter in centre stage. The Court is indeed both independent and representative — Judges being nominated nationally but elected by the General Assembly and the Security Council, under terms whereby their conditions of service may not be altered during their tenure. Although the Court reports annually to the General Assembly on its year's work, the judicial decisions are subject to no comment (still less rebuke) by the Assembly or its Members. There is a proper separation of powers, and the Judges of the ICJ are mercifully free of any pressures from their national governments. That the Court applies the law consistently and impartially is doubted nowhere.

Looking to another "rule of law test", the International Court can, and does, resolve disputes between the Member States. The Court contributes to preventing conflicts arising in the first place, to addressing post-conflict situations, and to aiding reconciliation, depending on the circumstances of the case in question. Since 1946, the ICJ has, through its Judgments, helped maintain and restore friendly relations between countries and prevent tensions from degenerating into military conflict. We have helped stop good inter-state relations deteriorating with decisions in cases such as *Kasikili/Sedudu Island (Botswana/Namibia)* and *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*. In other cases, there was already fighting on the ground at the time the case was brought to the International Court. This was the situation in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria*). Given that 1800 kilometres of land frontier, the vast Bakassi Peninsula, and the entire maritime delimitation offshore were all under litigation, the

political and economic issues at stake for both of the States were enormous. With some assistance from the Secretary-General, the Court's Judgment — in which the Bakassi Peninsula was stated to belong to Cameroon — is being implemented step by step. Good relations are resumed and the military have stepped back. Then there is the situation where a case comes to the Court too late for it to assist in stopping the fighting, but in time, perhaps, for judicial input to contribute to the process of conflict resolution. This occurred with the case concerning *Armed activities on the territory of the Congo (Democratic Republic of Congo v. Uganda)*. The judgment on the merits issued last December contains detailed and objective findings which helped resolve at least some of the intractable issues of fact and law in the Great Lakes region. We will see, after the Congo elections, if they are able to use the Court's favourable findings to negotiate a settlement that assists in drawing a line under the Congo-Uganda hostilities of a few years ago.

Contrary to a widespread misconception, the Court's Judgments are both binding and almost invariably complied with. Out of the 91 contentious cases that the Court has dealt with since 1946, only 4 have in fact presented problems of compliance and, of these, most problems have turned out to be temporary.

But the Court is restricted, by its Statute, to inter-state disputes. The criminal behaviour of individuals (that is, criminal under international law, being war crimes, crimes against humanity or even genocide) are beyond the competence of the ICJ. It is for that reason that we have seen in recent years the establishment of the international criminal courts and tribunals. The International Criminal Tribunals for the former Yugoslavia and for Rwanda were set up by the Security Council to render

accountable those individuals charged with violating the laws of war and humanitarian law in those countries. They are subsidiary organs of the Security Council and are doing important work, but they have now entered their end game and in a few years will be wound up. There is also the permanent International Criminal Court, which has jurisdiction to prosecute individuals responsible for the "most serious crimes of international concern". It is currently investigating alleged crimes in the Democratic Republic of the Congo, Uganda, and Sudan. The ICC is established by treaty and is technically not a UN Court at all, though it is in a close relationship with the UN and with the Security Council in particular.

If the international rule of law requires a consistency in the application of the law, do these different courts present the risk of "fragmentation" — i.e., different courts applying the law differently? Of course, in a national system there are many different courts so that risk is always present — but there is a hierarchical structure which is lacking in international relations. Even though the ICJ is generally regarded as being "at the apex" as the only court of universal jurisdiction and as the UN's principal judicial organ, it is not "the final Court of Appeal" for all the others. In my view, the risk of fragmentation is manageable and can largely be avoided by forming cordial relationships with the various international courts and tribunals involving the regular exchange of information and open lines of communication. To date, the general picture has been one of these courts seeing the necessity of locating themselves within the embrace of international law, and desiring to follow the Judgments and Advisory Opinions of the International Court of Justice.

A more disturbing element, in my view, is the ease with which it is accepted by states as a "given" that recourse to the International Court by states to settle their disputes must always continue to be based on consent. The Statute of the Court is annexed to the Charter and each of the 192 Member States of the United Nations is thereby a party to the Statute. Of these, 67 states have accepted the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute. Furthermore, approximately 300 treaties refer to the Court in relation to the settlement of disputes arising from their application or interpretation. States can also come to the Court by agreement, ad hoc. Thus the "consent" requirement is mitigated and, in these ways, the Court does play a significant role in international judicial settlement. But the absence of a compulsory recourse to the Court falls short of a recognisable "rule of law" model. There is no hint of change here in all the UN Reform Documents. We could draw a comparison with the European Court of Human Rights and the European Court of Justice.

All in all, it is clear that the domestic rule of law model does not easily transpose to international relations in the world we live in.

What is interesting, however, is that the phrase "rule of law" is today very much in vogue in international relations, though it is far removed from what we have been talking about thus far.

Speaking on the international rule of law, the representative of India recently observed during a debate in the Sixth Committee of the General Assembly:

> "The rule of law is often advanced nowadays as a solution to abusive governmental power, economic stagnation and corruption. It is considered fundamental in promoting democracy and human rights, free and fair markets and fighting international crimes and terrorism. It is also seen as an essential component of promoting peace in post-conflict societies. The rule of law may therefore have a different meaning and a different content depending on the objective it is seeking to achieve".

The EU representative stated that "the respect for the rule of law is a cornerstone for the peaceful coexistence of nations". It seems that the expression "peaceful coexistence" has gained currency beyond its classic usage in Communist phraseology and has been adopted by the broader diplomatic world. And Switzerland, for its part, noted that there was a risk of "mere rhetorical declarations" about the international rule of law and could only suggest that the task of definition be turned over to the UN Secretariat.

We get a sense of the enormity of the scope of the concept of the international rule of law when reading the Outcome Document that resulted from the meeting of more than 170 Heads of State and Government at United Nations Headquarters during the 2005 World Summit. This document is essentially a statement on everything that the representatives of the international community can agree on. In that light, it is rather impressive. It covers topics as broad-ranging as domestic resource mobilisation, debt, education, HIV/AIDS, migration, terrorism, refugee protection, and reform of the UN Secretariat. There is a specific section on rule of law in which the Heads of State and Government recognise the need for universal adherence to and implementation of the rule of law at both the national and international levels by, *inter alia*, supporting the establishment of a Rule of Law Assistance Unit within the UN Secretariat. This Unit would strengthen UN activities to promote the rule of law, including through technical assistance and capacity-building. It was expected to

adopt concrete measures such as establishing independent national human rights commissions, reintegrating displaced civilians and former fighters, and increasing the presence of law enforcement officials. You can readily see how conceptually dispersed is the idea of "the rule of law". More than one year after this specific request, the Unit still does not exist and there have been recent calls by a number of states for the Secretariat to take action to create the Unit as soon as possible. For once, the delay seems to be with the UN rather than with the Member States, and just perhaps reflects a professional scepticism.

Within the discrete Rule of Law section of the Outcome Document there is also explicit recognition of the International Court's role in adjudicating disputes between states and calls on states to consider accepting the Court's jurisdiction and to consider means of strengthening its work. This raises the question whether the International Court is expected to do something different from that which it regularly does within the rule of law framework. Or is it simply that the Court's normal work is seen as rule-of-law supporting? At this stage of the debate, the latter view is dominant.

The Outcome Document strongly makes the point that the attainment of the international rule of law is dependent also upon a *national* rule of law situation. I can readily agree that effective national rule of law is necessary for implementing international norms, but in my view it is not sufficient to that end. A stronger rule of law at the national level will result in a greater degree of compliance with the international legal order, but it will not strengthen the international legal order *per se*. Action to strengthen international institutions and to promulgate publicly international

law, enforce it equally and adjudicate international law independently is also essential.

I have mentioned the specific part of the Outcome Document dedicated to the idea of rule of law. But the concept of the rule of law permeates the Outcome Document as a whole and is closely linked to sections on human rights and democracy. The Heads of State and Government stated:

> We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognise that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations, and call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates.[1]

A direct result of this commitment was the decision to create a Human Rights Council, on which I will say a few words. In April of this year, the General Assembly passed a resolution replacing the Commission on Human Rights with the Human Rights Council. The Council is to perform a regular periodic examination of *all* States, regardless of their human rights record. As a former member of the Human Rights Committee, it has immediately struck me that this is precisely what the Committee does. The difference is that the Human Rights Committee is composed of 18 independent experts acting in their personal capacity. The Human Rights Council, in contrast, is composed of 47 state representatives. I am somewhat concerned that that the Human Rights Council — which necessarily will remain a political body — will detract from the — dare I say it — more serious work done by the Human Rights Committee. There is a risk that states will now say that it is enough that they are being examined by the Human Rights Council, and that they will take the examination

[1] A/60/L.1, para. 119.

by the Committee more lightly — an examination that is likely to be deeper and more serious, and less politicised. I have always thought that, as well as engaging in necessary reforms of what does not work well, the UN should nurture that which does work well. I would put periodic examinations by the Human Rights Committee (and indeed, its work more generally) into the latter category.

It may be seen that the Outcome Document reflects the various tensions within the UN Membership. Just as we have been through an era in which cultural and regional particularities of human rights have been contested, it seems that we are now entering into debates as to whether democracy is a universal value or not. The Outcome Document affirms that democracy is a "universal value" and insists upon its importance for the rule of law. It presents democracy not as a form of government, but as a value "based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives".[2] The Document is careful to note, however, that there is no single model of democracy and observes that it does not belong to any country or region.

The Outcome Document has also needed carefully to balance the authority of a state over its own citizens, which it articulates as a duty to protect, with a duty of the international community to act if the state fails in this most fundamental of duties. Thus:

> Each individual State has the responsibility to protect its populations from [such crimes]. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.[3]

[2] A/60/L.1, para. 135.
[3] A/60/L.1, para. 138.

So far as the international community is concerned:

> [It], through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organisations as appropriate.[4]

The realities behind these carefully chosen words lie in an understanding of the issues that divide the UN Membership. Thus, "on a case-by-case basis" means that the Security Council will still decide ad hoc which situations to act on, with the veto power of the Permanent Five members in place. This definitionally falls short of the rule of law principle of "the law being equally applied to all", which is not always achievable in Security Council decision-making.

The phrase "in cooperation with regional organisations" alludes to some recent history in the realm of peacekeeping. Over time peacekeeping has taken on a multitude of forms and has been directed towards a multitude of purposes. Some operations have been enormously successful, some have foundered. Under Secretary-General Boutros Ghali, there began an era of seeking to use regional organizations as an aid to UN action. This idea finds its basis in Article 53 of the Charter, which provides that "The Security Council should, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority". In fact, the first body turned to for this assistance was a body that has never described itself as a regional organization. NATO has always insisted that it is a collective self-defence

[4] A/60/L.1, para. 139 (emphasis added).

organization, but in the Balkans NATO became an international peacekeeper acting, as it itself clearly stated, within the parameter of agreements forged with the UN and essentially under its authority. There continue to be attempts by the UN to utilize, or at least to bless, the use of regional organizations. We have seen ECOWAS involved in peacekeeping efforts in Liberia since 1990 and the African Union, with the full support of the UN, doing what it can in Darfur.

In the height of the Cold War, the Security Council could agree on little. Now, there is a great deal of common interest within the Security Council, which often meets privately in order to avoid having debates that are largely directed at the domestic audiences of the Members. It has sought tools aimed at strengthening the rule of law in conflict and post-conflict situations, both thematically and in country-specific situations. It has engaged in the fight against impunity for international crimes by setting up various ad hoc criminal tribunals. And it has been working to enhance the efficiency and fairness of the sanctions regime. States that are not represented on the 15-member Council may view this range of activities with apprehension and emphasise that the General Assembly is the chief deliberative, normative, policy-making and representative organ. Last month in the Sixth Committee, there were a number of statements by delegations about the need to delineate the responsibilities of the General Assembly and the Security Council as well as comments about the Council itself needing to respect international law. Thus South Africa noted that the binding nature of the decision of the Council when acting under Chapter VII requires that it pays due attention to the rule of law, and always comply with legal norms itself. Others said that the Council should not seek to usurp the Assembly's role particularly in relation to lawmaking. India, for example, firmly

stated that the development of international law is a function of the General Assembly and not the Security Council. Yet the recently, highly active Security Council is engaged in much "law-making" — whether in relation to international criminal tribunals (including the new arrangements under preparation for Lebanon) or otherwise.

There are publicly diverse perspectives also on the implications of the rule of law for the principle of the equal sovereignty of states. South Africa, for instance, urged the Sixth Committee to consider the extent to which international law is respected equally by all states and the "impact of power on the equal application of international law". In contrast, China argued for distinct approaches at the international and national levels. It said that the "democratisation of international relations should be promoted as a prerequisite and basis for the rule of international law" and the "uniform application" of international law should be ensured. But when it turned to the rule of law at the *national* level, particularly in post-conflict situations, China emphasised "full respect for the sovereignty of the countries concerned and no interference in their internal affairs". It stated that the rule of law at the national level should be developed on the basis of a country's particular situation rather than a "one size fits all" formula.

In addition to these rather abstract discussions, very concrete measures to strengthen the rule of law were proposed during the Sixth Committee debate. There was considerable support for the idea of an annual Treaty Event involving not only the signing of treaties, but presentations on best practices and lessons learned regarding the implementation of key treaties under a specific theme each year. It was

suggested that the UN Secretariat could produce model legislation or, as Malaysia suggested, create a database of national implementation laws. There was also a general call for the regular dissemination of information on activities of the General Assembly, international courts and tribunals and the International Law Commission.

As you can tell from this overview of recent developments, there is general agreement about the importance of the subject of the rule of law at the UN these days, but the breadth of the subject is such that it could end up meaning "all things to all people". There is already a gap emerging between the objectives of different delegations. The sponsors of the agenda item, Liechtenstein and Mexico, have been pursuing the idea of promoting cooperation and coordination on the implementation of the rule of law at national and international levels. They emphasise the need to consider the rule of law in a comprehensive manner and would like to have a report by the Secretary-General describing all the activities of the UN in this field, including good offices, mediation and dispute settlement, efforts to facilitate access to international justice and compliance with judgments rendered by international courts and all related capacity-building activities. They are focused on making linkages between the different activities to build the coherent global framework that they perceive as necessary for the rule of law.[5] The United Kingdom, on the other hand, prefers to focus on the re-establishment of the rule of law in post-conflict situations. The EU delegate noted that during times when the need for justice is greatest, the structures for its deliverance may have collapsed or lost their legitimacy. Canada, Australia and New Zealand have identified as a key rule of law element the altogether rather narrower but undoubtedly real topic of the "residual" or "legacy" issues that

[5] UN Doc. A/61/142.

will arise as the International Criminal Tribunals for the Former Yugoslavia and Rwanda complete their work around the year 2010.

As the debate on the rule of law in the United Nations develops, it will hopefully become more focused. The topic is broad and the interests of various states are diverse. The difficulties of transposing the national rule of law model to the international context are also apparent. The concept of the "international rule of law" is still a work in progress.