

International Peace and the Crisis of the Rule of Law

by Kristen Boon*

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There have been numerous issues in international affairs to which we could dedicate an evening of criticism, discussion and philosophy. Honing in on the topic for tonight was a bit like choosing a coffee at Starbucks: we wanted something with punch – something that would wake everybody up – but we wanted to avoid all the steam and complex labeling that is common to international pundits and coffee addicts alike. So we went for the basics - the plain cup of coffee: the Rule of Law, which is one of the most widely used terms in international parlance today.

I had hoped to impress you with some statistics regarding its usage, but my lexis-nexus searches were blocked because they returned more than 3,000 results. That, I hope, will say enough. The Rule of Law is standard terminology in everything from the justification of the invasion of Iraq to conditionality in World Bank loans. It is used both in the context of war crimes trials after mass atrocities and as a criticism of the modern administrative state.¹ It was a banner of both the winners and the losers in the Gore versus Bush debacle in Florida in 2000, and it was also a theme in George Bush's

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¹ Cherif Bassiouni: *Post-Conflict Justice* (2002); and for a general discussion of A.V. Dicey's work, see P.P. Craig: *Public Law and Democracy in the United Kingdom and the United States of America* (1990) ch. 2.

inaugural address last week.² Like moths drawn to fire, policy makers, lawyers, economists, are politicians all find themselves consumed by the light of the Rule of Law.

The logic of this reverence for the Rule of Law in international affairs is nonetheless suspect in light of a number of events. The NATO bombings of Kosovo in 1999 and the US/UK invasion of Iraq in 2004 took place without the authority of the Security Council, the only body that can authorize those invasions under international law. The Rule of Law was also undermined when prisoners at the Abu Ghraib prison in Iraq were tortured and humiliated in contravention of the Geneva Conventions, which are designed in principal part to protect the dignity of all persons. Similarly, the detention of prisoners at the US base in Guantanamo Bay, who until the US Supreme Court ruled otherwise, had no access to counsel or the right to know the charges against them, is remarkable. Kofi Annan, Secretary General of the UN, echoed the sentiments of many when he said in Sept. 2004: “Today the rule of law is at risk around the world. Again and again, we see laws shamelessly disregarded.”³

Indeed the stakes for the “Rule of Law” are high. Adherence to the Rule of Law may mean the difference between state sovereignty and an international invasion. The “Rule of Law” has become a particularly prominent theme since 9/11, and is now being addressed as a topic in its own right by the Security Council. It is routinely included in the mandate of UN peace-keeping operations, and billions of dollars in development assistance is tied annually to assessments of whether nations enforce the Rule of Law at

² Jeremy Waldron: *Is the Rule of Law an Essentially Contested Concept (in Florida)?* 22 Law and Philosophy (2002) 137-164; see also George Bush’s 2005 Inaugural Address (available at: <http://releases.usnewswire.com/GetRelease.asp?id=41915>)

³ CTV.ca news staff: “Rule of Law at Risk Around the World: Annan” Sept. 21, 2004 (available at www.ctv.ca)

home.⁴ And the American President was chosen by and is beginning to define his mandate in reference to the Rule of Law.⁵

These various events suggest that the Rule of Law – whatever this complex phrase means -- is abused as much as it is exulted. But do these recent events demonstrate that the Rule of Law is in crisis? In order to answer this question, I want to flesh out this relationship between the Rule of Law and international affairs by exploring three issues:

- (i) what is the Rule of Law?
- (ii) why is *law* of particular importance to world peace and a stable market economy?
- (iii) and finally, do violations of certain international laws mean that the Rule of Law is in crisis?

My argument is that while some violations of the *Rule* of Law are serious and prevalent (and particularly so when they are the acts of super-powers), the *role* of law in international affairs is ever expanding. Indeed, we are witnessing what some have called the “judicialization” of international affairs by virtue of the expansion of international courts and tribunals and the legalized management of global issues.⁶ While the structure of the international system produces inequalities and even permits rule-bending amongst some of the players, the international system is not contracting. To the contrary, it is

⁴ See e.g. Daniel Kaufmann: *Governance Redux: The Empirical Challenge* (World Bank Institute) p. 8. See also the prevalence of Rule of Law programming in World Bank lending practices (available in documents on the World Bank website).

⁵ See the special edition of *Law and Philosophy*, *supra*, vol. 22 dedicated to the 2000 Gore v. Bush election.

⁶ Judith Goldstein et al: *LEGALIZATION AND WORLD POLITICS* (2001)

expanding and functioning well in a range of areas. The proliferation of law in international affairs means that the international system should be able to withstand occasional aberrations – and so the question becomes: how much is too much? Are recent breaches of international law indicative of a crisis?

What is the Rule of Law?

The Rule of Law describes a situation where clear rules are applied to future cases in consistent ways. That is, the Rule of Law involves the application of *impartial* instruments such as statutes and constitutions to new situations. The most essential aspect of the Rule of Law is *procedural*: laws should be defined by elements like clarity, prospective application (no retroactivity), stability and generality.⁷ These procedural qualities are important because the Rule of Law is short hand for legal certainty: law is effective when it can be a guide to future conduct in a range of cases.

Yet I should be clear: despite the ubiquity of the phrase – the Rule of Law - there is little consensus on its definition.⁸ Philosophers call it an “essentially contested concept” – a term of art that denotes the lack of agreement on its core features.⁹ One of the most significant disputes about the Rule of Law is whether it has a substantive dimension in addition to these procedural requirements.

Let me give you an example. In Nazi Germany and Apartheid South Africa, legal theorists were drawn to the question: should judges enforce morally problematic laws?

⁷ See e.g. Lon Fuller: *The Morality of the Law* (Chapter 2)

⁸ See e.g. Judith Shklar: *Political Theory and the Rule of Law*, in *THE RULE OF LAW: IDEAL OR IDEOLOGY* (Allan C. Hutcheson and Patrick Monahan (eds)) (1981)

⁹ Jeremy Waldron: *Is the Rule of Law an Essentially Contested Concept (in Florida)?* 21 *Law and Philosophy* 137 (2002); see also Thomas Carothers: *The Problem of Knowledge* (2003) p. 7 (available at: http://www.ceip.org/files/publications/HTMLBriefs-WP/WP_Number_34_January_2003/2000953fv01.html).

That is, should judges uphold and apply laws that discriminated against blacks or Jews? If the law is an instrument of justice, surely it should not be used in as an immoral weapon.

There have been adherents to both sides of the argument. Some have said that judges must enforce all laws that meet the procedural requirements of clarity, prospective application and so forth, because it is not up to a judge to decide whether a law is good or bad. For example, Joseph Raz wondered how neutral and even useful the concept of the “Rule of Law” really is if it is based on content: “If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy.”¹⁰ Perhaps only a legislature can make this determination. Others have said that judges should not enforce morally unjust laws – because it is contrary to the purpose of justice to perpetuate injustice.

Whether the “Rule of Law” contains both substantive and procedural dimensions is something that will occupy legal minds for years to come. Interestingly, however, in August 2004, the Secretary General released a Report on the Rule of Law. He defines the Rule of Law in substantive terms. According to this report, the Rule of Law is “a principle of governance in which all persons, institutions and entities, public and private including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated and *which are consistent with international human rights norms and standards.*”¹¹ This definition emphasizes human rights norms, and in so doing, takes a position on which laws are good laws.

¹⁰ Joseph Raz: *The Authority Law* (1979) p.212 (Essay: The Rule of Law and Its Virtue)

¹¹ SG Report para. 6. See also the Preamble to the Universal Declaration of Human Rights: “it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”

This debate over substance and procedure in international law is something that I will return to – but one element I want to emphasize now is that part of the reason for this difference at the international level arises from the fact that in international affairs, the Rule of Law has often been limited to (i) the equality of states under international law, and (ii) the right to be free from force.¹² Due to the realpolitik of the international system, international law has often existed in the flux of world events, and at the whimsy of great states and changing alliances. In the view of many, international law is not really law at all because it has no legislature, it has only a few courts, and it has virtually no enforcement mechanisms. International law has therefore been the poor cousin of the national legal system, and references to substantive principles may be a way to shore up support for the legitimacy of the international system: to find common values and rules that define the terms of engagement of the global community.

Second point: if the Rule of Law means nothing and everything, why does this concept have such moxie in international affairs? Or to put it differently, why is law so intertwined with our perception of the stability of the international order?

The short answer is that the Rule of Law is considered to be fundamental to three things:

- (i) the exercise of civil liberties (democracy)
- (ii) a market economy, and
- (iii) global peace and security.

¹² See discussion in Ruti Teitel: *Humanity's Law: Rule of Law for the New Global Politics*, 35 Cornell Int'l L. J. 355 p. 259-365 (2002)

The Rule of Law is, therefore, to international affairs, what the tooth fairy is to a child: a mysterious comfort and a promise of great reward, or better yet, the precondition to and a product of a functioning system of loss and betterment.

Law has long been considered a guarantor of international peace and security. Two of the greatest proponents of this idea are the German Philosopher Immanuel Kant and the American President Woodrow Wilson. Both propounded variants of what is today known as the “liberal peace thesis” – which provides that law and democratization promote peace, and that democracies rarely go to war with one another. Today, this theory is connected to the view that law is essential to marketization and a prosperous economy.¹³ That is, nations that respect the Rule of Law tend to respect national and international rules as well as the rights and freedoms of their citizens. They are therefore less vulnerable to unrest, wealthier, and more stable.¹⁴

The emphasis on the role of law in international affairs is not without its critics. Many countries that are considered to be democratic have poorly functioning legal systems. Shortcomings in the Rule of Law often exist within reasonably democratic systems.¹⁵ There are prominent examples of countries that do not have a formalist rule of law that still demonstrate economic development and stability: for example, Japan.¹⁶ In addition, the market potential in China has attracted great foreign investment, and many investors have not been deterred by China’s poorly functioning legal institutions.¹⁷

¹³ See works of Michael Doyle & R.J. Rummel for an exploration of this theory.

¹⁴ Mr. Mark Malloch Brown, former head of UNDP, stated to the Security Council in October, 2004: “The Rule of Law is, after all, the indispensable platform for development. People and economies need rules if the sustained interactions that build societies are to take place.” Record of 5052nd Meeting of the Security Council (Oct. 6, 2004). UN Doc. S/PV.5052 (Resumption 1) p. 2.

¹⁵ Thomas Carothers: *The Problem of Knowledge* (2003) p. 7

¹⁶ Frank Upham: *Mythmaking in the Rule of Law Orthodoxy* (2002)

¹⁷ *See id.*

So while the jury is still out on how important law *really* is to international order, it is certainly a central part of the strategy of international institutions such as the UN:

- In the Secretary General's report on **The Rule of Law and Transitional Justice** which I mentioned earlier, the SG links the rule of law to recent peace building and peace keeping exercises, and the successful consolidation and maintenance of peace after conflicts.¹⁸
- The 2004 **Report of the Secretary General's High Level Panel on UN Reform. In addition to wide ranging UN reform, this report** recommends better international regulatory frameworks and norms, particularly in the areas of natural resources and weapons control.¹⁹
- The January 2005 report of the **Millennium Project headed by the economist Jeff Sachs: Investing in Development** similarly recommends trade liberalization and strengthening the rule of law through investing in efficient public sector management.²⁰

Even if there is a crisis in the Rule of Law, the appetite for law has not diminished amongst international institutions.

The Next trend I want to discuss is the “judicialization” of international affairs.

¹⁸ Report of the Secretary General: *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004) UN Doc S/2004/616 para.2.

¹⁹ Report of the High Level Panel on Threats, Challenges and Change (2004) UN Doc. A/59/565 p. 35-8

²⁰ Report of the Millennium Development Project (2005). Available at <http://unmp.forumone.com/>

We have witnessed a vast expansion of international law in many fields: international treaties and conventions are increasingly numerous and complex, and cover the arena from the environment to international criminal law. Although the most recognizable forms of international law are human rights and the law of armed conflict, it is important to recognize that there are vast fields such as trade and diplomatic immunities that are also managed by international conventions.

We are also witnessing the proliferation of international courts and tribunals such as the International Criminal Court (2000), and war crimes courts in Cambodia, East Timor and Sierra Leone. Courts and dispute settlement mechanisms are also prevalent in trade and investment disputes. These courts are (i) clarifying applicable laws; (ii) developing the linkage between different subject matters (i.e. trade and the environment; state responsibility and armed conflict); and (iii) reducing the ability of states to hide abuses behind the shield of sovereignty.

The “embeddedness” of international law is increasing in national systems through the implementation of treaties and the integration of international norms in domestic legislation. For example, the War Crimes and Crimes Against Humanity Act in Canada that implements the ICC statute has introduced a number of important new principles into Canadian law, including the definitions of crimes under the ICC Statute.

In addition, international organizations are promulgating new standards and codes. Although these are non-binding, they are encouraging standardization amongst international businesses and institutions on issues as diverse as food packaging and mining.

Legalization across issues areas is not uniform – indeed, economic and trade issues have the highest incidence of adherence – and security issues the lowest. Nonetheless, these developments represent a general willingness of states and private actors to subject themselves to laws. International law is no longer a state-to-state matter, governed by treaty alone. Instead, law – and I want to argue the Rule of Law – is diffuse, increasingly determinate and having an important impact on the behavior of international actors.

I have shown that we are witnessing an expansion of (i) international law; (ii) international law makers, and (iii) the use of law as a tool for promoting international peace and economic reform. These developments suggest that the “Rule of Law” in the international domain is well functioning.

Nonetheless, instances of abuse of international law are, as I indicated at the outset, very apparent. This brings us to the crux of our inquiry: *are recent violations of international law indicative of a crisis in the Rule of Law?*

Let’s flesh out the possible sources of threat. Our perception that there is a “crisis” in the Rule of law generally arises from three areas: (i) the high incidence of human rights violations by States that are party to international treaties indicating a disrespect for international norms; (ii) the circumvention of international law by states like the US by, for example, invading Iraq, and (iii) instances where international organizations are not following the law – as has been alleged by the failure to prevent genocides in Rwanda and now the Sudan, and in the recent UN oil-for-food scandal.

Let's examine each of these areas of concern. First, does the violation of human rights treaties undermine the Rule of Law? There is no question that persistent human rights violations such as torture, the oppression of free speech, and discrimination against minorities threaten the rule of law. Once a state has signed a treaty, it has a good faith obligation – as a matter of law – to respect its principles. A quick glimpse at the Amnesty International Webpage reveals the extent of violations of basic human rights around the world.

Nonetheless, it is normal for laws to be broken and for the breaches to go unpunished.²¹ In Canada, there are thousands of crimes that are committed every year that are never addressed. Whether due to a lack of evidence, a lack of resources, the exercise of prosecutorial discretion or other factors, the Criminal Code is still law, and the breaches don't detract from its status. On my trip out yesterday, I read an article in the NYT that discussed the reform of turn of the century laws against women:

Florida struck down a law forbidding unmarried women to parachute on Sundays, Michigan did away with a law making it illegal to swear in front of women and children, Texas women could, until recently, face 12 months in prison for adjusting their stockings in public.²² There are many laws on the books that meet the procedural requirements that we discussed earlier. Even though they are not enforced, they are still law. This analogy applies to the international arena as well: a lack of compliance with certain laws does not mean that the "Rule of Law" is in crisis.

I don't want to trivialize the human rights abuses that do occur. The prevalence of non-compliance is still unacceptably and tragically high, but some very important

²¹ Thanks to Gib Van Ert for suggesting this point.

²² Sarah Kershaw: "A 1909 Washington State Law Shielding a Woman's Virtue is being Challenged", the New York Times, Jan. 26, 2005 p.A13

loopholes have been closed, and interest in continuing this process is apparent. But it is important to recognize how law still exists even if it is imperfectly enforced, and how the “impunity gap” is being closed. We have witnessed several landmark developments in the preceding decade that demonstrate a declining toleration for violations:

- the attempts to prosecute the former Chilean dictator Pinochet;
- the indictment and prosecution of Slobodan Milosevic by the International Tribunal for the Former Yugoslavia,
- creation of the International Criminal Court with its 97 ratifications.

These developments indicate that international law has a growing compliance rate. As Louis Henkin said almost three decades ago: most nations obey their international obligations most of the time.²³

(ii) **Violations of International Law by Powerful States.** Due to our proximity to the US, my comments will be directed towards it, although other countries must be kept in mind as well, among them Russia and China. It is not controversial to state that the US is very suspicious of international law, and that it tends to interpret it in such a way as to defend its best interests. It is also clear that the US’s compliance with international law is particularly suspect on matters it perceives as affecting its national security.

All states try to place themselves in the warm light of legality with regards to their actions under international law. Powerful nations have incentives and disincentives to obey international law: by obeying, (i) their legitimacy within the global community is

²³ Louis Henkin: *How Nations Behave* (1979) (available at www.umanitoba.ca/faculties/law/Courses/gallant/intlaw/cb2003.pdf)

increased, and (ii) they can cooperate with others to address global problems. They generally disobey international law when the sovereignty cost is too high: US opposition to the International Criminal Court for example, is rooted in a fear that US citizens and officials will be prosecuted by a foreign court.

Although the international system is based on the formal equality of states, it is clearly not true in practice. A Lesotho is not equal to the US in terms of power and influence, just as Vanuatu is not equal to China. This has led some to describe the international legal system as hegemonic. That is, rather than operating as equal states on equal footing, weaker states pledge allegiance to stronger states for security and economic assistance.²⁴ This view of the system reminds me of a quip from Woody Allen: “The lion and the calf shall lie down together, but the calf won't get much sleep.”

This theory rings true. The US does use its power to extract concessions from weaker states, and weaker states must decide where their priorities lie. The US, for example, has engaged in a massive campaign for bilateral agreements with countries around the world, which exempt US citizens from ICC jurisdiction. This campaign is problematic: although the US is not a party to the ICC statute, the campaign undercuts the principles of the ICC which many states the US is targeting have signed, and is unnecessary in light of the ICC mechanisms themselves, which incorporate numerous safeguards. Today, almost as many countries have signed the ICC statute as have signed bilateral agreements.

Nonetheless, superpowers must still work within the confines (or at least the terminology) of the legal system to maintain their legitimacy. Even though the US ultimately circumvented the UN during the invading Iraq, the US still attempted to

²⁴ See Jose Alvarez: *97 Hegemonic International law Revisited* 4 (2003).

demonstrate the legality of its acts under international law – by arguing that the attack was “preventative” and hence a matter of self-defense. It also was careful to structure subsequent Security Council resolutions in such a way that the US presence in Iraq was recognized.

Recent Security Council resolutions on Counter-terrorism reveal a related trend. The same states that circumvented the Security Council with regards to the invasion of Iraq have taken advantage of the expansive and undefined legal powers of the Security Council to combat the financing of terrorist activities.²⁵ For example, the SC resolutions on terrorism require states to change their national legislation to track financing. What does this show? That breaches of the international order can be the norm.

(iii) Finally, are international organizations undermining the rule of law? Calls for UN reform have come from many corners in recent years. Nonetheless, two situations are worth reflecting on. (i) the failure to intervene in Rwanda and now Sudan in spite of evidence of massive crimes and possibly genocide, and (ii) the so-called Oil-For-Food scandal.

In Sudan, more than 70,000 people have lost their lives, and almost 2 million have been displaced. To date, there have been background negotiations and a peace agreement, but no international intervention. It has been said that good judgment comes from bad experience, and a lot of that comes from bad judgment, but the failure to act decisively in Sudan (particularly against the backdrop of Rwanda) is troubling. Why has there been such a tepid response? Part is based on the definition of genocide: it requires the intent to extinguish a group, and it is not clear this has happened in Sudan—evidence suggests that there has been the forced removal of ethnic groups, but not their extinction.

²⁵ SC Resolution 1267

In addition, evidence is very difficult to collect in the midst of a conflict, making it difficult to mount a case. Nonetheless, the Genocide Convention creates an obligation to act to prevent. The “g word” is not bandied about lightly. Much of the inaction is political. It has been suggested that China’s interests in oil have led to the watered down language on economic sanctions, as have Russia’s arms trading activities with Sudan.

The Security Council has proposed to deploy a peace keeping force, and the Secretary General commissioned an expert report in the fall that should be released on February 1, 2005. It is expected the report will recommend the situation in Sudan be referred to the ICC. If this occurs, the ICC may gain a stamp of approval, and the requirement to react to possible genocide will be further fleshed out. Therefore, the debate will have important implications for future conflicts.

Because the situation does not clearly constitute genocide, one cannot categorically say that the rule of law has been undermined in this situation. Yet the lack of action due to political interests is disheartening. Nonetheless, this may change. Some are now starting to inquire into whether international organizations may be held to account or sued for a failure to act in situations like the present.

Oil for Food: Coverage of the so called Oil for Food scandal has been extensive in recent months. The \$60 billion program created in 1996, was meant to help Iraq deal with sanctions after the invasion of Kuwait. Recent revelations have demonstrated that Hussein likely used money from this program to buy off officials. Two inquiries are taking place: (i) a congressional inquiry, and (ii) an inquiry launched by the UN and headed by Paul Volcker, a former US Federal Reserve Chairman.

The reports are not finalized, but to date it looks like there have been lapses (overbilling and smuggling) but not serious flaws. Misdemeanors, not felonies as one recent newspaper report put it. We must wait to see the final results, but I want to highlight this investigation because it has been used to question whether the UN follows the “rule of law”, and yet it is of a very different magnitude than the Sudan situation.

Conclusion

I have tried to show that the Rule of Law is not in crisis, but its strengths and weaknesses are all the more apparent. The malleability of the system provokes conflicts over who interprets it, and technology permits us to be instantaneously aware of developments around the globe and their purported conformity (or non-conformity) with international law. The court of international opinion is much quicker to condemn than the international courts of justice.

I raised the issue of substantive and procedural notions of the rule of law earlier tonight. I'd like to close by asking you think about what notions are actually prevalent in this current climate. Technical and procedural violations of international law rarely provoke the same ire as substantive violations. Indeed, it is differences over the larger questions: when is it right to use force? When is there a right or even the responsibility to intervene? How should “freedom” be spread abroad? that have led to concerns about chaos and crisis.

But if law is a dialogue – and international law is the forum with which we can discuss our common global values and notions of justice -- this debate is as it should be. Many commentators predicted the final days UN after the US invaded Iraq, and yet only

months later, the US was back at the UN in order to secure its support and approval of the occupation mandate. The US could do not do it alone. In fact, the most important strides against terrorism have been through multilateral means, including border patrols, law enforcement and security.²⁶

If there is a crisis in the rule of law, it is not in the system itself, it lies in whether the notion of the “rule of law” can operate to deter non-state actors such as militias. Will the rule of law have any effect on the LRA in Uganda? This remains to be seen.

My final words are to the Chumir Foundation for their generosity and vision in setting up the Public Policy Fellowship program. When I was a fellow last year, I had the opportunity to spend 4 months working on a project concerning legal reform in post-conflict zones such as Iraq and Kosovo. The fellowship enabled me to take a step back from the tides of everyday life in order to reflect on contemporary issues at the nexus of ethics and international affairs. This experience was both a treat and a privilege, and a starting point, it turns out, for my current scholarship in international law.

Alexis de Tocqueville, the French sociologist and philosopher who toured America in the 18th Century said that democracy is defined by engaged citizenry. The Chumir Foundation – under the inspired leadership of Marsha Hanen – is helping to make this observation come true by providing a forum for vigilant public discussion on issues at the cutting edge. While some of our compatriots might lament: “Pity to Canada, so far from God so close to America” – and particularly so at an evening on international affairs - organizations like the Chumir Foundation are carrying on this great Tocquevillian tradition. As a Westerner myself, I’m thrilled to see this leadership

²⁶ Bruce W. Johnson: Tough Love Multilateralism, Washington Quarterly (2003-4) p. 9

emerging from Calgary, and as a Canadian, very proud to have had the opportunity to engage in this discussion tonight.