

Strengthening the rule of law through the United Nations Security Council

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Accounting for the absence of rule of law: history, culture & causality

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ACCOUNTING FOR THE ABSENCE OF RULE OF LAW: HISTORY, CULTURE & CAUSALITY

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In considering how to strengthen the rule of law through the UN Security Council, it may be helpful to begin with a definition of rule of law. A basic or 'thin' notion of rule of law asks that all entities, including states and international organizations, remain accountable to laws that are publicly known.¹ A thicker definition requires additionally that laws are consistent with international human rights.² This paper utilizes a thin definition and, as such, the issues raised are applicable to either thin or thick understandings. The rule of law is beneficial as it creates order and predictability and ensures equal treatment. For these reasons, the rule of law can help guard against abuse of power and protect the weak from the strong.

With regard to the Security Council, strengthening the rule of law is usually understood in both the domestic and international sense.³ The former entails the Council ensuring that its domestic impact through the use of force, sanctions, peacekeeping, peace-building, and so on, promotes a rule of law culture within nations and does not undermine it. The latter requires the acts of the Council itself to be subject to the rule of law, including decisions to use force, administer sanctions, and undertake peacekeeping and peace-building missions. In the first case, the underlying assumption is that the Council's actions can both promote and undermine a rule of law culture within states. In second case, the assumption is that the Council lacks a rule of law culture. While these are valid assumptions, this paper suggests that this is not the whole story when it comes to the complex relationship between the Security Council and the rule of law. When suggesting how to strengthen the rule of law, whether in the Council itself or within states, solutions proposed are often legal, regulatory and institutional reform, checks & balances, judicial review, and so on. While such solutions make sense, this paper argues that they are a partial solution. Indeed, such reform efforts may be ineffective or even counterproductive if the relationship between the Council and rule of law is not more fully contextualized and understood.

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¹ Charles Sampford, 'The Rule of Law Begins at Home', *Strengthening the Rule of Law through the Security Council Workshop Paper Series*, Working Paper 1.1, 4.

² *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 (23 August 2004), para 6.

³ See generally *Strengthening the Rule of Law through the Security Council Workshop Paper Series*.

This paper begins with making two points, which are later illustrated through examples from the Arab region. First, **legal, regulatory and institutional reform cannot bring about a rule of law culture in the absence of an enabling environment.** The reasons for not obeying law may go beyond the abilities of law reform to mitigate against. The rule of law is usually affirmed as a universal value.⁴ Professor Sampford states that '[a]ll cultures have rule of law traditions (howsoever called) and contrary traditions'.⁵ If we assume this to be true,⁶ how then do we account for the triumph of a rule of law culture in some states and not in others? What prevents a rule of law culture from emerging in certain places? One way to answer this question and test whether assumptions about causality are accurate would be to inquire into how rule of law cultures emerged in the past.

In states that are now considered epitomes of the rule of law, the emergence of a rule of law culture evidences a complex history. In the United Kingdom, for example, it involved among other things a gradual transition from an absolute monarchy towards a more parliamentary and democratic kingdom, alongside the expansion and contraction of the British Empire, the acquisition and the emancipation of slaves, the expansion of suffrage, the industrial revolution, and so on. While the role of law and legal reform was very important, it alone cannot adequately explain the emergence of a rule of law culture in the UK. In places where rule of law is lacking today, the reasons are not only a lack of legal, institutional or regulatory safeguards, but are perhaps also attributable to other causes. We may find the answers in history, in culture, in economic policies, in environmental policies, in migration & asylum policies, and so on. Often the practice of empire allowed for movement towards a thriving rule of law culture in the centers of power at the expense of – or active undermining of – such cultures in the peripheries. Such dynamics are not entirely absent from the international system today.

The second point, in some ways related to the first, is that **the assumption that legal and institutional reform is lacking may be incorrect.** There may be enough law, thoughtfully and beautifully crafted law, or even too much law. Many contemporary problems with regard to the Security Council and rule of law were debated when the Charter of the United Nations was written and have been grappled with in the decades since. Reform proposals have been undertaken both with regard to the Security Council and the UN more generally. Sanctions regimes and peacekeeping operations have been subject to various reforms and accountability mechanisms, particularly in recent decades.

⁴ For a recent example, see Mark Lyall Grant, Permanent Representative of the United Kingdom's Mission to the UN, *The UN's Response to the Arab Spring – One Year On* <<http://ukun.fco.gov.uk/en/news/?view=PressS&id=730248882>>: 'While much of Europe had still to emerge from the dark ages, it was the Baghdad of Haroon al-Rashid that saw a flowering of free religious debate and an openness to learning from non-Muslim sources. Free speech, the Rule of Law, and pluralism are aspirations of people everywhere and we should stand by all those that strive for them'.

⁵ Sampford, above n 1, 3.

⁶ While this assumption is accepted for the purposes the points made in this paper, considerable debate exists as to whether the rule of law is indeed a universal value. For an overview of the debate see Brian Tamahana, *On the Rule of Law: History, Politics, Theory* (2004) 137-141. See also Maxwell Chibundu, 'Globalizing the Rule of Law: Some Thoughts at and on the Periphery' (1999) 7 *Indiana Journal of Global Legal Studies* 79, Elisabetta Baviera, 'A Closer Look at the Rule of Law', *Law & Development.org* at <http://www.lawanddevelopment.org/docs/ruleoflaw.pdf> (accessed 31 October 2012).

The Charter envisioned a balance between the different parts of the UN. While the Council is the most powerful part of the UN in many ways, its mandate was meant to be a narrow one compared with the General Assembly's all-encompassing mandate. Given the design of the Council, it was not intended that the Council should uphold the rule of law in the sense that the ICJ should. The Council institutionalizes unequal representation through granting permanent membership and veto power to some states. While there may be ways for Council behavior to become more predictable and consistent, the Council was not designed to function impartially or provide equal treatment. In this sense, there are aspects of the Council that inherently undermine the rule of law even in its thinnest sense. If the goal is to minimize such aspects, one way would be to consider revitalizing the General Assembly, whose mandate has been actively undercut both by the Bretton Woods institutions on economic issues⁷ and the Security Council's expansive reading of security issues through emphasizing the nexus between security and other issues such as economic and human development, human security, and more recently environmental degradation.⁸

To illustrate the two aforementioned points, this paper first considers rule of law domestically through recent developments in Tunisia and Egypt; and then considers rule of law in the international context through the case of Iraq. In the Arab region, public attention to both international and domestic rule of law issues has intensified over the last two years. The uprisings ensuing across region since December 2010 were provoked not only by rising unemployment, and food and fuel prices, but by unequal distribution of power, wealth and opportunities. Before the 'Arab Spring', the international community was praising many Arab states for their economic and human development progress.⁹ In recent decades, some states had successfully channeled the region's natural resource wealth into effective social welfare schemes. However, in a region dominated by authoritarian regimes, there was no rule of law to ensure transparent, accountable or consistent action and even benevolent state behavior could prove capricious. For instance, the World Economic Forum singled out Tunisia as the best economy in Africa, largely because of its business-friendly legal environment, with simple and predictable economic, financial and labor regulations.¹⁰ Yet, it was also where the Arab uprisings began when a street vendor, Mohammed Bouazizi, self-immolated in despair after many years of police bullying and corruption. Local police confiscated his cart, scales and produce on various occasions, wrongfully asserting the need for legal permits as a means of extorting bribes from street vendors. In December 2010, Tunisia's legal environment for businesses was simultaneously both ideal and hopeless, depending on who was asked and what type of business they had.

⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2003) 245-272.

⁸ See eg Balakrishnan Rajagopal, *International Law from Below* (2003) 135-145; Chandler, David, "The Security-Development Nexus and the Rise of "Anti-Foreign Policy"" (2007) 10 *Journal of International Relations and Development* 362; David Chandler, "The Responsibility to Protect? Imposing the "Liberal Peace"" (2004) 11 *International Peacekeeping* 65.

⁹ See eg United Nations Development Programme, *Human Development Report* (2010) 29: Arab states led the world in terms of improvements in human development over the past forty years. Development in leading states such as Oman, Saudi Arabia, Tunisia, Algeria, Morocco, and Libya was not solely in terms of increased gross domestic product, but also in terms of improving access to health and education.

¹⁰ World Economic Forum, *Global Competitiveness Report 2010-11* (2011) 15: Tunisia is ranked 1st among African states and 32nd in the world with regard to the success of its economic growth model.

The situation illustrates the potential for rule of law discourse to be selectively utilized and manipulated. Most Arab citizens are familiar with the slippage between 'rule of law' and 'rule by law' discourse in authoritarian states, where the power of law and legal institutions helps to structure and maintain systemic and predictable quotidian injustice. Nevertheless, in post-revolutionary states such as Tunisia and Egypt, it is to the rule of law that people are turning for deliverance. There is a renewed faith, particularly in constitutionalism and reform of legislatures, courts and police, as the primary means of effectively constraining state power. Before the revolution, Egypt had a constitution that guaranteed separation of powers, civilian control of the military, an independent judiciary and international human rights. It had laws against corruption and abuse of power. It had laws guaranteeing transparent governance and a free press. However, President Mubarak's regime overrode these laws through emergency provisions in the constitution, ruling Egypt under a 'state of emergency' for many decades. In such a situation, how should Egypt move towards a rule of law culture? Will more or different laws and institutions help? Would stricter provisions for recourse to a state of emergency have prevented the executive power from undermining the rule of law? Or would it have found a way to manipulate these laws as well?

These questions in the domestic context may shed some light on strengthening the rule of law through the Security Council with regard to peacekeeping, sanctions and the use of force. The Arab region has experience with these issues. Indeed, the region illustrates that rule of law issues in domestic and international spheres cannot be understood separately. International law and international institutions gave the region its borders and a sovereign state system, through the League of Nations Mandate System, the doctrine of *uti possidetis juris* or the inalterability of colonial frontiers, the creation of the state of Israel, and so on. Contemporary Arab systems of law, governance, economy, and development patterns reflect the influence of French and British mandates under the auspices of the League of Nations, as well as the legacy of colonial powers' considerable private corporate, trade and cultural influences. The region's geostrategic importance, its oil wealth, and its symbolic importance for many world religions, have ensured that it remains the subject of international attention. When the British and French departed the region, they left cooperative monarchs behind. As colonial power waned and influence of the United States and Soviet Union grew, some monarchs were replaced by authoritarian regimes that successfully exploited Cold War dynamics to gain and maintain power.

In Iraq, while Saddam Hussein's aggression during the Cold War was encouraged by each of the Security Council's permanent members through various technology and armament deals, his aggression against Kuwait after the Cold War was seen as a threat to peace and security. The Council authorized a coalition to use force to diffuse the threat. Various resolutions followed on disarmament and sanctions, the latter causing widespread suffering. A UN Oil-for-Food programme was instituted, which was later mired in corruption. Additionally, some coalition members enforced occasional no-fly zones in Iraq on the assumption of continuing authority to intervene. Hussein's attitude to Council and coalition demands alternated between postures of defiance and capitulation. This to-and-fro culminated with the US-led 2003 invasion, which removed Hussein from power and commenced a long process of occupation and nation-building. The Security Council did not explicitly authorize the 2003 use of force. While the US claimed continuing authorization under previous Security Council resolutions, most

legal experts disagreed and there was strong global public opposition to the war. After the invasion, the Security Council passed resolutions governing the occupation and peace-building that followed.

This brief overview of the Security Council's relationship with Iraq reveals the complex role of the rule of law. Since the British and French first drew the borders of modern Iraq in the Sykes-Picot Accords, there has been no lack of applicable international law. It has been regularly invoked by all parties over the last century, asserted alternatively as a reason for intervention, for non-intervention, for particular types of intervention, and so on. In recent times, freed from its Cold War impasse, the Council functioned roughly as the UN Charter intended, at times authorizing the use of force, at times denying it. Even without initial authorization, the US was able to get the Council's blessing for the occupation that followed. The UN and its various agencies participated in peace-building activities in Iraq and continue to do so.

As in the aforementioned Tunisian example, international law's role in Iraq could be described as either dysfunctional or efficient, depending on which histories, events and points of view we choose to highlight. If dysfunctional, then we could suggest more or better international laws: Security Council reform, judicial and other types of oversight, more consistent and effective uses of force, sanctions, peace-keeping and peace-building. On the other hand, if international law has significantly shaped the modern Iraqi state, then the problems of contemporary Iraq are not because states failed to follow international law but because they adhered to it all too well.

In the Arab world, the latter view often triumphs, as a history of problematic international interventions has created suspicion of international law and institutions. This was evidenced by the bombing in 2003 of the UN Headquarters in Baghdad, even though most Security Council members and the UN Secretary-General himself had spoken out firmly against the invasion. While such prejudices may be overturned through international legal and institutional reform, there is also a risk that reforms instead entrench an international system of unequal sovereigns.

One way to guard against the latter tendency and promote the former may be **to situate rule of law discussions in broader historical, political, economic and cultural contexts** so as to avoid the pitfalls of past reform efforts and move towards a more equitable and just system of international relations. Reform efforts through the Security Council may not be as effective as we would wish unless they are read alongside trends in, and implications of, other areas of international law and policy such as trade, economics, migration, environment, and so on. Advocacy may be more effective if we more holistically assess the complex causalities involved in journeys towards or away from rule of law cultures in each individual situation. **If we diagnose more broadly the things that undermine a culture of rule of law both in the Security Council and within states, then the types of reforms that rationally follow may be different. Or expectations may have to be adjusted as to what law reform proposals may achieve.** Alternatively, if a particular justice outcome is what is really desired, then it may be more effective to advocate for particular laws, rather than a rule of law culture more generally.