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The Rule of Law Begins at Home

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Introduction

During the last decade there has been growing agreement that the rule of law is critical in both domestic and international affairs. At the 2005 United Nations World Summit, member states unanimously recognized the need for 'universal adherence to and implementation of the rule of law at both the national and international levels'.[1] This resolved an impasse in which some western countries were pressing for improvements in the rule of law in developing countries and others were pressing some western countries to adhere to the international rule of law – especially with regard to interventions and other missions involving the deployment of troops.

This was an inspiring compromise – to pursue both rather than none. However, we should remain inspired without becoming than naïve. Like many international agreements, it was entered by some in bad faith (possibly in utmost bad faith[2]). Fortunately, bad faith, however consistently applied in attempts to ensure that agreed norms are made ineffective, is not a defence, least of all one that can be publicly made. It is not a form of state practice that can be judicially noted.

One of the problems of this welcome consensus is that the term 'rule of law' is subject to a range of interpretations/perspectives/dimensions that are affected by context as well as theory. Even within the United Nations (UN), the variety of interpretations is considerable and influenced by the perceived missions of various UN agencies.[3]

Peacekeeping missions now typically involve police, military and civilian components from a range of countries as well as NGOs and several UN agencies. Most recognize the importance of the rule of law but often have different conceptions of what the rule of law means and, more importantly, what it requires. Peacekeeping missions raise issues of both international and domestic law and so form one of the intersecting points of the domestic rule of law and the international rule of law. These overlapping rule of law issues should be addressed concurrently and consistently rather than divorced at the risk of making the missions and the participants appear hypocritical.

In this paper, I draw on three strands of my previous work. First, I draw on work on the domestic rule of law going back 21 years[4] and culminating with an OUP book on 'Retrospectivity and the Rule of Law.'[5] Secondly, I draw on work covering peace missions and the rule of law going back a dozen years to a major linkage[6] with (then) Lt Col Mike Kelly. Finally, I will draw on ten years work on the international rule of law including a book on the concept, a major ARC linkage project with the United Nations University (UNU), UN Rule of Law Unit, Centre for International Governance Innovation (CIGI) on 'building the rule of law in international affairs' and an R2P Fund project involving IEGL, the APCMCOE and the UNU. The link between the earlier 'domestic work' was made when Mark Plunket, the UN Special Prosecutor in Cambodia, came to one of our workshops and told me that he was in the middle of the practical version of 'Rule of Law 101' and that he did not think he had been taught the theory very well. However, the practical version did seem to be very much on track with his suggestions for giving priority to police, courts and corrections as being necessary to provide security. He introduced me to Mike Kelly who took what I saw as a Hayekian justification for the rule of law in peace missions – if you state clearly, firmly and convincingly in advance how you will use force then others adapt their behaviour to avoid that which will generate

[1] UNGA (2005), para 134.
[2] *Uberrima mal fides* – if that term is not too much of a neologism
[3] For example consider: Office of the United Nations High Commissioner for Human Rights (2006); UNDP (2008-2011).
[4] Sampford (2005); Sampford (2003); Sampford (2001); Sampford (1998).
[5] Sampford (2006).
[6] ARC linkage grant on 'Preserving and Restoring the Rule of Law in the Asia Pacific'.

that use of force. The rule of law in this sense must start when the first 'blue helmet' puts a foot on the ground, not after the first elected president takes office. I will be arguing that the rule of law (in international affairs) must start before that, when the mission is authorized and planned. The United Nations Security Council (UNSC), the countries taking part in peacekeeping missions and the members of the need to plan for what they are going to do to assist the host state develop its own rule of law (and its integrity system generally). They need to plan how the rule of law will be applied to what they do. And they must ensure that the mandate is, itself, subject to the international rule of law. If the mission participants are not prepared to subject themselves to the rule of law, the chances of the rule of law emerging in the communities that are the subject, and intended beneficiaries, of peacekeeping missions are remote.

In this sense, the rule of law begins at home – in the UNSC and in the countries that take part in these missions.

What I will seek to do in this essay is:

1. Understand the various meanings/interpretations/dimensions we give to the domestic rule of law.
2. Briefly apply these to the international rule of law.
3. Apply them to peacekeeping missions which include both.
4. Examine the two ways that the rule of law might be applied to the UNSC and the countries taking part in UNSC peacekeeping missions:
    a. Voluntary acceptance of judicial review and formal accountability by the UNSC and its insistence that it be accepted by any country which expects authorization to act by the UNSC.
    b. A 'Coke moment' – named after the English judge who insisted that James I could not be a legislator and judge as well as king (though having read Veronica's paper, a Coke moment might need to be pronounced differently and have a trade mark next to it.

Some of these points could be made about the UNSC and the use of force. However, the issues also apply to peacekeeping missions where the development of the 'domestic' rule of law in the communities where the peacekeeping mission operates is more likely to be emphasized – and where it may be easier to implement first.

The 'Domestic' Rule of Law (the rule of law within sovereign states/at the national level)

Domestically, the rule of law is a majestic phrase with many largely reinforcing and supportive meanings. It is alternatively characterized as a fundamental value/ideal, an ethic for lawyers and officials, the basic principles of constitutionalism and a set of institutions that supports its attainment. While these multiple meanings and dimensions may occasionally serve to confuse, they are generally congruent and mutually supportive in that the partial achievement of each supports the fuller achievement of all.

- This reflects the multifaceted nature of the rule of law.
- However, it is important to keep the meanings and dimensions distinct to avoid confusion.
- The differences of meaning do not seem to be essentially cultural. We carried out a project for the Open Society Institute comparing governance values in Western and Islamic countries.
    - Islamic/western comparison showed that there was no fundamental difference with 'congruent' if not necessarily identical meanings.
    - However, there are differences within cultures based on emphasis and position. Liberal Muslims and liberal westerners have a great deal in common. Fundamentalist Muslims and fundamentalist Christians have more in common than either dare admit.
    - All cultures have rule of law traditions (howsoever called) and contrary traditions.

'Thick' and 'Thin' theories of the Rule of Law

One of the biggest distinctions different supporters of the rule of law have is more a matter of classification – of what is included within the rule of law and what is listed under different governance values. Some of the most popular definitions of the 'rule of law' mix an expression of an ideal or value with the institutional prerequisites for the achievement of that ideal. Developing ideas found in Hayek, Fuller and others, Raz listed eight basic elements of the rule of law: (1) laws should be prospective, open and clear; (2) laws should be relatively stable; (3) law making should be guided by open, stable, clear and general rules; (4) independence of the judiciary must be guaranteed; (5) principles of natural justice should be observed; (6) courts should have review powers (of the exercise of power by others); (7) courts should be easily accessible; (8) discretion of crime-policing agencies should not be perverted.[7] An overlapping principle is that sanctions (especially involving the use of force) should only be applied to others according to clear rules publicized in advance.

I have characterized this as a 'thin' theory of the rule of law.[8] This is contrasted with 'thick' theories of law propounded by those who seek to incorporate within the 'rule of law' other governance values/virtues concerning the content and provenance of law i.e. human rights and democracy.

Those who adhere to such thin theories are generally just as supportive of democracy and human rights but prefer to keep those 'governance values' or 'virtues of law' distinct, recognizing that they can sometimes conflict and that they are rarely introduced at the same time (with the rule of law generally coming first). They also recognize that it may be possible to secure agreement to the development of the rule of law before agreement can be reached on democracy (and how it is to be interpreted and institutionally implemented) or what rights are to be incorporated into the content of law.

Chapter V of the International Forum for the Challenges of Peace Operations[9] refers to the rule of law and human rights separately – recognizing their separate and mutually reinforcing importance – but also their distinctiveness. The UN Secretary General's definition quoted therein is clearly a 'thin theory'.[10] The Secretary General's definition contained in the background paper to this workshop is a thick one.

However, this theoretical/philosophical list does not reflect the degree of embeddedness involved in a state subject to the rule of law. In such states, the rule of law is also seen as a:

a. A fundamental Governance Value.
b. A basic Constitutional Principle.
c. An Ethic for Officials - i.e. that officials should be bound by the law and can only derive their power and authority from law. All such power is held in trust to be used only to the extent permitted and for the purposes authorized.
d. A set of institutions – independent legislatures and courts, an independent bar etc.
e. The core of nascent Integrity Systems.

Within sovereign states, each of these dimensions is mutually supportive.

The Rule of Law as a fundamental Governance Value

The rule of law is now seen as one of the fundamental values underlying modern 'liberal democratic'

[7] Raz (1979); Chesterman (2008); Aronson and Dyer (2000).

[8] As far as I know, I was the first person to apply this distinction between these versions of the rule of law (applying Rawls' well known distinctions between 'thick' and 'thin' theories of justice). I have seen other, more recent use of this distinction. I am not sure if I was the first to use it or if I used it following others in ignorance of their use. I prefer this to 'formal' and 'substantive' meanings of the rule of law. The thick theory does include prescriptions as to the content of law. But what is substantive is the content added, not the rule of law itself.

[9] See: International Forum for the Challenges of Peace Operations (2010).

[10] *Loc. Cit.* Page 69, citing UNSG (S/2004/616).

states – along with human rights, democracy, citizenship and the famous trinity of *liberté, egalité, fraternité*. This was not always so. The Treaty of Westphalia was, in many senses, a tyrants' charter – made largely by and for the absolutist rulers of the day. It recognized a set of formally independent and equal states whose sovereigns were recognized on the basis of their ability to effectively control the territory of a state. Brutal enforcement of their rule was proof of sovereignty rather than a disqualification for it. Internally, absolute rule was frequently justified as the only way of avoiding the chaos of a state of nature in which the life of man would be nasty brutish and short.[11] Once life and civil peace were secure, more was demanded of those states by *philosophes*, lawyers, and revolutionaries who saw themselves as citizens in whose interests sovereigns should rule according to the above-mentioned values. As they sought and gained concessions, the post-Westphalian state was gradually civilized by the institutionalizing of those values. The rule of law was the first of these values and many states were substantially *rechstaats* long before they saw even a modicum of democracy and human rights. The rule of law is not only the longest standing of enlightenment values; it is generally the least controversial.

The Rule of Law as a basic Constitutional Principle
The rule of law underlies and is supported by basic constitutional principles such as constitutional rule and the separation of powers. However, it does not require a formal or written constitution and the concept clearly pre-dates such instruments. What it does require is a separation of judicial power from legislative and executive power with that judicial power determining what texts are recognized as laws, how they are interpreted and to whom they apply.

The Rule of Law as an Ethic for Officials (of state and other organisations) exercising power.
The rule of law is primarily addressed to lawyers and officials rather than citizen obedience.[12] The rule of law is the central ethical principle for judges and the legal profession more generally. But it is also central to most officials including civil servants, the military and elected officials. All such power is held in trust to be used only to the extent permitted and for the purposes authorized.[13] The domestic rule of law was built by the efforts of lawyers, soldiers, politicians and dedicated non-government organisations from the *philosophes*, to unions, to the modern NGO.

Chapter V of the Forum Draft and the UNSG's definition of the rule of law includes the general acceptance of, and compliance with, the law. This is not such a common approach to the rule of law with good reason. Individuals may obey for a variety of reasons. However, although the ordinary criminal law applies, or should apply, to all, there are a number of laws which are addressed to officials – about what their power is and the purposes for which it is entrusted to them. Civil disobedience is appropriate for individuals within a society under the rule of law but not for officials.

This is particularly true in relation to the use of force – and why acceptance of the rule of law is a critical element in the ethics/honour of the military – and those who deploy the military. Note that this is not just a matter of officials of the state – despite the Weberian notion that the state has a monopoly of violence, even legitimate violence.

In the 17th century, the rule of law was as much about controlling the use of force by the local barons and bands of mercenaries as royal officials. Now we should look at other sources of power – corporations, warlords and private military companies. This is where the Forum Draft rightly refers to the importance of 'all institutions and entities (public and private)' being held accountable.[14] The

[11] Hobbes (1991), p89.
[12] Deflem (2006).
[13] Waldron (2006).
[14] International Forum for the Challenges of Peace Operations (2010), p 69.

rule of law is about the lawful exercise of power in that the powers themselves and the purposes for which they are exercised are determined and regulated by law.

The Rule of Law as a set of institutions
Those who value the rule of law recognize that it can never operate effectively as a purely normative phenomenon (be it value, ethic or principle). It requires institutions to make it effective so that the rule of law may be partially defined in terms of common institutional supports for the rule of law – legislatures, courts, police, corrections, independent bar and NGOs – as Ann Livingstone[15] said these are vertically and horizontally linked. Not all those institutions are institutions of the state – traditionally lawyers and the church – now lawyers, NGOs and corporations.

The Rule of Law and nascent Integrity Systems
Since the late 1990s, it has become increasingly accepted that the way to avoid corruption and other abuses of power require an 'integrity system' – a set of norms (formal and informal), institutions and practices that serve to promote integrity (or 'good governance') and inhibit corruption. All effective integrity systems involve some basic institutional arrangements associated with the rule of law – especially courts and a legal profession that are not indebted to the holders of political power and can review the actions of powerful institutions to determine whether or not they are within power. These institutions are the oldest and longest standing elements of the integrity systems of western states. They are supported by newer institutions of democratic governance (parliaments, parliamentary committees) and oversight (ombudsman, auditors-general, anti-corruption commissions, media and NGO watchdogs) which make rule of law mechanisms more effective.

Integrity systems are far less developed in international affairs and, naturally, in the countries in which peace missions occur. They face obstacles that lead some to doubt the possibility of an international rule of law or international law itself. However, legal institutions often existed and were effective long before democratic institutions were formed and became, rightly, the heart of the integrity system.

The International Rule of Law

How much can experience of the rule of law at the domestic level apply to building the international rule of law is a big question which we are addressing in a large project in conjunction with the UN Rule of Law Unit, the UNU and CIGI. While this is not the place to provide a full report of the work in this project, a few points might be usefully made at this stage. At the international level, there are strong arguments for keeping to a 'thin' theory of the rule of law and treating democracy and human rights as other values. Simon Chesterman suggested at a workshop on ethical supports for the international rule of law that the international rule of law would need to be ultra-thin or possibly 'anorexic'.[16] The application of 'democracy' to international affairs is particularly problematic. Even here, this is more a matter of classification and tactics than a fundamental value difference for most supporters of the international rule of law. However, as in the early stage of the development of domestic law, it may only be possible to secure widespread agreement on the international rule of law, leaving democratisation of international institutions and the universal implementation of human rights to other and later battles.

[15] Vice President, Pearson Peacekeeping Centre, Canada.
[16] Workshop on ethical supports for the international rule of law, held at the Center for International Governance Innovation, Waterloo, Canada, October 19-20 2009

On the other hand, there is no need to include human rights into the definition of the rule of law. Human rights are already written in to the content of international law in the most emphatic way. Indeed, not only civil and political rights but economic, social and cultural rights are also built in. If international action is to be subject to the rule of law in the thin sense, it will necessitate the application of human rights that have been a prominent part of the content of international law for more than half a century and for almost the entire life of the United Nations.

Most other meanings and dimensions can be extended to the international rule of law – though their realisation internationally is much more limited than in most established democracies. This does not detract from their usefulness because they indicate areas where progress towards an international rule of law might be made. I have discussed these at length elsewhere[17] but will here highlight two:

Ethics for officials

As seen above, the domestic rule of law is built into the ethics of key officials of sovereign states operating under the rule of law – not just judges, prosecutors and lawyers but soldiers, civil servants and elected officials. Most of the key actors within international institutions are committed to international law but codes of ethics for international officials are relatively new and rare with the Burgh House principles for international judges being less than six years old. Most would be imbued with ethical principles from their home states which may well emphasise the domestic rule of law but will say little about the international rule of law and may suggest that loyalty to domestic sovereign power is more important. I have argued elsewhere that international lawyers and soldiers engaged in UN missions should be in the forefront of developing and promulgating codes of ethics to govern their behaviour which respect international and domestic applications of the rule of law.[18]

Institutions

The largest problems for the international rule of law lie in the lack of institutions that create, interpret and enforce international law. This lack of effective institutionalization inhibits the development of the rule of law in its other senses. The lack of a legislature is not a fundamental problem for the rule of law. It makes change difficult but all that is needed is a set of clearly agreed sources, the means by which those sources generate authoritative legal texts, and the hierarchy of sources in cases of conflict.

There is a court, the International Court of Justice, (ICJ) which can provide authoritative interpretations of those texts and of any conflicts between them. The ICJ is harder to stack than any national appellate court. The problem is the lack of compulsory jurisdiction and the limited number of cases that can therefore be heard before it.[19] This makes it much harder for the law to give clear guidance to those who want to be bound. However, Cassese suggests that the relative weakness of central global institutions means that other institutions and practices may take on a greater role[20] – including self-regulation and standard setting by non-state actors, civil society[21], business and legal communities[22].

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[17] See final chapter of Sampford (2006); Sampford (2005).

[18] Sampford (2009).

[19] If States do not agree to be bound by the ICJ, then the ICJ has no jurisdiction even over crimes such as genocide. The voluntary nature of the ICJ even over breaches of *Jus Cogens* was emphasized by *Democratic Republic of the Congo v Rwanda (2002), request for the indication of provisional measures order*, ICJ 12610, 40. In this case the parties accepted the *Genocide Convention* stated laws of the *jus cogens*. The majority held that genocide enjoyed peremptory status; nevertheless, they held the ICJ Justice did not have jurisdiction to consider an action against a State which had not agreed to be subject to the court's jurisdiction, pp. 71–72.

[20] Cassese (2005).

[21] Christenson (1997).

[22] Dellinger et al (2003).

This comment about the potential institutional supports for the international rule of law reminds us that domestic rule of law is not just about state institutions. States were never the only game in town – whether in the peacekeeping missions or in internal affairs generally.

The Rule of Law in Peace Missions

Traditionally the goals of peace missions were largely directed to the ending of mass violence. Democracy and the rule of law were initially seen as the business of the relevant state or states in which, or between whom, the mission operated.

Early peacekeeping missions were aimed at keeping the warring parties apart and it was assumed that the relevant sovereign states could and would protect their citizens once the main threat had passed. Over the last twenty years many peacekeeping missions have been mounted in states which lack either the capacity or will to protect civilians and in some cases have constituted a major threat to civilians on their territory. In other missions civilians have been targeted by the combatants. Accordingly, it has been recognized that 'keeping the warring parties apart' does little or nothing to protect civilians and Protection of Civilians (PoC) has become a key part of missions.

When the holding of elections became part of UN mandates, the assumption seems to have been that security would come first followed by elections with the governance and the rule of law left to the incoming regime. During the 1990s Dr Mike Kelly and others emphasized that the rule of law had to start with the first troops moving in not after the first elections – as well as the fact that you needed more than troops to re-establish the rule of law. This is critical for the success as well as the legitimacy of missions. This was part of the impetus for research conducted previously with the Australian Defence Force and Australian Federal Police.

If we look at the various aspects of the domestic rule of law, all are highly relevant to peacekeeping missions and their more limited scope and close relationship. Peacekeeping missions must, of necessity, pursue a thin theory of the rule of law which can be expanded as stability is secured. Peacekeeping missions must be exemplars of respecting human rights in their own activities but generally cannot force the incorporation of human rights into the content of local laws.

Peacekeeping missions should seek to incorporate as many dimensions of the rule of law as possible. The areas of function and focus listed above might be seen as applicable to the constitution of the mission itself – to make them effective, to serve as an exemplar and to help establish more effective governance measures.

The mission will naturally seek to advise and assist the host country to strengthen the rule of law in its territory.

Advise

- Rule of law principles and to administer them.

Promote

- Rule of law as governance value and basic constitutional principle.
- Rule of law as ethic for key officials.

Help develop

- Set of institutions that support rule of law.
- Integrity systems – especially the legal elements that support PoC.

But the rule of law must not just be the subject of the mission but built into the peacekeeping mission itself. If you believe in the rule of law, you have to practice it as well as preach it and enforce it. The mission is not just there to preach and assist but to practice the rule of law in its domestic and international forms.

- Standard rule of law principles should be built in:
    - rules under which missions operate should be prospective, open and clear;
    - these rules should be relatively stable;
    - rule making by the Mission should be guided by open, stable, clear and general rules;
    - must be an independent judiciary to judge its actions which must be accessible and have review powers;
    - they should observe principles of natural justice and policing and prosecutions should not be one-sided;
    - sanctions, especially the use of force should only be applied according to clear rules publicized in advance.
- The rule of law (in both domestic and international forms) as a fundamental governance value of the mission itself.
    - The mission should have clear authority.
        - Generally from the host country as national laws are important for the authorization, limitation and governance of civil-military cooperation – as well as providing the substantive laws which should generally rule. In the rare cases where authority is not given by host country, it must be given by UNSC or a body established by a treaty which the host country has signed.
        - This applies to the original authority for the mission itself. However, it should be clear that the mission has clear continuing authority. While the most serious cases occur in the use of force in a potentially stale mandate (as in Iraq in the late 1990s where P5 members interpreted the mandate as they wished), all mandates include authority to act. It should be easier to insist on this provision with peacekeeping, setting the precedent of Chapter VII interventions.
    - That authority and the actions officials take under the mission should be subject to 'independent adjudication'.
        - Not just the International Criminal Court (ICC) but also ICJ.
        - Even if a country does not sign up to compulsory jurisdiction, it should commit itself to accepting the ICJ jurisdiction for its actions under the mandate. This would guarantee independent adjudication of the legality of their actions. I know that this is unlikely now but good international citizens should have nothing to fear and their actions will be more effective.
        - While the need for this is acute if the host country does not authorize the mission, it should be standard fare and I hope to live to see the day when it is.
    - The mission's dealings with the host country must be subject to international law.
- The mandate (which provides the effective "constitutional" basis for the mission) should include the rule of law as a basic principle.
- The rule of law should be a core part of the ethic of every group of officials within the mission – including military, police and civilian components from all countries contributing to the mission.
- The conduct of police and military forces during the mission and compliance with relevant human rights norms.
- The various institutional components of the mission should mutually support each other in respecting and furthering the rule of law within their mission – and recognize the relationship between the rule of law and protection of civilians.

- Trials of those accused of perpetrating the violence against which the civilians had to be protected should be initiated by truly independent prosecutors before truly independent tribunals. Where these are not before permanent tribunals, the funding and selection should not be from either belligerents nor peace keepers.[23]
- Peacekeepers should never come from belligerents.

These issues apply to missions authorised under UNSC approval, regional (e.g. African Union (AU)) approval, mixed missions and in cases of bi-lateral agreements between a host state and one that provides assistance.

Case studies

We are often asked for case studies. Some of the most interesting case studies can be found in the emergence of the rule of law and other governance values within Western countries. We see that the process is not pretty, it is not quick, it involved compromises – some of which worked, some of which did not and that it might not be obvious for years which it was. Sometimes the 'bad guys' stayed in power – they were called 'kings'. Sometimes power holders were executed, securing transitional justice that led to chaos rather than the rule of law. The difference then, as now, was whether those who had been part of the problem saw it in their interest to be part of the solution.

Past experience and case studies offer some hope. The development of the rule of law generally takes a long time – but huge strides can be made quite quickly when political will and public outrage align to focus on governance reform.

Apparent reasons for delaying the introduction of the rule of law

Some plausible arguments can be made for deferring the rule of law in post-conflict situations. A long conflict is coming to an end. The major participants – sometimes from a coalition of victors in the civil war, sometimes from all parties – have finally reached an agreement. They desperately want to restore peace and re-establish a functioning economy out of the devastation that years of conflict have wrought (though some areas are much more damaged than others which makes the former dependent on the latter). The winners have been united in struggle but have different views of how and for whom the peace should be ordered. It seems sensible to have a council that includes all the relevant parties. It is called the 'The National Salvation Council' or something like that. Their first concern is to ensure the peace and to prevent conflict breaking out between them. They want to deal with new issues as they arise and to start the long process of getting their world back on track and enabling development of their shattered land. The council is given plenary powers to act quickly – including legislative, judicial and executive powers. However, 'executive' powers are more powers of co-ordination because the new government has very few resources and is dependent on the major parties for the implementation of decisions.

They have plenary powers because of the perceived ability to act quickly. The legislature is non-existent, weak, riven, lacking in legitimacy and/or with significant debate about the basis of representation – population, ethnic groups, previous (and disputed) sub-national entities. The judiciary is non-existent, discredited, underused, inexperienced and with similar issues about appointment and legitimacy and concerns about potential bias.

[23] When Jamie Shea was asked in 1999 whether NATO pilots had committed war crimes he pointed to the funding of the International Criminal Tribunal for the former Yugoslavia (ICTY) and said that they would not be convicted. I do not know if the ICTY had contempt powers but whether or not they were, he should have been instantly suspended and subject to disciplinary proceedings. It is essential that officials appointed by a state should have the rule of law built into their ethics. Not only did Shea appear to have no ethics, he assumed the ICTY had none.

The principles of separation of powers are understood by some but not by others. Even those who are entirely familiar with such separation of powers have been operating during the civil war with wartime measures to streamline decision making and are emphasizing solidarity rather than accountability. Rather than surrendering legislative and judicial power to regulate their actions, they think that it is better to operate on the basis of consensus – with a formal or informal veto on collective action given to any of the key players. They are initially more concerned at the possibility of action being taken without the agreement of a key player than ensuring that the powers of the National Salvation Council be subject to judicial review and hence conform to the rule of law. If one of the key players cannot be persuaded to agree with, or at least to acquiesce in, the course preferred by the majority, conflict may break out once again. Given the untold evils of the previous conflict, nobody is prepared to risk this. Inaction is better than action taken against the clear wishes and interests of a key player. Human institutions are always imperfect and improvements take time. Institutional choice is generally a 'wicked problem' – especially when 'wickedness' is found in the actors as well! A deeply flawed institution can still represent a great leap forward and achieve remarkable improvements in the human condition.[24]

One can understand those motivations, even if one strongly disagrees with a particular compromise outcome reached and believes that there should have been a tripartite institutional structure wielding legislative, executive and judicial powers. One may even go along with these institutional arrangements for quite some time – especially on the assumption that, at some stage at least judicial power would be separated from executive/legislative power sooner or later. As things settle down and trade develops, some areas of the country become stronger than others. There is increasing questioning about the National Salvation Council. Some wished that there had been the rule of law from the beginning. Others believe that it should, at least, happen now – possibly arguing that the necessary institutional arrangements immediately after the conflict, though necessary then are now an impediment to good governance. In various public forums, it is unanimously agreed that the rule of law is a very good thing and should be implemented. However, there is (generally limited) debate about the rule of law, there are attempts to include more in the rule of law which makes it more difficult to implement. Above all the key members of the National Salvation Council members are not particularly keen on giving up their powers and having their own activity subject to the rule of law – even while urging the rule of law on others.

This little parable describes a problem that occurs in some countries in which peacekeeping missions are mounted. However, most readers will have detected another, perhaps overly obvious parallel – the end of the second world war. The National Salvation Council (NSC) reflects the UNSC formed at the end of the second world war. (Some may have even picked the clunky and possibly over-obvious use of initials).

The point I want to make is that the UNSC should think about the parallel for several reasons.

1. To get peacekeeping missions right and to build the rule of law into them
2. To decide that, 66 years after the end of the second world war, it is time to reform themselves and accept that the UN, its institutions (including UNSC) and those who act in its name and with its authorization should be subject to the rule of law.
3. To recognize the interaction between the two – not just as a matter of symbolism but of integrity and effectiveness.

[24] A conclusion I would reach for the UN and the UN system which I have argued have largely put a floor under human misery – freeing us from the worst consequences of the traditional scourges of war, famine and pestilence through the UNSC, UNHCR, FAO and WHO and achieving many positive advances in education, culture (UNESCO), environmental awareness (from UNEP-FI to Durban via Montreal and Kyoto) and action. It has also emerged as the peak norm generator – in which its 'unique legitimacy' most clearly resides.

I will briefly discuss the last issue.

Integrity

The UNSC has no credibility in authorizing missions to build the rule of law within a country if it is not subject to the rule of law itself. They might make a distinction between the domestic rule of law and international rule of law. But the General Assembly, including all member nations of the UNSC have signed up to both. The countries attempting to carry out those mandates will have limited credibility (and deserve less), if they do not subject their own action to the rule of law.

This is a matter of ethics and integrity. For a long time I have explained ethics and integrity in the following terms. For Singer, the key ethical question is 'how should I live my life'. This involves asking hard questions about your values, giving honest and public answers and living by them. If you do, you have integrity. If you do not, the first person you cheat is yourself because you are not the person you want to be. This is a reasonably standard individualist approach to ethics. But I have long argued that this can and should be applied to institutions. Institutions must also ask themselves hard questions about their values, give honest and public answers and structure themselves so that they will collectively live by them. If it does, it has institutional integrity. If it does not, it is not only hypocritical but is not the institution it claims to be and wants to be.

I have separately contrasted integrity with corruption. If corruption is the abuse of entrusted power for personal or party political gain, it is not possible to know if there is an abuse without knowing what the correct use is. That use is determined by the above process of establishing institutional integrity, sometimes with sign off by the body to which the institution is accountable. Integrity is defined as the 'use of entrusted power for publicly justified and official endorsed purposes.'

There are many reasons given to purportedly explain why those who authorize and take part in peacekeeping missions do not subject themselves to the rule of law (most notably the post-world war two reasons given above). These wear a bit thin, especially in telling the NSC why it should not have plenary power subject only to the potential veto of those who are too powerful to cross.

Some things are complex, some things are simple. In some cases, the apparent complexity is because that simplicity is not in the interests of the powerful and the powerful are needed.

But I do not expect that arguments from ethics and integrity will win across all the self-interested doubters among those who do not want to be won over because they perceive it to be against their interests. So I turn to arguments of effectiveness which reinforce rather than undermine the position clearly required by ethics and integrity.

Effectiveness

I mentioned what I had learnt from Mike Kelly, Mark Plunkett and the 'Cambodian Peace Vets.' The rule of law does not start with the first government, election or constitution. It starts with the arrival of the first blue helmet. For reasons that would be as equally recognized by Hayek and Fuller, the mission will be more effective if others know in advance how they will use their power. However, I would modify this and say that the rule of law must begin when the UNSC writes a mandate and various member states accept that mandate and agree to take part.

It must be recognized that hypocrisy has a cost in credibility and effectiveness. The 'Golden Rule' and its equivalents are too well known in too many cultures. The NSC may seek to emulate the UNSC out of the interests of its members.

One point that I have emphasized for the last dozen years is that there may be a reluctance to authorize missions where a P5 member is one of the countries authorized (directly or indirectly) to act. There is an asymmetry in initiating and cancelling mandates – between authorization and accountability. If a P5 member responds to the mandate and interprets the mandate very broadly (and the mandates tend to be very broad and non-specific) and the issue is brought back to the UNSC, the P5 member can veto any clarification contrary to its interpretation. This effectively means that there is no accountability where a P5 member is authorized to act (or, gains authorization from the mandates authorizing member states to act). This might be very convenient for the mission and its P5 members, but it will have a chilling effect on future authorizations. If other countries (including those on the UNSC and those who elect them) think that the mandate has been abused, they may be much more wary about issuing any more. In the lead up to the Kosovo war I explicitly suggested that the extraordinarily extensive interpretation of UNSC 678 by the United States and the United Kingdom might have been an impediment to securing UNSC approval. On the other hand, if the ICJ or some other body exercises judicial review, then this fear of abuse is greatly reduced. This would mean that P5 members would be more likely to be authorized to engage in a range of peacekeeping, peacemaking, peace enforcement and other missions because it will be clear what the mission can do and what it cannot do. To put it another way, other countries can have greater confidence that states engaged in peacekeeping will do what they say they want to do and not more.

Of course, we have to be aware of the practical realities of peace missions. They cannot be overly planned and overly prescribed. Von Moltke's dictum that "No campaign plan survives first contact with the enemy" is reinforced if the core elements are made public by the UNSC.

This is where our experience with law is important. Higher authorities, like to UNSC, need to set out the basic goals and delegate the detail within those basics. This detail will have to be left to commanders. However, the mandate must set out clear limits which can be the basis of subsequent legal determination (generally in a form similar to a declaration).

The commanders of UN missions cannot bring decisions back from the 'front line' for political decision making. This is true even when the ultimate executive power is wielded by a cabinet of a united people ruled by a government enjoying support from a war time coalition comprising virtually the whole of the legislature (e.g. UK in World War 2). Such a body faces issues of knowledge, real-time decision making and division between those who make decisions about commitment and mandate and those who issue orders. This is even more true of a body with very different members and views and a veto

The UNSC needs to set out the mission and the mandate. Policy, doctrine and interoperability protocols need to be developed based on previous missions and in advance of new missions. A commander needs to be appointed and he or she takes on the role of planning the mission, setting rules of engagement with JAG lawyers and then issuing orders. Force commanders should be given broad authority to secure the identified goals with the limitations on means being established by IHL and the Rome Statute rather than detailed restrictions (some of which may be imposed by spoilers).

How can we move towards this outcome. There are broadly two ways of building the rule of law into the issuing and review of UNSC mandates – the integrity route and what I call the 'Coke moment'.

The Integrity route?

The UNSC could make a general commitment that all mandates are subject to judicial review to resolve disputes as to what actions are within power and that the UNSC would only issue mandates

to those who agree to accept, for the purposes of that mission, the compulsory jurisdiction of the ICJ and give an equivalent undertaking to the ICC.

I do not anticipate the UNSC being able to commit itself at this stage – though I think we should work on persuading them to do so. A good start could be made with peacekeeping operations. A group of at least seven countries on the UNSC (preferably more and preferably with the backing of the General Assembly) could sign an 'integrity pact', jointly agreeing that no new peacekeeping missions would, in fact, be authorized unless the mandated countries accepted the above jurisdictions, the mandated countries would accept the jurisdiction of the ICJ to determine whether their mandate was within power of the UNSC and their actions were within the mandate. In future elections to the UNSC, acceptance of this principle would be a condition of securing the votes of other nations. This would have a number of consequences.

1. Not all countries have to agree to be so limited initially – just those countries that engage in peacekeeping.
2. We may have to do without those countries which do not accept these conditions. But should we ultimately want the assistance of countries demanding the right to ignore international law.
3. Other nations may have to build up forces to take the place of those who will not agree to the restriction. However, this is less of a problem for peacekeeping than peace enforcement and R2P. Peacekeeping is not as demanding. In any case, the UNSC is unlikely to authorize major wars or even R2P pillar three operations in the immediate future. It is better to start where the principle can be more readily enforced. In any case, we might not get more R2Ps for a while. By the time we get around to a situation in which support for a major operation is likely to be supported, there will be a weight of precedents in peacekeeping which will be hard to resist. Indeed, experience with mandates subject to the rule of law may mean that P5 and other states with significant militaries are not so worried about mandates subject to the rule of law.
4. This may mean that some more people will suffer. This is the hardest thing to say but I will say it: 'history is a long game with no pre-determined direction or end'. If we try to move too quickly to the ends we seek, we may stir too many forces in response. We cannot expect to respond to all evils and right all wrongs and sometimes the attempt to right a wrong fails and even if successful may cause more damage than the wrong itself. Sometime the longer game produces more lasting success. Given the justified reticence to provide a mandate authorizing force by the UNSC, this insistence may help to secure the mandate.

The coming 'Coke moment'?

While it is time for the UNSC to adopt the integrity route and the majority of nations to sign an integrity pact, the catalyst may not come from 'above.' Coke is generally held as a Common Law hero whose battles with James I and Francis Bacon in and out of court would make a good film and a better play. James thought he should be able to be king and also act as a legislator and a judge. Coke told him he did not have those powers.[25] Along with another of his decisions[26] these helped set the framework for the rule of law in England. It was a near run thing – and he knew it. He knew he was risking his life and that the intervention of other senior ministers downplaying the effect of the decisions was needed to keep him out of the Tower of London on one occasion but insufficient on another. Nonetheless, he was released and managed to include these cases in the first of the Nominate Reports – proving that in law, even more than in war, history is written by the winners.

The UNSC, like James I and the fictional NSC of the parable above, needed to be told that they cannot be executive, legislature and judiciary. The judges who tell them as much need not fear the

[25] *Prohibitions* 1607 and *Proclamations* 1611.

[26] *Dr Bonham's case* 1610.

UNSC as Coke had good reason to fear James. The verbal response could be ferocious (reflecting the attacks on Kofi Annan when his caution slipped and he stated what most international lawyers agreed – that the invasion of Iraq was contrary to international law[27]). But there is no Tower of London in the UN compound.

There are a number of ways in which it might be brought to a head which I want to discuss in another paper. The ICJ could be more definitive in a re-run of *Lockerbie*. Some are practical if fanciful – such as New Zealand suing Australia in the ICJ for breach of clause one of the ANZUS Charter for invading Iraq. There is also the possibility of a member of NATO suing the UK over one of several acts that are in breach of similar provisions in that treaty. One way could be if state based or regional courts start issuing advisory opinions, declarations or injunctions with regards to the obligations the UNSC is trying to impose on them. Where the country is hostile to the requirements, this might not be difficult to get the case up and for the court to decide. The issue has already been raised in *Nada v Switzerland*. If high quality reputable national and regional courts seek to determine issues of UNSC power, they will carry great moral weight – well in excess of the self-serving arguments put forward by legal apologists in the employ of states pursuing dubious mandates or stretching existing ones. This is likely to stimulate the need to go to the ICJ for a more definitive view. Until then, it would have a chilling effect on the issue of mandates.

Conclusion

That much underrated General and President, Dwight D Eisenhower, who commanded United Nations forces in Europe before there was a formal United Nations once said:

> "The time has come for mankind to make the rule of law in international affairs as normal as it is now in domestic affairs. Of course the structure of such law must be patiently built, stone by stone. The cost will be a great deal of hard work, both in and out of government particularly in the universities of the world. Plainly one foundation stone of this structure is the International Court of Justice … [and] the obligatory jurisdiction of that Court. … One final thought on rule of law between nations: we will all have to remind ourselves that under this system of law one will sometimes lose as well as win. But … if an international controversy leads to armed conflict, everyone loses."[28]

That was 14 years after the foundation of the United Nations and its inclusion of the ICJ into the new UN system. Forty six years later that view was unanimously endorsed at the UN summit. The time is overripe for the UNSC to take to heart the unanimous declaration of the General Assembly that should have put beyond doubts the views of its first great warrior who hoped that they would need no more warriors. While the General Assembly should be more authoritative, Eisenhower's views should be more poignant and silence those who want to issue new and infinitesimally lesser

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[27] My own view is that, if the US, UK and Australia were so sure that the invasion was legal, why were they so shy about allowing the matter to get to court (as it would have had the Australian government not changed its recognition of the ICJ a year before the invasion). The fact that they found a lawyer who was prepared to write a supportive opinion cuts no ice – especially when none of the published opinions at the time raised the prospects of success in a court of competent jurisdiction. I have not given my opinion of the legality of the war, merely noting some of the obstacles confronting their chances of success and honing in on the ethical issues in giving such advice. See Sampford 2003 and 2005.

[28] D. Eisenhower (1959) *Remarks Upon Receiving an Honorary Degree of Doctor of Laws at Delhi University* December 11, 1959 <http://www.eisenhowermemorial.org/speeches/1959>. Those who are surprised by the source of the quote should recall that this soldier turned politician used federal troops to protect a black student in Little Rock and warned of the military industrial complex. In Delhi, the old warrior who had masterminded the 6 June Normandy landings of the 'United Nations' (a phrase used in newspapers on that day) made his plea for law not war. This quote was found for me in 2007 by Valentin Hadjiev, a Senior Research Assistant and former Bulgarian lecturer and Fulbrighter. I have used it in several articles since.

mandates for the use of force without subjecting them to the International Rule of Law he thought so critical. As argued in this paper, it can start with the easiest of mandates – those for peacekeeping. And it should start at home, with the UNSC itself. If not, we will have to await a 'Coke moment' and I call on all aspiring Cokes to brew the broth.

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