

INTERNATIONAL LAW FORUM 2006

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IL2**

**THE RULE OF LAW AND PEOPLE'S PARTICIPATION:
THE INTERNATIONAL CONTEXT**

“The Meaning of an International Society under the Rule of Law”

Keynote Address 1

by

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Excellencies,
Ladies and Gentlemen,
Dear Colleagues,

First of all, allow me to thank you warmly for inviting me to address this International Law Forum.

The intention is that the Forum should provide some insight in the international legal mechanisms, in the relevance and dynamics of international law, and in the interaction between the international and national legal environment. The organizers hope that a possible outcome of this Forum for the Lao PDR should be a better understanding of the rule of law principles at both the international and national level; an insight into the interaction between international and national rule of law principles; an awareness of the benefits of the rule of law; and an understanding of the benefits of acceding to international treaties.

When I address this topic, I often take as a point of departure the so called “Millennium Report” of the Secretary-General of the United Nations “We the peoples: the role of the United Nations in the twenty-first century”. In this report, the Secretary-General states inter alia:

“Taking a long-term view, the expansion of the rule of law has been the foundation of much of the social progress achieved in the last millennium. Of course, this remains an unfinished project, especially at the international level, and our efforts to deepen it continue.”¹

The report contains several references to the rule of law. This caused the General Assembly to respond by expressing its determined support for a rule-based international society in its Millennium Declaration in September 2000.²

Another important development is the adoption by the General Assembly of the United Nations of its summit resolution in September 2005.³ In this resolution Member States recommit themselves to actively protect and promote all human rights, the rule of law and democracy. It is a very powerful document from a rule of law point of view, and I have actually made an excerpt of the resolution to the extent that it addresses the issue of the rule of law. You will find it in the material circulated before the Forum.

In my presentation, I will address three elements. I will

- explain the concept of the rule of law at the national level;
- explain the rule of law in international relations; and
- explain the interrelationship between the rule of law at the national and the international level.

Rule of law at the national level

The concept of the rule of law at the national level has an old history. The expression is English, but similar expressions exist also in other languages. Much has been written about the concept, but I will not go into too much detail about its history.⁴ Rule of law implies that, within a State, the exercise of power in the public domain should be performed with full respect for the laws that apply. This means that everyone, including the Head of State, the parliament, the government, the judiciary and other authorities are bound by the constitution of the State and must act within the parameters set by the same. They are also bound by the statutory provisions enacted by the parliament and by rules issued at lower constitutional levels, be it by the government or other bodies entrusted with legislative power.

Rule of law means that also the legislative bodies must respect the laws that they themselves have adopted. This is important, in particular with respect to the parliament, which in its legislative activities is bound by the limits drawn up by the constitution. The constitution can of course be amended, but that requires that certain procedures be observed. Sometimes there is a requirement that amendments are made by a specific majority or by two consecutive decisions. In some cases the constitution requires that parliamentary elections be held between the two decisions.

Another important feature is that the judicial instances and other public authorities are subject to the existing law in the exercise of their functions. This means that, unless this is specifically prescribed for certain cases, there is no room for discretion on the part of those who apply the law. On the contrary, what is required is an impartial and independent application of the law by the judiciary. Other state or local authorities are required to apply the law objectively in accordance with its letter and intent. In short, authority in the public domain should be exercised “under the laws”.

In discussing this matter, there is one element to which special attention should be paid, and its importance cannot be emphasized enough. A proper system under the rule of law requires that the application of the law is entrusted to persons with the necessary integrity, independence and impartiality.

This applies especially to the judiciary and the courts of a state. They must be independent and impartial. Those who apply the law are not supposed to seek or receive instructions from other bodies, in particular not from political instances. I refer in this context specifically to Article 14 of the International Covenant on Civil and Political Rights of 1966.⁵ However, the rule of law requires that not only the judiciary and the courts but also all who exercise power in the public domain act with similar objectivity and that they demonstrate the necessary integrity to command respect among the general public.

The next question to examine is what we mean by law. We cannot just discuss this in abstract manner. What is this law? There is a very simple answer to this question. By law should be understood the whole body of norms that is necessary to administer a modern society. And it is multifaceted.

We would have to look at the body of rules that govern personal status, marriage, inheritance, real estate, property in general, education, public health, social welfare, business, local administration, including urban and rural planning, criminal

responsibility, legal procedure, etc. All these rules would have to be applied in a consistent and coherent manner.

But it is also important to point out that this law must be adopted in a “legitimate” manner, which basically means that the legislator must be a democratically elected or appointed body. The laws must also comply with constitutional and internationally recognized human rights standards.

One of the major challenges today is how to best assist the many countries that have not been able to lift this complex materia to a sufficiently sophisticated level. In December 2005, I actually wrote to the Secretary-General the United Nations suggesting that the United Nations should take the initiative of mapping the rule of law status in all Member States of the Organization to make it easier to identify instances where assistance is needed.

My background as a Judge Registrar of titles to land in my own country, prompts me to point to the need for a proper land register (cadastre). Without such a register it is literally impossible to develop a modern society where titles to land can be registered and property can be transferred in a secure manner and be used as collateral for the financing of investments, be it for business purposes or private housing.

A complicating factor is that such a register cannot be established through a simple administrative procedure. One must first establish with sufficient certainty the rightful owner or leaseholder that can be entered in the register as the holder of the title. From experience I know that this can often prove to be an extremely delicate matter, giving rise to contentious issues that sometimes have to be settled in court. And then the question arises: does such a court system exist and does it have sufficient resources to deal with the many issues that will arise in the process?

One could mention many other sectors that present formidable challenges to the national legislator. But I wanted to mention this specific area just to give an illustration to a problem that many countries face. Until such countries have a sufficiently developed legal system they will have difficulties in developing a viable economy. This means that they will be dependent on aid and support from others, and that is not healthy in the long run.

The need for proper legislation is, however, only one element. Basically, there are four requirements that must be met in order for a State to be able to establish a system under the rule of law: democracy; proper legislation; institutions – administrative as well as judicial – to administer the law; and, as I just said, individual civil servants and other officials, including judges, with the necessary integrity to handle this administration.

So therefore, even if a country would be able to adopt a full-fledged set of laws for different purposes, these laws would still have to be applied by the national authorities, including the courts, at the state, regional or local level as circumstances require. And for this you need officials with sufficient education, training and experience. It may take considerable time to develop such competence.

And now I come to a very sensitive matter. Regretfully, one of the major threats against the development of a system under the rule of law at the national level is corruption. The need for concerted action against corruption is tremendous. It has been addressed at the global level by the United Nations. This effort led to the adoption, on 31 October 2002, of the United Nations Convention against Corruption.⁶ This Convention was opened for signature in Mérida, Mexico, on 9 December 2003. There are presently 70 parties to this convention. It was signed by the Lao PDR on 10 December 2003, but it is not ratified by the republic.

In the message to the signing ceremony in Mérida the Secretary-General said that it is now widely understood that corruption undermines economic performance, weakens democratic institutions and the rule of law, disrupts social order and destroys public trust, thus allowing organized crime, terrorism, and other threats to human security to flourish. He went on to say that no country – rich or poor – is immune to this evil phenomenon. Both public and private sectors are involved. And it is always the public good that suffers. In focusing on developing countries he stated that corruption hurts poor people in those countries disproportionately. It affects their daily life in many different ways, and tends to make them even poorer, by denying them their rightful share of economic resources or life-saving aid.⁷

An indispensable component in a system under the rule of law that should not be forgotten in this context is a free and independent bar. It is important that citizens and others have access to counsel to assist them in various matters of a legal nature. In criminal cases, international law requires that the accused has access to counsel of his or her own choice. And if the person accused is indigenous, he or she should be provided with a public defender.

The Lao bar is still in its initial stages and it was suggested to me that it may benefit from advice from colleagues in other countries. The International Bar Association (IBA) or national bar associations may be in a position to assist. (After my retirement from public service, I became a member of the Board of the IBA Human Rights Institute in 2004 and a consultant at Mannheimer Swartling, Sweden's largest law firm, in 2005. Through these channels I might be able to identify useful contacts, if the Lao bar so wishes.)

To sum up: developing a system under the rule of law at the national level is a formidable challenge, first to those concerned at the national level, but also to those who may have to assist them. But it is a challenge also to countries where a system under the rule of law exists, because it must be constantly defended.

Rule of law in international relations

Let us now turn to the international level and see whether the principle of the rule of law can be applied there, or more specifically, in international relations. The answer is clearly yes, even if the aspects are slightly different.

The first step would be to look at the Charter of the United Nations.⁸ In its preamble it is said that the peoples of the United Nations are determined “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. Furthermore, Article 1, paragraph 1

of the Charter states that one of the purposes of the United Nations is “to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace”. According to paragraph 3 of the same Article another purpose is to achieve international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”.

More detailed provisions on peaceful settlement of disputes appear in Chapter VI of the Charter, and, as you know, one of the six principal organs of the United Nations is the International Court of Justice.

Against this background, it is fair to say that one of the purposes of the United Nations is to contribute to the establishment of the rule of law in international relations. This conclusion is also supported by many decisions in the past by both the General Assembly and the Security Council.

Another important factor that testifies to the fact that the rule of law applies at the international level is the way in which States act. Additional areas are identified in which States determine to regulate their relations through treaties. Great efforts are made by the contracting States to abide by their commitments. And, if differences occur, States make their best efforts to settle them by using the peaceful means that exist.

Furthermore, in most cases when it is suggested that a State is in violation of international law, the State shows great concern and attempts to defend itself against the allegation. It has become an embarrassment to be suspected for, or accused of, a violation of international law. And if violations occur, the government could even be criticized by the general public at the national level, n.b. if freedom of expression applies at that level.

What are the laws that exist at the international level? The most important source of international law today is the law that is laid down in treaties. No major activity in the world today, whether at the level of individuals or at the level of States, takes place without some treaty having an impact on it.

Since the United Nations was established in 1945, States have concluded many thousands of treaties. More than 500 multilateral treaties are deposited with the Secretary-General of the United Nations,⁹ and these treaties form a comprehensive framework of legal norms, regulating the conduct of nations, and also, in a sense, the conduct of individuals.

It should be noted that many key multilateral conventions addressing critical concerns of the international community were negotiated under the auspices of the United Nations. In particular, numerous treaties covering human rights and fundamental freedoms have been negotiated within the Organization.¹⁰ The United Nations Commission on Human Rights played an important role here. The International Law Commission (ILC) drafted other instruments. The United Nations conventions on diplomatic and consular relations, on treaty law, on terrorism and related criminal law issues could be mentioned as examples.¹¹ A particularly

important contribution by the ILC is the first draft of what later became the Rome Statute of the International Criminal Court.¹² A number of trade law related conventions were negotiated within the United Nations Commission on International Trade Law (UNCITRAL).¹³

All these treaties cover the full spectrum of human activity: human rights; humanitarian affairs; economic and financial relations; the environment; health; postal and telecommunications; communications by road, air and the seas; use of outer space, etc. The list of treaties displays a remarkable variety of matters where Member States have seen it necessary to join together to solve problems of common interest. They also reflect the desires of States to establish enforceable rights and obligations among themselves – in effect, to further enhance the international rule of law. But they also reflect the concerns and aspirations of ordinary people and of civil society.

In this context it is important to note that also customary international law plays a prominent role in addressing common concerns. Customary international law is created through the actions of States that form a pattern that gradually develops into rules that are considered binding by States.

To understand the meaning of the rule of law at the international level it is informative to look at Article 38 of the Statute of the International Court of Justice, which forms an integral part of the Charter of the United Nations. In deciding in accordance with international law, such disputes as are submitted to it, the Court shall apply, *inter alia*: (1) international conventions, whether general or in particular, establishing rules expressly recognized by the contesting States; (2) international custom, as evidence of a general practice accepted as law; and (3) the general principles of law “recognized by civilized nations”.

A feature of particular importance is that treaty law by time can develop also into customary international law. This means that, when a treaty is accepted by a large number of States, and the conduct prescribed by that treaty becomes an accepted State practice, the contents of the treaty may constitute the customary norm upon which all States and the International Court of Justice will act. The Conventions on Diplomatic and Consular Relations are good examples. Even if these Conventions have not received universal ratification or accession, they now constitute in most respects customary international law.

Another example is when a document that originally was adopted only as a declaration by time develops into law that is considered binding. I have long maintained that the 1948 Universal Declaration of Human Rights, which was adopted as a General Assembly resolution, now constitutes customary international law.¹⁴ This would apply to the Lao PDR, since Laos has not yet acceded to the Covenants.

Against this background it is clear that, today, there is a vast body of law that is accepted by States and which forms the basis upon which they interact. A problem is, however, that this law is not always respected at the international level. At the national level, everyone is – or should be – subject to the jurisdiction of the national courts. Ultimately, national authorities execute – or should execute – the judgments

of these courts. However, there is no comparable arrangement at the international level. Let us examine this issue.

It is true that the International Court of Justice can adjudicate disputes, provided that the States in question have accepted the jurisdiction of the Court. However, once the judgment is handed down, the States themselves are obliged under the Charter (Article 94, paragraph 1) to see to it that the judgment is executed. We sometimes see that States do not respect this obligation. The Security Council may be seized of the matter and may make recommendations and decide upon measures to give effect to a judgment if there is non-compliance (Article 94 (2) of the Charter).

On the whole, however, it is fair to say that States do adhere to the judgments by the International Court of Justice and do execute them in good faith.

But now you may ask what happens if a State does not respect a judgment by the International Court of Justice and the matter is really serious? To be frank, there are no readily available means to ascertain acceptance. Unfortunately, the more powerful the State in violation of the judgment is, the less the likelihood that it will adjust its behaviour if it has decided to go its own way.

However, ultimately, there is the option that a State which does not execute or adhere to a judgment by the International Court of Justice can be seen by the Security Council of the United Nations as causing a threat to international peace and security. The Council can then apply Chapter VII of the Charter allowing for coercive measures in order to ascertain that the judgment is respected. But this option is probably rather unlikely, and if the State in violation is one of the permanent members of the Council, there would be a veto against any resolution expressing criticism.

Over the last decades we have also seen the development of other court structures at the international level and in particular at the regional level in the field of human rights.¹⁵ The International Tribunal for the Law of the Sea should also be mentioned.¹⁶ I have already mentioned the International Criminal Court.

Attention should here be drawn to the web sites that have been established for: the International Court of Justice; the International Criminal Court; the International Law Commission; the Codification, Development and Promotion of International Law; Treaties; UNCITRAL; the Law of the Sea; the Sixth Committee and the web site of the UN Legal Counsel.¹⁷

So, the conclusion is that the rule of law is a prominent element at the international level not only in the relations between States and between States and international organizations. It now also has a bearing in the relations between States and individuals.

The interrelationship between the rule of law at the national and the international level

And now to the third element of my presentation: The interrelationship between the rule of law at the national and the international level.

I have been asked whether the international community is “entitled” to “impose” the rule of law on independent sovereign states. Another question put to me is if the existence or prevalence of the rule of law in a certain country is a condition or prerequisite for actively playing a role at the international level or in the international community.

From a strictly legal point of view, I suppose one would have to answer “no” to both questions. The law that applies is basically Article 2 of the Charter of the United Nations. The Organization is based on the principle of the sovereign equality of all its Members (para. 1), and nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State (para. 7).

However, the Charter also provides for solutions in case a State is in violation of its obligations under international law. It indicates means to settle the dispute, and as we have just heard, if the Security Council determines that the behaviour of the State in question is a threat to international peace and security, then the Council may take action. This means that one has to examine every situation on its own merits.

Having drawn this conclusion, we must also conclude that to impose in more general terms “the rule of law” on a sovereign State would not be in conformity with international law. The same goes for one of the most important elements of the rule of law, namely democracy. Hopefully, more and more States will join the community of democratic States, but democracy can hardly be forced upon a State by other States or the UN through the use of force.

Let us hope that the determining factor here will be the good example.

With respect to the other question put to me: even if the existence or prevalence of the rule of law in a certain country is not a condition or prerequisite for playing an active role in the international community, it goes without saying that a State where these elements exist is able to appear at the international level with much more authority and credibility than a State where these elements do not exist.

The overriding purpose of the United Nations is to develop friendly relations among nations. This goal can hardly be reached unless more States join to develop a system where the rule of law at the national level goes hand-in-hand with the rule of law at the international level. I would even go as far as to suggest that a State that cannot demonstrate that the rule of law applies at the national level appears with a certain deficit at the international level. Basically, other actors on the international arena can never be certain that a government that represents a State, which is not a democracy and a State under the rule of law, acts with full legitimacy in the interest of its people.

The fundamental documents that must be referred to in this context are the Universal Declaration of Human Rights and the two Covenants from 1966. If these were fully applied at the national level, this would entail democracy and the rule of law. And,

above all, it would lead to a completely different political climate in the world. A closer look at the reasons for any conflict anywhere in the world leads to the same result: the obligations flowing from these instruments are not fully respected!

Expressed in different terms, one could argue that what is required is that States demonstrate good faith when they appear on the international arena. And this should be very much in the interest of States, since this would also create conditions at the national level which would attract investments, generated both at the national level and in terms of foreign direct investment. As suggested in the material disseminated before this Forum, good governance, the absence of corruption and, indeed, a climate in which the rule of law prevails are conducive to economic growth.

In this context it should be noted that the Millennium Declaration identified certain key objectives, including some in the legal field. Let me quote the following five:

- To strengthen respect for the rule of law in international as in national affairs and, in particular, to ensure compliance by Member States with the decisions of the International Court of Justice, in compliance with the Charter of the United Nations, in cases to which they are parties.
- To make the United Nations more effective in peaceful resolution of disputes.
- To ensure the implementation by States Parties of treaties in areas such as arms control and disarmament and of international humanitarian law and human rights law, and to consider signing and ratifying the Rome Statute of the International Criminal Court.
- To take concerted action against international terrorism, and to consider acceding, as soon as possible, to all the relevant international conventions.
- To minimize the adverse effects of United Nations economic sanctions on innocent populations, to subject such sanctions regimes to regular reviews and to eliminate the adverse effects of sanctions on third parties.

In the Millennium Declaration, Member States also made the following pledge, followed by a number of detailed commitments (paragraphs 25 and 26):

“We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.”

The most important contribution that the United Nations as such can make to the rule of law in international relations is supporting and sustaining the rules set out in the existing body of treaties, since this is crucial for the effective operation of international society. But several of these treaties, though they have been open for signature, ratification or accession for some time, have not yet attracted universal participation.

However, to realize the rule of law in international affairs, it is not enough for States to establish their consent to be bound by treaties. If the peoples of all nations are to participate in the emerging global legal order and enjoy its

benefits, it is necessary that States also respect and implement the obligations laid down in the treaties that they have concluded. And this is where the focus is on the Member States themselves. The treaty making process is a concerted effort that has to be complemented by adherence to the commitments by the States individually.

Treaty obligations must always be translated into obligations at the national level in conformity with the national constitutional requirements.

One problem is that national authorities sometimes lack the necessary expertise or resources to ensure that treaty obligations are properly implemented and applied. What is needed is to draft and adopt the appropriate legislation, to put in place the necessary procedures and administrative arrangements, to train those involved in their application and to familiarize them with international rules which they are designed to implement.

In order to contribute to the strengthening of the rule of international law, the United Nations Secretariat has developed an Action Plan which includes a number of measures that can be taken by various units within the United Nations system. The plan consists of the following five elements:

- Encouraging participation in multilateral treaties.
- Assisting States to prepare necessary implementing legislation.
- Training of judges and practicing lawyers.
- Training of other persons involved in the application of international law.
- Education and dissemination of international law.

It is in this area where legal technical assistance comes into play.

As it appears from the material that I have provided for dissemination before this Forum I believe that it should be clear to anyone who gives thought to world governance that:

- Rule of law is necessary to create a society in which human beings can live in dignity with their human rights protected;
- Rule of law as it is understood today can only exist in a democracy;
- There is a direct correlation between the rule of law and a State's ability to attract foreign and domestic investments, to address poverty and to protect the environment.

In the material provided, I have also developed my thinking with respect to the question how best to assist States that are in need of legal technical assistance. Maybe this is something that we could discuss in the working sessions during our Forum.

Obviously, States and international organizations are the ones that could contribute in this field. But we should also be aware of the contributions by many diverse and increasingly influential non-States actors, such as non-governmental organizations, private sector institutions and multilateral agencies. In the material disseminated special reference is made to the efforts by the International Bar Association and the American Bar Association.

Another element that I never fail to emphasize is legal education. As international law develops to regulate more and more fields of daily life and business, it plays an even greater part in the laws of each nation. This imposes a special responsibility on lawyers and on those who educate them and train them. Education in national law and international law are indispensable elements in a society under the rule of law. In particular, to satisfy the fundamental demands of the rule of law, lawyers need nowadays to be familiar with international law – to be schooled in its methods and to know how to research it and to apply it when the occasion demands.

There is certainly much more to be said about the interrelationship between the rule of law at the national and the international level. But I hope that I have been able to give you at least a flavour of the topic.

Conclusion

In my presentation, I have attempted to explain in very simple terms what is meant by the rule of law at the national level; explain what is meant by the rule of law in international relations; and explain the interrelationship between the rule of law at the national and the international level.

It is my hope that this will be of assistance and that we will have a fruitful discussion in the working sessions of the Forum later today.

Thank you for your attention.

¹ UN doc. A/54/2000. The quotation is from paragraph 326.

² General Assembly resolution A/RES/55/2.

³ General Assembly resolution A/RES/60/1.

⁴ Sir Arthur Watts, "The International Rule of Law", German Yearbook of International Law, vol.36 (1993), pp.15-45. This writing provides an excellent overview of the questions relevant to the topic.

⁵ United Nations Treaty Series, Vol. 999, p.171. The Covenant was signed by the Lao PDR on 7 December 2000, but it is not yet ratified.

⁶ <http://www.un.org/News/Press/docs/2003/ga10199.doc.htm>

⁷ http://www.un.org/law/counsel/english/corruption_message.pdf

⁸ United States, Treaty Series, No. 993.

⁹ <http://untreaty.un.org>

¹⁰ An extensive account of the role of the United Nations can be found in "United Nations and Human Rights 1945-1995", Blue Book Series, Vol. VII, Sales No. E.95.I.21.

¹¹ Convention on Diplomatic Relations, done at Vienna on 18 April 1961, United Nations Treaty Series, Vol. 500, p.95. (The Lao PDR acceded to the Convention on 3 December 1962.)

Convention on Consular Relations, done at Vienna on 24 April 1963, United Nations Treaty Series, Vol. 596, p.261. (The Lao PDR acceded to the Convention on 9 August 1973.)

Convention on the Law of Treaties, done at Vienna on 23 May 1969, United Nations Treaty Series, Vol. 1155, p. 331. (The Lao PDR acceded to the Convention on 31 March 1998.)

Convention on Succession of States in Respect of Treaties, done at Vienna on 23 August 1978, document A/CONF.80/31.

Convention on the Law of Treaties between States and International Organizations or between International Organizations, done at Vienna on 21 March 1986, document A/CONF.129/15.

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly on 14 December 1973, United Nations Treaty Series, Vol. 1035, p.167. (The Lao PDR acceded to the Convention on 22 August 2002.)

¹² <http://www.icc-cpi.int/>

¹³ See <http://www.uncitral.org>

¹⁴ General Assembly resolution 217 A (III) of 10 December 1948.

¹⁵ The European Court of Human Rights and the Inter-American Court of Human Rights are good examples. See <http://www.dhcour.coe.fr> and www.oea.org, respectively.

¹⁶ See <http://www.un.org/Depts/los/index.htm>

¹⁷ See <http://www.un.org/law>