

# Rule of Law

## A guide for politicians



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OF HUMAN RIGHTS AND HUMANITARIAN LAW

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The Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the  
Hague Institute for the Internationalisation of Law 2012

ISBN: 91-86910-99-X

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Cover: Publimarket B.V., The Netherlands

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## A Guide for Politicians

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## Foreword

The purpose of this Guide is to provide an orientation for politicians regarding the basic elements of the rule of law.

The Guide was inspired by discussions within the InterAction Council of Former Heads of State and Government. The process of preparing the material was initiated and supervised by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden, and the Hague Institute for the Internationalisation of Law (HiIL), the Netherlands.

The first draft of the Guide was authored by Dr Ronald Janse, head, rule of law programme, at HiIL, during the Henry G. Schermers Fellowship at the Netherlands Institute for Advanced Study in the Humanities and Social Sciences. Further work was then performed within the two supervisory Institutes. The material was then reviewed by members of the InterAction Council and representatives of the Inter-Parliamentary Union. Valuable comments were also received from individual experts. The final review was made by Dr Hans Corell, Chairman of the Board of Trustees of the Raoul Wallenberg Institute and former Legal Counsel of the United Nations.

A lodestar in the preparation of the Guide has been that it should be as short as possible so that it could be read by busy politicians at various levels. But it should also be useful to other decision-makers and policy-makers and to journalists and others who need to orient themselves in the topic. The Guide should also be easy to translate and publish in different languages. This is also the reason why there are no graphical illustrations or pictures in the Guide.

The original language of the Guide is English. However, the Guide may be translated into other languages with the permission of the Institutes, provided the present Foreword is included and that the translation is a true representation of the text. The original is available on the websites of the supervisory Institutes, where translations will also be published.

Lund and The Hague, August 2012

For the Raoul Wallenberg Institute of  
Human Rights and Humanitarian Law

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## 1 INTRODUCTION

The rule of law has become a global ideal and aspiration. It is supported by people, governments and organizations around the world. It is widely believed to be the cornerstone of national political and legal systems. It is also progressively recognized as a fundamental component in international relations.

In the 2005 World Summit Outcome Document, the Heads of State and Government of the world agreed to recognize the need for universal adherence to and implementation of the rule of law at both the national and international levels. A year later, the United Nations General Assembly adopted a resolution on the rule of law at the national and international levels and has continued to do so at its annual sessions thereafter.

In 2010, the General Assembly decided to convene a high-level meeting of the Assembly on the rule of law at the national and international levels during the high-level segment of the sixty-seventh session in 2012.

The aim of this Guide is to explain the basics of the rule of law at both levels. It also explains that the rule of law at the national level partly depends on the rule of law at the international level, and vice versa.

The genesis of the Guide is a discussion among members of the InterAction Council of Former Heads of State and Government in June 2008. In their Final Communiqué from the 26<sup>th</sup> Annual Plenary Session of the Council, held in Stockholm, Sweden, on 25-27 June 2008, they addressed among other questions "Restoring International Law".

As it appears from their website the InterAction Council was established in 1983 as an independent international organization to mobilize the experience, energy and international contacts of a group of statesmen who have held the highest office in their own countries. Council members jointly develop recommendations on, and practical solutions for the political, economic and social problems confronting humanity.

During the preparation of their 2008 Communiqué the point was made that there was a need to raise the awareness of politicians of the basics of international law and the meaning of the rule of law.

This idea was then developed further within the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Hague Institute for the Internationalisation of Law (HiiL). It was also discussed in meetings organized by the World Justice Project. In this context readers of the Guide may be interested to see how their country is assessed in the Rule of Law Index referred to at the end.

In the process, the Inter-Parliamentary Union (IPU) – the international organization of Parliaments, established in 1889 – was also engaged. The IPU is the focal point for world-wide parliamentary dialogue and works for peace and co-operation among peoples and for the firm establishment of representative democracy. One of the aims of the IPU is to contribute to better knowledge of the working of representative institutions and to the strengthening and development of their means of action.

As it appears from the Foreword, representatives of these institutions have been actively involved in preparing this Guide.

There is of course readily available extensive literature on the subject matter. However, it was felt that it would be useful to produce a brief overview of the topic, so that busy politicians would be able to quickly orient themselves in the area with a particular focus on their role and the way in which they can contribute to enhancing the rule of law.

The Institutes are fully aware that the contents of the Guide can be viewed as reflecting only some of the legal systems in the world. But it is their hope that the contents will nevertheless be of use to all concerned. In this context, special attention is drawn to the references made to the material produced by the IPU.

Another aspect is that the Guide might be viewed as focusing more on politicians in very central positions, while less attention is paid to their many colleagues at the local and regional levels within states. This is in a sense inevitable. However, the Institutes hope that the Guide will be useful also to those who perform their important work at those levels.

## **2 THE RULE OF LAW AT THE NATIONAL LEVEL**

### ***2.1 The meaning of the rule of law at the national level***

#### *2.1.1 What is the rule of law?*

In essence, the rule of law means that citizens and those who govern them should obey the law.

This simple definition needs some clarification. To what types of issues does the rule of law apply? What is meant by the word law?

The rule of law applies to the relation between national authorities (the government and other parts of the executive branch at different levels and the judiciary) and citizens, residents and other private actors, such as associations and companies. By way of example, it is about how laws should be made or suspects of crimes should be treated or the way taxes should be levied and collected.

The rule of law also applies to what goes on among private actors in society. It is relevant to such issues as buying or selling property, be it a mobile phone or a car, or entitlement to compensation for damage incurred in a traffic accident or family relationships, like marriage, divorce and heritage. It also relates to issues such as the right to cultivate a piece of land or buying or selling land.

In short, the rule of law is relevant both to relations between those who are governed and those who govern and to the relations between private entities, be they physical persons or legal persons, such as associations and companies. This is worth stressing, since there are those who sometimes argue that the rule of law is exclusively concerned with limiting the exercise of governmental power. It is not.

That said, there is a significant difference between the scope of the rule of law in the relations referred to. There are different views with respect to the extent to which law should permeate society. So-called welfare states tend to favour extensive regulation of social and economic affairs by the government, whereas more economically liberal states see a more modest role for the government.

At the same time it should now be clear that the only aim of a state cannot be to ensure "law and order" and nothing else. The fact that the rule of law is intimately connected to the observance of human rights implies that the state must assume certain social functions. This means that the rule of law requires that states legislate and regulate certain social relations including in the economic field. It is however obvious that the level of regulation differs from country to country, partly depending on the level of trust that the government enjoys among the population.

In some countries, many social relations are heavily regulated, whereas in other societies law plays a more limited, even marginal role. But even heavily regulated states acknowledge that it is neither possible nor desirable that the law regulates everything which goes on among people in society. Other types of norms are often more appropriate, for instance religious norms or norms of neighbourliness or the norms of business life. In short, the rule of law is not relevant to all relations among citizens and other private actors.

But the rule of law is always a yardstick when governmental power is exercised. No exceptions are allowed here.

First, whenever an official exercises power, he or she must have legal authority to do so. For example, if an official wants to search a house, the official must possess proper legal authority. That is, the law determines *who* is allowed to exercise which power under which circumstances.

Second, when exercising power, officials must obey the law. For example, when making an arrest, the official is in many jurisdictions under a legal obligation to present a warrant and to inform the person of the reasons for the arrest. The interrogator must advise the suspect that everything the latter says can and will be used against him or her in a court of law.



The law determines *how* power is to be exercised. This can also be referred to as “due process” which is designed, by way of example, to protect the rights of individuals and protect them from being put in jail without charge, and which makes sure that people have access to lawyers if they are charged or arrested.

To sum up: the rule of law subjects the exercise of power to law, and it is relevant also to relations among individuals and private entities.

### *2.1.2 The rule of law and the responsibility of politicians*

For the ordinary citizen, it is extremely important, for reasons that will be explained shortly, that the exercise of political power is subjected to law. It is decidedly not a good thing when the government can do as it pleases at whim as in a dictatorship. It is important that their own behaviour and that of their fellow citizens is subject to law, because the law facilitates a stable and predictable environment which is conducive for everything from personal security of individuals and their liberty to safe business transactions.

But the rule of law does not require that all or even most of the behaviour of citizens is subjected to ever more laws and legal regulations. Quite the contrary, citizens are often justifiably opposed to subjecting too much of their own behavior to laws and regulations. More laws could mean less freedom of action.

As a policy-maker, on the other hand, the politician may have to take a different position. There are situations where an absence of law is a defect, a weakness, a danger, an undesirable state of affairs from the perspective of the rule of law. Those who exercise power should not be able to prescribe penalties or similar sanctions on others without being guided by clear legal rules. Nor should they be able to distribute benefits or grant favours without legal authority and without being guided by legal rules.

A politician should also be vigilant that other policy-makers and officials are not free to exercise power as they please. In short, as a policy-maker, a politician should not be in favour of being free to do as he or she pleases, but be content to be entirely bound and constrained by law. A politician should strive for a system where the exercise of authority is done according to law.

Thus, as far as the exercise of political power is concerned, politicians, whatever their position in the political system, should never allow officials, let alone themselves, to operate outside the law, either by exercising a power they are not entitled to employ, or by using it in a way that violates the law.

This is especially relevant for politicians working in the executive branch of government. The temptation to sidestep the law to get things done

quickly, without burdensome substantive and procedural limitations, is the greatest in this branch.

Politicians working in the legislative branch should always be mindful that the exercise of power is sufficiently limited by law. If they discover that the law allows for too much discretion, they should feel obliged to make the necessary adjustments to the existing legislation. Recently, anti-terrorist legislation has proved to be an area where the danger of overbroad definitions is high and fundamental rights are easily eroded.

The responsibility of a politician, whatever his or her position, is to ensure that governmental power is subjected to law and exercised in accordance with the law.

### *2.1.3 Three constituent elements of the rule of law: legality, democracy and human rights*

An essential question which must be asked with respect to the definition of the rule of law is: what, exactly, does the word law mean in the expression the rule of law? Three aspects can be distinguished.

Firstly, the rule of law entails that laws are rules which possess a set of formal characteristics. These characteristics are called formal because they say nothing about the content or substance of the laws. An example of a formal characteristic is that an enactment contains the features that demonstrate that it is a piece of legislation, that it is published in a national legal gazette, and that the quality of the issuance is such that those to whom it is addressed are able to understand it.

The second aspect concerns the way in which laws are brought about. There are broadly two options. Laws can be made by persons who have been elected by and are accountable to the people or by persons who have not been elected. They can be made democratically or in a system where there is no democracy. It goes without saying that the rule of law can only be fully realized in a democratic political system.

It should however be noted that not all laws in a country are enacted through parliament or another elected body. Law-making power can be delegated to other bodies, notably regional or local agencies. And in some democratic systems there may also be representatives in parliament who are not elected. The main thing is that those to whom legislative power is entrusted are subject to the law and appropriate constitutional oversight.

This is not to deny that the formal characteristics of the rule of law can be realized to some extent also in some non-democratic political systems. In these systems, politicians may exercise power through laws, but are usually not subject to laws themselves. These systems are characterized by rule *by* law, not by the rule *of* law.

The third aspect concerns the content of the law. Here, the crucial element is that the rule of law requires respect for human rights. This is

true in particular with respect to civil and political rights. It is hard to imagine, for example, how the rule of law can exist without respect for the rights to free speech and association. But also other human rights come into play here, including economic, social and cultural rights.

In this Guide, the two latter aspects of the rule of law – democracy and human rights – will be addressed in the proper contexts below, since they are significant issues in their own right. The continuing focus on the Guide will be on what is distinctive about the rule of law.

This is not to say that one should lose sight of the requirement that the laws must be legitimate in the sense that the competent legislator is trusted by the citizens. Basically, this trust can only be established through a democratic process, in particular by a national assembly or a parliament elected by secret ballot.

## **2.2 Rule of law requirements at the national level**

### *2.2.1 Constitutionalism*

A basic requirement of the rule of law may be labelled constitutionalism. In essence, this means that there must be a body of fundamental laws in a legal system, which defines the executive, legislative and judicial powers of the state. The fundamental laws must lay down which bodies in the state are responsible for the exercise of these powers and how these powers are to be exercised, both among these bodies and vis-à-vis citizens and other private entities.

Most importantly, this legislation must define in general terms what the limits of the exercise of the various powers are. In other words, the constitution must provide the basic structure and rules of the legal system and tell who is entitled to exercise which powers and how. Without such a basic legal framework, it is not possible to measure with reasonable accuracy the government's fidelity to the rule of law.

This set of basic laws is mostly laid down in a formal, written document which is meant to be an exhaustive summary of the basic laws and is called "the constitution".

Regrettably, there are states with written constitutions which do not at all reflect the way power is actually exercised or fulfil the requirements of such a framework. In such states, the written constitutions are no more than an exercise in window-dressing.

One should also be aware that there are states with unwritten constitutions. There are also states (for example Israel) where there is a mix of various laws and documents of a constitutional nature. Such systems can also exist in conjunction with a written constitution. It goes without saying that politicians have an obligation to familiarize themselves

with the constitution of their countries. In some countries there are introduction or training seminars for new members of parliament.

### *2.2.2 Publicity, clarity, non-retroactivity and stability*

It is obvious that rules can only guide conduct if the people to whom they are addressed are aware of their existence. Laws must therefore be promulgated, that is, made public.

Furthermore, the laws must be sufficiently clear, since people cannot obey laws if they do not understand them.

It is also important that laws apply prospectively, not retroactively. This principle of the non-retroactive application of the laws is especially important in criminal law. This is why this principle is enshrined in the Universal Declaration of Human Rights (1948). Its Article 11, paragraph 2 states that "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed...". International and regional human rights conventions have subsequently reaffirmed this fundamental right.

There is, however, one important exception to this rule, namely responsibility for certain international crimes. This follows from Article 15, paragraph 2, of the International Covenant on Civil and Political Rights, which reads: "Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Other human rights treaties have similar provisions. The jurisdiction of the International Criminal Court under the Rome Statute (1998) should also be mentioned in this context.

Furthermore, laws and in particular constitutions must be stable over time. They must not be amended or changed too often. If laws change frequently, it will be difficult to follow them. Frequent changes also lead to permanent uncertainty about the content of the law. Moreover, actions which involve long-term planning become impossible. For example, if one considers setting up a business, it is important to know whether laws with respect to taxes and tax breaks are likely to remain roughly what they are in the near future.

Obviously, stability is a matter of degree. It is not possible to fix a period within which laws must remain what they are. Moreover, stability is more important in some fields of law than in others. A rule of thumb is that laws which regulate matters that require careful planning and long-term decisions must change less frequently than laws which deal with subject matters where more short-term decisions are common.

In one of its landmark cases, *Sunday Times v. United Kingdom* (1979), the European Court of Human Rights summed up many of the requirements just mentioned: "The law must be adequately accessible:

the citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case...a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

### *2.2.3 A special responsibility of parliaments*

Parliaments bear a special responsibility for upholding the principles just mentioned. They must ensure that laws are adequately made public, clear, and stable. This needs careful attention. Clarity is not only a matter of precise wording. It also requires consistency between new laws and existing provisions. New provisions, however clearly drafted, may turn out to be confusing when read in conjunction with existing laws and provisions which contain the same words but define them differently. Moreover, clarity can also be undermined by overregulation and a multitude of laws as this easily confuses citizens and officials.

Clear laws thus require adequate legislation techniques and skills among those who draft them. This work may be performed by parliamentarians, but is most often done by civil servants working for the parliament or for ministries. In a legal system which aspires to respect the rule of law, it is important that such persons have adequate training and sufficient skills to perform their work.

To ensure the quality of legislation, it is also important that in the legislative process advice is sought from independent institutions both in the public and private sector, in particular from non-governmental organizations, trade unions and the business community. Furthermore, exchanges with parliamentarians and officials from other countries have often proved very useful in improving legislative skills and techniques.

Some parliaments have legislative training and drafting institutes that provide training in legislative drafting techniques to parliamentary staff also from other countries. India could be mentioned as an example. The Inter-Parliamentary Union can provide information about this.

Publicity is also more than a formal announcement in an official gazette. It is simply not possible for citizens and officials to keep themselves informed about new laws and changes in the law simply by referring them to such publications. Given the enormous amount of information that people have to digest on a daily basis, publicity requires that those affected by legal changes are actively informed.

Even if it is the task of the executive to organize and carry out such information campaigns, parliament must keep an eye on whether this is done satisfactorily. The Internet can be a very useful tool in making law known and accessible to various audiences. In societies where printed material and the Internet are not easily accessible, other means have to

be employed. Also here, the Inter-Parliamentary Union can provide further information.

Although the prohibition on the retroactive application of laws, mentioned above, is primarily aimed at the judiciary and the executive, especially public prosecutors, parliaments have a responsibility here too. Particularly in criminal law, where the prohibition on the retroactive application of laws is most important, prosecutors and judges are all too often confronted with provisions which were drafted a long time ago and which may no longer provide adequate guidance to current legal problems. Parliaments can and should see to it that such situations are avoided by checking regularly whether the wording of laws in statute law, especially old provisions, is still in conformity with contemporary standards and views among the general public, the legislature and lawyers. The prohibition on the retroactive application of laws benefits greatly from regular review and, if necessary, amendment of laws.

Also the executive has an important role to play in upholding the requirements of legality. The clarity and publicity of laws is greatly enhanced when the executive ensures that groups for which particular laws are especially important, are being kept up to date and that the language of these updates is tailored to these different audiences. The Internet can play an important role here. It is important to reach out, either via the Internet or other media, to lawyers' organizations, professional organizations, non-governmental organizations, legal aid offices, etc.

#### *2.2.4 Discretion*

The rule of law requires that governmental power is exercised as much as possible through laws, which are general, being adequately made known in advance, etc. But political power cannot in all cases be exercised through laws. Discretion and the exercise of power through particular orders is an inevitable part of governance. To satisfy the standard of the rule of law, however, the authority to exercise such discretionary power or make orders needs to be circumscribed by general rules.

Moreover, the executive should not resort to the use of discretionary powers too lightly. This is of course one of the most difficult issues in the exercise of political power, as threats to national security must sometimes be dealt with in great secrecy and may even require certain restrictions of civil and political rights. The rule of law sometimes needs to be balanced against other important aims. Politicians should act in good faith when they engage in these balancing acts.

Important elements in striking this balance are acts that regulate access to information and how such acts are or should be implemented. Further guidance can be found in recommendations of treaty bodies and in the case-law of international human rights courts.

The IPU handbook *Parliamentary Oversight of the Security Sector: Principles, Mechanisms and Practices*, describes the legal framework and good practices in this context. Among other things it describes the international principles for dealing with states of emergency, including legality, proclamation, communication, temporality, exceptional threat, proportionality, and intangibility, the latter pointing to specific fundamental rights, from which there can be no derogation.

This handbook also advises that parliament should be actively involved either in the proclamation of a state of emergency or in its ratification once the executive has decreed it. The objective is to prevent the executive from having the sole competence for the adoption of measures of such gravity.

### *2.2.5 Separation of powers*

The rule of law requires that the main powers, the executive, the legislative and the judiciary, are separated. This separation not only means that these powers are exercised by different institutions (for instance the government, the parliament and the judiciary), but also that individuals cannot be member of more than one of these institutions (for instance the prime minister cannot also be a judge).

Of course, an absolute and strict separation of powers has never in fact existed: in every country there are institutions which take part in the exercise of two powers. A common feature is that the executive can issue certain types of rules (decrees, executive orders etc.) or have joint authority to issue certain types of rules. Moreover, in both civil law and common law countries case-law is regarded as part of the existing laws through the way these laws are interpreted and applied in a specific case. This means that when judges exercise their judicial powers they also contribute to the development of the law at the national level.

Moreover, many countries allow individuals to be part of two institutions at the same time in some cases. For example, in the United Kingdom a cabinet minister may also be Member of Parliament.

In fact, the situation in many countries can best be described as one of a system of checks and balances rather than a strict separation of powers. Power is distributed among various institutions and individuals in such a manner that no institution or person can assume absolute power because the exercise of power is always checked and balanced by the exercise of other powers. A case in point is parliaments exercising oversight over the executive branch.

A proper system of checks and balances is of utmost importance to the rule of law. For instance, the key function of the rule of law, limiting the exercise of power, would not be realized if executive and legislative powers were exercised by the same institution or individual.

### 2.2.6 *The judiciary*

An indispensable requirement of the rule of law is the presence of an impartial and independent judiciary which, in the last resort, is able to resolve disputes and assure respect for the laws.

In every society conflicts inevitably occur. Some of these conflicts arise in the relation between the government and the citizens. Other conflicts occur in the relations among citizens or other private entities.

Some of these conflicts are about facts. The police accuse a man of taking part in a riot – the man denies that he was there. A woman says a neighbour still owes her money – the neighbour denies she ever borrowed it.

Other conflicts are about law. One person holds that he has a legally valid contract to buy a house because he communicated to the owner that he accepted the price for which the latter had put the house for sale in a local newspaper. The owner argues that there is no contract and that he is not obligated to sell the house, because the advertisement was merely an invitation to start negotiations and not an offer which, if accepted, constitutes a contract in the legal sense.

Conflicts must be resolved according to the law

Conflicts like these must be resolved according to the law. A decision must be made with respect to the facts, the law, and the application of the law to the facts. In the absence of such decisions, conflicts will continue or be settled by other means, in the worst case by force.

In addition, if officials and citizens are to obey the law, they must know which interpretation of the law is correct or how the law is to be applied to facts. A decision by a competent organ can provide this clarity. Its significance thus goes beyond the settlement of the dispute between the parties in a particular case. It helps to ensure more generally that officials and citizens understand the law and can obey it.

Independence

Decisions of this kind must be made by a third party, a judge or a court of law. Those who belong to the judiciary must be free from outside pressures. They must decide according to the law and nothing but the law. This means, first of all, that they must be independent from the government. Their judgments must not be influenced by the powers that be. On the other hand, judges must commit to codes of professional integrity and conduct, and be accountable for judging in a fair manner.

This independence must be promoted and ensured by laws regarding issues such as the appointment of judges, the security of tenure, conditions of service, and ways of setting salaries – all of which must be removed as far as possible from the government's influence.



## Impartiality

A judge's freedom from outside pressures means, secondly, that the judge is impartial, in other words that he or she is not biased towards any of the parties in the case at hand. This requires, among other things, that parties, if they have reason to suspect that the judge is biased, have an opportunity to challenge him or her. The result may be that the judge is taken off the case. Judges must also be entitled to recuse themselves in case they have a relationship with one of the parties to a conflict.

One of the greatest threats to the impartiality and independence of the judiciary is corruption. For this reason, adequate salaries, security of tenure, and the like are indispensable. That this must be balanced by obligations to observe codes of professional integrity and conduct appears from the above.

## Professional ethics

Applying the law correctly, equally for all, uninfluenced by outside pressure, does not only involve adequate rules and arrangements. It also involves high standards of professional ethics and good conduct among all participants in the dispute resolution process.

Judges must also not compromise themselves in their private lives and jeopardize their independence and impartiality by making themselves susceptible to the pressure of outside influences. They must abide by the law, even in apparently trivial cases where many ordinary citizens may habitually have a tendency to disobey the law.

Judges must even be cautious in engaging in activities which, though lawful, could possibly make them susceptible to outside pressure. It is very doubtful, for example, that judges should allow themselves to go gambling in perfectly lawful casinos. The same applies to prosecutors.

## Role of politicians

It is extremely important that politicians publicly accept and honour the independence and impartiality of the judiciary. Politicians must not, for example, give an opinion on what they consider to be the desirable outcome of a case which is before a court but has not yet been decided by the court. This could be interpreted by judges – and the public at large – as outside pressure to influence the outcome of the case.

Politicians must also refrain from commenting on the details of outcomes of specific cases or suggest that cases have been decided wrongly. This does not mean, of course, that politicians can say nothing at all about case-law; they may wish to amend or introduce laws as a consequence of a judicial decision or a series of such decisions which they do not find in accordance with contemporary standards. But they should limit themselves to very general remarks and in no way suggest that the judges in particular cases have made wrong decisions. As a matter of fact,

the rulings may be fully in accordance with the applicable law. The responsibility then rests with the legislator.

Politicians must also be extremely cautious when they publicly discuss the terms and conditions under which judges are employed. It is highly inappropriate, for example, to respond to the outcome of a particular case by suggesting that security of tenure of judges should be abolished and that judges should be fired when they make the "wrong" decision.

This is not to say that arrangements like the extent of security of tenure of judges cannot be discussed by politicians as long as the rules eventually adopted satisfy the requirement of ensuring the independence and impartiality of the judiciary.

It is a different matter that parliaments must exercise oversight over the executive branch, including the judiciary, to ensure due administration of justice. The exercise of this duty is not an interference with the independence of judges.

Courts must be accessible

It is important that courts are accessible. People must not refrain from taking their case to court because this is excessively expensive, troublesome or complicated. Access to justice is an important element in a society under the rule of law.

This means, first of all, that criteria for admitting a case to be heard and decided in a court of law must not be too tough and strict. Some restrictions are inevitable, for too many cases will overload and impair the judicial system. But any restrictions must serve a justified objective and be necessary to achieve that objective.

For example, given the seriousness of punishment and the technical nature of criminal proceedings, it may be justified to require suspects to be represented by lawyers. But mandatory legal representation in small and relatively simple claims cases does not seem to be necessary, provided that judges have adequate authority to apply all relevant law.

Secondly, court costs must be moderate and there must be subsidies for people who cannot afford court costs or attorney fees. A common solution to the dilemma that lawyers' fees can be prohibitive is a legal aid scheme.

For example, under Article 6 of the European Convention of Human Rights, people do have a right to free legal aid in criminal cases. In the landmark case of *Airey v. Ireland*, the European Court of Human Rights ruled that a state, under particular circumstances, also has an obligation to provide legal aid in civil cases. Another aspect is that travel distance to the court must not be too long.

### Justice delayed is justice denied

It is also of greatest importance that court cases do not take too long but are resolved within a reasonable period of time. Justice delayed is justice denied, is a well-known observation. This is one area where parliament should take an interest. In particular, it should be concerned with ensuring that the justice system has the means required to render justice in a timely fashion.

### Procedures must be fair

Furthermore, the adjudicative procedures in courts of law must be fair. This means, among other things, that hearings in principle are open to the public. It also means that the parties can seek legal representation, that they have adequate time to prepare their arguments, that they are able to respond to the arguments of the other party or parties and that they are entitled to have their case reviewed by a superior judicial body.

### *2.2.7 Alternative dispute resolution*

In a rule of law perspective, disputes can also be resolved by other means than the judiciary. Alternative ways to settle and resolve disputes may be perfectly acceptable. As a matter of fact there is a range of methods, including mediation and arbitration, better known as "alternative dispute resolution" that can be resorted to. There are also quasi-judicial institutions, such as the Ombudsman, which may investigate complaints against governmental or organizational abuse of power.

The advantages of all these alternative ways to settle disputes can be many: relatively accessible in terms of costs and distance, relatively quick, better compliance with the outcome, alleviating the case-load of the formal judiciary, etc. Moreover, it is possible to establish small and strongly simplified procedures within the formal judiciary structure, such as small claims courts, mandatory conciliatory proceedings and the like.

To the extent that these alternative procedures within or outside the formal judiciary lead to an increase in the efficiency and effectiveness of dispute resolution, they are not only acceptable from the point of view of the rule of law, they actually strengthen the rule of law. The precondition, however, is that these procedures provide legal protection to all parties, including the rights to a fair hearing, and satisfy the requirements of impartiality and independence.

In this context should also be noted that in many countries there is a National Human Rights Institution (NHRI). Many NHRIs have the mandate to receive and investigate individual complaints and can follow up such complaints with the relevant government institutions. Where appropriate, NHRIs also exercise a conciliatory function, bringing the complainant and respondent together in a confidential process to discuss and reach an agreement on the issues raised. Additionally, NHRIs are typically required by law to report to parliament, and this could lead to changes in

legislation and improvement of the human rights situation in the country as a whole.

Further guidance can be sought in the so-called Paris Principles relating to the Status of NHRIs, adopted by General Assembly resolution 48/134 of 20 December 1993.

#### *2.2.8 Other decision-makers*

In addition to the judiciary, there is a great variety of administrative officers and agencies that apply the law and make decisions that affect citizens. It goes without saying that the law must be applied and obeyed by the administration at all levels, from the ministers to the public prosecutor, the police officer on the street, the tax officer, the urban planning officer, the environmental protection agency, etc. The decisions of many of these agencies have a deep impact on the lives of citizens. The tax office is a case in point. It is therefore of the utmost importance that these agencies operate within the boundaries set by law, and that they ensure that the law is in fact respected. They are essential to make the rule of law work.

#### *2.2.9 Adequate enforcement*

The rule of law is about disciplining the exercise of governmental power by subjecting it to law. This means that power is exercised only by those who have legal authority to do so and that power is exercised under the laws.

Furthermore, the rule of law requires that laws are generally strictly enforced and seen to be enforced. The rule of law requires that laws are respected by and backed by power.

If people are to obey the law, it is important that they see that the law is in fact respected. If they learn or experience that law is not in fact obeyed, in other words that officials and citizens in reality apply "norms" in a manner that is entirely different from what "the law in the books" requires, they cannot be expected to respect the law themselves. Widespread disobedience generates distrust of and indifference to the legal system.

An independent judiciary plays an important role in ensuring congruence between applicable rules and actual behaviour. In particular, the judiciary plays a role in checking excesses of executive power.

At the same time, it is vitally important that all agencies and those who serve in them are clearly aware of the importance of the rule of law and what it requires of them. They cannot enforce the law if they do not know or understand it. Nor can they uphold the rule of law if they are unaware of its basic characteristics and importance. Sustained efforts to inform and educate the government at all its levels, not only about the rule of law in general, but also about what it means for their daily work, is imperative.

In this context should also be mentioned the importance of adequate parliamentary oversight through appropriate mechanisms.

### *2.2.10 Cautions*

The list of formal requirements for the rule of law could be further extended. However, this would be going beyond the scope of the present brief Guide. It is, however, important to highlight certain other points.

There are no hard and fast criteria

The first has already been mentioned in passing: requirements for the rule of law do not have the character of either/or, black and white, but are a matter of degree. There are no hard and fast criteria which indicate whether the requirements have or have not been met.

For example, it is easy to say that laws should be clear for those to whom they are addressed. Perfect clarity, however, is unattainable.

For one thing, it is a matter of accepted wisdom that all words are subject to different interpretations in some cases. For example, if local law states that vehicles are not allowed in the park, it is clear that cars, motorcycles, and bicycles are prohibited. But what about skateboards and roller skates? All words have a core meaning which is undisputed, but there is always room for uncertainty of meaning.

Moreover, although the wording of the law must be as close to ordinary language as possible, a degree of technicality is inevitable for the sake of the clarity of the law. Furthermore, many legal systems have – often for justified reasons – deliberately included words in the law, which are open to different interpretations; human rights provisions in constitutions and international conventions are evident examples. And so are provisions about equity or reasonableness in many tort and contract law codes.

Of course, the impact of these and other factors on the clarity of the law should not be exaggerated. It is possible to ensure that citizens and officials are aware of their core obligations and rights in most of the cases most of the time. The point is rather that the extent to which legal systems are in accordance with the rule of law is always a matter of degree – and thus debatable.

An overarching framework

Another caution is that the requirements just mentioned have the character of general principles. To be effective, they must be refined and developed into far more detailed rules and legal arrangements. In other words, the principles provide no more – and no less! – than the overarching framework, the baseline; they must be developed into detailed and specific rules. In this process, many choices must be made.

For example, in some legal systems laymen do not participate in the adjudication of criminal and civil cases, whereas other legal systems use laymen for these purposes. In both instances, however, adjudication is considered to satisfy the requirements of independent and impartial dispute resolution and the requirement of a fair hearing.

To take another example, most legal systems have given the judiciary the power to review whether laws made by the supreme legislature are in accordance with the constitution, whereas other legal systems have no such so-called constitutional review. Under both systems, however, there may be adequate checks to ensure the constitutionality of legislative acts.

In some legal systems, prosecutors have the duty to prosecute any crime or offence which is brought to their attention, whereas in other legal systems prosecutors have a degree of discretion in this regard. In both systems, however, the enforcement of the criminal law may be adequate and predictable.

There is no one-size-fits-all solution

In short, there is usually no single right answer to the question how the rule of law requirements must be implemented. Rather, there are usually many ways in which this can be done. Legal systems which vary greatly over the precise content of rules and institutions may satisfy the requirements of the rule of law to an equal extent. Hence, there is no legal system which can serve as a universally applicable model of the rule of law. There is no one-size-fits-all solution to the problem of translation of the general requirements of the rule of law into specific legal rules.

This also means that no politician should think that his or her national model is the only one in compliance with the rule of law. This is especially important in the field of legal cooperation with other countries, in particular when the aim of such engagements is to build or strengthen the rule of law in those countries.

Awareness of relativism

One should, however, not be relativistic either. Some legal rules and arrangements simply violate the basic requirements of the rule of law. If judges are directly appointed by the executive with no safeguards and if the executive can have judges fired at will, the rule of law is not respected. If people can be arrested and put in jail for weeks without being brought before a judge, the rule of law is violated. If acts of government involving the exercise of public power vis-à-vis citizens are excluded from judicial scrutiny and review, the rule of law is violated.

### ***2.3 Why is the rule of law at the national level indispensable?***

There is not just one single reason why it is important that officials and citizens bow to the law. The rule of law embodies a variety of aims, most of which are closely related to each other.

### *2.3.1 Restraining the exercise of power*

In many, if not all states, the government has tremendous power over its citizens. It has the power to punish or otherwise negatively sanction them. It levies taxes. It provides financial assistance or other benefits. Governmental power deeply impacts on the lives of citizens.

If officials are obliged to act pursuant to and in accordance with the law, the exercise of power is confined to the limits of the law. The rule of law restricts discretion and hinders a wrongful exercise of power, in other words an exercise based on willfulness, arbitrariness, prejudice, whim and bias. This is the foremost reason why the rule of law is indispensable.

It is evident that citizens benefit from the absence of arbitrary power. But it is important for other reasons as well. Foreign investors, for example, are not attracted to a country when every official transaction has to be accompanied by a bribe or when the protection of property is dependent on the whims of officials.

A country which wishes to attract capital is more successful if it can guarantee that economic transactions take place within the framework of a body of clear and stable laws, that legal remedies are available, that decisions can be relied upon, and that authorities act in accordance with the laws. Subjecting the exercise of governmental power to law is conducive both to business and to the rights of workers.

### *2.3.2 Legal certainty and freedom*

Another value which underlies the rule of law is certainty. The rule of law is a prerequisite of mutual trust.

If the government exercises power in accordance with the law, citizens are able to predict when and how the government will use its power and whether and how it will respond to their actions. Citizens can go about their business in the comfortable awareness that they will not be confronted with adverse actions, such as fines, imprisonment or other coercive governmental interference. They should also be able to receive benefits or subsidies that the government is obliged to provide under relevant legislation.

If the rule of law is respected, one can expect almost everyone to act in accordance with the law almost all of the time. One also knows which rules apply in case there is a problem. The fact that an independent and impartial judiciary and enforcement agencies provide remedies in cases where people do not behave according to the law, enhances this sense of certainty.

This is especially important when dealing with people one does not know or know only remotely. Certainty encourages people to engage in short-term or long-term interaction. This is beneficial, among other things, for

economic transactions. The rule of law in this sense facilitates economic development.

Apart from this societal benefit, certainty is beneficial for personal well-being. If people feel confident that they know what they can do and how others will respond to their actions, they will feel that they can make short-term and long-term choices and act accordingly. This ability to plan one's life is an aspect of freedom. Of course, this freedom can be rendered illusory by other factors, such as poverty. But that is another issue and does not diminish the importance of the value of the rule of law, all the more so as poverty is often the result of the absence of the rule of law.

### *2.3.3 Equal treatment*

The third value which underlies the rule of law is equal treatment. If officials and judges apply the law justly, they cannot treat people differently who are the same in the eyes of the law. They cannot treat someone or some group differently because of prejudice, corruption or a foul mood. The rule of law is partly based on the fundamental sense of fairness that like cases are to be treated alike.

It should be noted that this notion of fairness is formal. It says that equals are to be treated equally, but it does not indicate who should be regarded as equal before the law. As is well-known, however, the 20<sup>th</sup> century has witnessed the steady and progressive elimination of discrimination from many legal systems. Women, ethnic minorities, the disabled and children have gained ever more rights and are by and large treated on an equal footing in ever more legal systems.

This progressive elimination of discrimination has been confirmed and promoted by international treaties, such as, in the context of the United Nations, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and the Convention on the Rights of Persons with Disabilities.

Consequently, the formal rule-of-law-requirement that equals are to be treated equally is less and less a purely formal matter. Increasingly, it guarantees that nobody is discriminated against as a matter of law.

This is not to say that problems do not exist. By way of example, the connection between empowerment of women and the rule of law cannot be overemphasized.



### 3 THE RULE OF LAW AT THE INTERNATIONAL LEVEL

#### 3.1 *The meaning of the rule of law at the international level*

The rule of law has been developed at the national level. It is not, traditionally, a common and widely-used term in international law. Over the few past decades, however, it has become widely accepted that the international legal and political system, too, must respect the rule of law.

There is no difference between the core meaning of the rule of law at the national and international level. In both situations, rule of law means that the law should be respected. The rule of law at the international level applies primarily, but not exclusively, to states and international organizations. But this difference does not constitute a barrier to transposition of the core meaning of the concept from the national to the international level. The rule of law at the international level simply means that international law must be respected by its subjects, in other words states and international organizations. In many instances this also applies to individuals and other private entities.

It is important to realize, however, that there is a significant difference between national legal and political systems and the international society. At the national level, the rule of law applies primarily to the hierarchical relation between the state and its citizens. The rule of law, to a large extent, is an understanding of how the all-powerful state must be organized and act.

There is no equivalent to this hierarchy at the international level. The international society consists of over 190 sovereign states and a large number of intergovernmental organizations. There is no "superstate" or "world government" to which all these states and organizations are subject.

Let us take law-making as an example. At the national level, law is created by the state and its organs. At the international level, there is no such central legislature. Instead, law-making is a common effort by states and international organizations.

There are two main sources of international law: customary law and treaty law.

Customary law consists of state practices recognized by the state community at large as laying down rules of conduct that have to be complied with. Customary law thus depends on what states are willing to accept as rules; a rule will not become, or cease to be, part of customary law, if states generally object to it.

Treaty law rests on the principle that agreements must be honoured, expressed in the Latin sentence *pacta sunt servanda*. Hence, treaty law consists of agreements between two states (bilateral treaties) or several states (multilateral treaties) on different subject matters. States are not

bound by treaties to which they are not party or by treaty rules to which they have made reservations.

In some cases treaty law represents a codification of customary international law. Conversely, treaties that are ratified by a large majority of the state community are often considered as customary international law and are in this sense binding also on states that have not ratified them. The Vienna Conventions on Diplomatic and Consular Relations, the 1949 Geneva Conventions, often referred to as the core of international humanitarian law, and certain human rights treaties are cases in point.

Some treaties, especially in the sphere of human rights, contain many provisions which are very much open to different interpretations. International courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights, as well as monitoring bodies, such as the United Nations Committee on the Elimination of Discrimination against Women, have developed an impressive body of case-law and recommendations which gives guidance and clarity regarding the interpretation of these treaties. Nonetheless, these open norms will continue to raise interpretative questions in light of challenges posed by technological advances, international security, and differences with respect to morals.

We can also look at law enforcement. At the national level, the enforcement, prosecution, and punishment of violations of the law are the responsibility of the state. At the international level, there is no police force, nor is there a unified system of sanctions or, with a few exceptions, an equivalent to the prosecuting office. Instead, enforcement is to a large extent a matter of self-help: states decide whether or not to take action or seek assistance. The role of the United Nations Security Council in this context is dealt with in section 3.2.3.

These differences between national and international legal systems do not, as was noted before, alter the core meaning of the rule of law. Nor do they fundamentally change the requirements of the rule of law. But the differences do account for the fact that the realization of the rule of law at the international level faces some serious challenges.

### **3.2 Rule of law requirements at the international level**

#### *3.2.1 International law must be made public, accessible, clear, and prospective*

The rule of law in the international society requires that laws are made public, accessible, clear and prospective and that the law-making process is guided by clear rules. There is no difference in this respect between the rule of law at the national and the international level.

At first glance, international law faces more challenges than national law, because, as was noted before, there is no central legislator who is or can

be held responsible for the accessibility, clarity and certainty of international law. Instead, the responsibility for the certainty of international law lies in the hands of the many states which conclude treaties and form customary law.

There are, indeed, concerns here. Treaties are often the product of compromise and bargaining and this does not always contribute to clarity. There are so many bilateral and multilateral treaties that it is very difficult to keep track of all the obligations and rights that states have. It is therefore important to mention that assistance can be given by depositaries of international treaties. Reference should be made in particular to the United Nations Treaty Collection.

Some treaties, for instance in the sphere of human rights, contain many provisions which are very much open to different interpretations. However, as mentioned above, quite a number of the treaty-monitoring bodies adopt general comments on the interpretation of the convention for which this particular body has been established, elucidating the content of the articles of the convention. Some treaty-monitoring bodies also develop case law based on decisions on individual complaints.

Customary law is generally clear, but notoriously imprecise at the level of detail. Decisions by national judges which bear on issues of international law are largely unknown, although much effort has been made of late to remedy this deficiency. There is no authoritative compilation of general principles of law.

Some of these problems are also present in many national legal systems. In spite of what has just been said, ambiguity arising from the fact that human rights are open to different interpretations is a case in point. In many areas of law it is often difficult to know what the law says at the level of detail. However, the problems should not be exaggerated either at the national or at the international level.

A more recent concern is the proliferation of rules and institutions of international law. Eminent observers have argued that international law is in a process of fragmentation, in other words that it will dissolve into a number of discrete systems. The problem, some fear, is that norms may become grossly inconsistent, that conflicts between norms are exceedingly hard to solve, and that the transparency, clarity, and certainty of international law will be fatally undermined.

In a recent report on this issue, however, the International Law Commission, a United Nations body engaged in the progressive development of international law and its codification, concluded that these risks are manageable as long as sufficient attention is being paid to the development of methods and techniques for dealing with collisions of norms, regimes and rules.

It should also be noted that international law does have significant strengths. The 1969 Vienna Convention on the Law of Treaties provides an impressive body of rules regarding such issues as the conclusion,

interpretation, and termination of treaties. Thanks to this treaty, the rule-of-law-requirement of clarity in the law-making process is most certainly met, at least as far as treaty law is concerned.

Furthermore, the Internet has made treaty law much more accessible. By way of example, the United Nations Treaty Collection is accessible via the Internet. Decisions of some judicial bodies are well publicized and extensively analyzed and commented on. The case law of the International Court of Justice or the international criminal tribunals could be mentioned as examples.

This list of weaknesses and strengths is not exhaustive and could be elaborated on. Despite its decentralized nature, international law is generally regarded as having a sufficient level of certainty, predictability and clarity, at least in such core substantive areas as human rights law, humanitarian law, labour law, economic law, the law of the sea, and the law of state responsibility.

This is not to say that one should be complacent. Improvements in the clarity, accessibility and certainty of international law can and should be made. But meeting these requirements is not *the* most important challenge to international law.

### *3.2.2 An independent and impartial judiciary*

A more formidable challenge to the realization of the rule of law at the international level regards dispute resolution by peaceful means.

In the international society, there are, as is well known, two types of dispute resolution by peaceful means: diplomacy and adjudication. Many disputes are resolved by means of diplomacy, that is, through negotiation, good offices, inquiry, and conciliation. But if diplomacy is unsuccessful or inappropriate to resolve the dispute at hand, parties may opt for adjudication, in other words to submit their case to a binding judgment of a disinterested third party.

There is no shortage of mechanisms of adjudication in the international society, quite the contrary. The argument is sometimes made that there is too much machinery rather than too little.

Adjudication may take the form of arbitration, for example before a permanent court of arbitration or by arbitrators appointed for the particular case. It may also take the form of judicial settlement.

Depending on the exact definition, there are about 15 international and regional courts, most of which have a permanent character. These permanent courts include the International Court of Justice, which is the principal judicial organ of the United Nations, the International Tribunal for the Law of the Sea, the International Criminal Court, the European Court of Justice, the European Court of Human Rights, the Inter-American

Court of Human Rights, and the African Court of Human and Peoples' Rights.

Nor is the problem that courts, panels and other judicial bodies in international law are lacking in independence and impartiality. The International Court of Justice is generally held in high esteem as regards the professional integrity and competence of its judges, and so are the other courts just mentioned. The International Court of Justice is open to all states which are party to the Court's Statute, that is, to all states that are members of the United Nations as well as to non-member states on certain conditions.

The most prominent challenge for the courts at the international level is the nature of their jurisdiction. In national law, it would, from a rule of law point of view, be considered unacceptable if parties to a dispute could decide whether a court has jurisdiction to hear and decide their case. The inevitable result of such a system would be that the disputes would remain unresolved.

Obviously, the rule of law at the national level requires that courts have compulsory jurisdiction. This means that they decide, on the basis of neutral criteria, not dependent on the consent of the parties involved, whether they are competent to hear and decide a case.

Some of the international courts just mentioned do have compulsory jurisdiction. The European Court of Human Rights is a case in point for the simple reason that states cannot be members of the Council of Europe if they do not accept the compulsory jurisdiction of the European Court of Human Rights. But other courts do not have compulsory jurisdiction and require the consent of the parties to be able to hear a case. These include, most prominently and most problematically, the International Court of Justice in contentious cases.

Consequently, defendant states can, if they wish, block the resolution of disputes with plaintiff states by the International Court of Justice or indeed by any other form of judicial or arbitral settlement. Disputes may thus remain unresolved.

This is also unsatisfactory in a more general sense: if determinate judgments regarding alleged violations of international law are not made, this undermines the clarity of the precise content of international law. It is a well-known fact that disputes may be prevented or resolved through diplomacy if there is a clear judgment by the International Court of Justice regarding a similar case.

It should be noted in this context that Article 36, paragraph 2 of the Statute of the International Court of Justice contains a provision under which states can consent in advance to the compulsory jurisdiction of the Court in cases against states which have accepted the same obligation. Currently, this provision is not very effective. So far, only 67 states have accepted the compulsory jurisdiction of the Court. Regretfully many of those states have also made extensive reservations, thereby rendering

the requirement that the other party has accepted the same obligation as an illusion in most cases.

Clearly, the way forward to the realization of the rule of law at the international level is general acceptance of the compulsory jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2 of the Statute. Europe could serve as a model in this respect: states cannot participate in the European Union and the Council of Europe if they do not accept the compulsory jurisdiction of the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg, respectively. It should be noted, however, that far from all European states have accepted the compulsory jurisdiction of the International Court of Justice.

Another issue that has emerged as norms and institutions, including courts, have proliferated, is that judges will find it increasingly difficult to interpret and apply international law in a consistent manner. But judges at both the national and the international level have responded to this challenge by increasingly consulting decisions by other courts, thus creating a multi-level or multi-system interaction. These practices of open communication, dialogue and drawing on decisions of sister institutions is likely to contribute to preventing major inconsistencies and uncertainty in the application of international law.

### *3.2.3 Adequate enforcement*

A famous international lawyer, Louis Henkin, once wrote: "It is probably the case that almost all states observe almost all principles of international law and almost all of their obligations almost all of the time."

Although violations of international law do occur and are often well publicized and much discussed, they are the exception that proves the rule. Most observers and practitioners accept that international law is generally observed. Enforcement thus does not seem to be a major problem.

Yet the situation is far from satisfactory. As noted before, there is no central law enforcement agency with a monopoly of force in the international society. True, there are bodies which have the authority and power to secure, or at least attempt to secure, compliance with international law. But many of these bodies can be ineffective.

The most prominent among these bodies is the Security Council of the United Nations, which, as is well known, has the authority to take measures, if necessary by the use of force, in case it determines that international peace and security is threatened or needs to be restored.

But its even-handedness is often questioned and the Council has been accused of sometimes applying double standards. One reason for this is that the Council is frequently prevented from acting by the right of the veto of its permanent members with the result that violations of

international law have been left unaddressed. In some cases members of the Council, including permanent members, have even themselves violated the UN Charter.

Moreover, whereas bodies like the UN Security Council have the authority to address violations of international law which concern the general interests of the international society, in particular peace and security, hardly any machinery is in place for disputes between two states which fall outside the scope of the UN Charter. Also, judicial settlement of differences is usually not available because of the voluntary nature of the jurisdiction of the International Court of Justice.

Consequently, in more "private" matters, the only form of enforcement available to states that feel wronged is self-help. States can, for instance, take lawful retaliatory measures, known as retorsions, which include the imposition of economic or travel restrictions and the termination of diplomatic relations. They can also take measures which are in themselves illegal but which are justified by a previous unlawful act by the other party, such as blockades.

The problem with self-help, however, is that its efficacy is uneven for the simple reason that it depends on the relative strength of states. It is also unsatisfactory, because there is no independent and neutral third party involved in judging whether obligations under international law have indeed been violated. Dispute resolution should not be a matter of power but a matter of law.

### ***3.3 Why is the rule of law at the international level indispensable?***

It is often said that rule of law at the international level serves similar interests as the rule of law at the national level. In this view, the rule of law at the international level promotes predictability and equality in the relations between states and other subjects of international law and restricts the use of arbitrary power. There are, however, several other reasons why it is important that states, organizations and individuals obey international law.

Firstly, international law is traditionally a set of norms and institutions which is aimed at creating and maintaining peace and security in the society of states. Furthermore, one of its branches, humanitarian law, is aimed at humanizing the conduct of war if violent conflicts do occur.

It is generally recognized that peace and stability would be harder, if not impossible, to achieve if there was no international law or if this law was generally disobeyed. An anarchic international society would be far more violent than a society under the rule of law. It is also clear that warfare is exceedingly brutal if humanitarian law is not respected.

Moreover, international law has increasingly been aimed at attempting to solve global or regional problems. International crime, international

terrorism, dysfunctional financial markets and threats to the environment (atmospheric and marine pollution, global warming, threatened wildlife species, the dangers of nuclear and other hazardous substances) are clear examples. Problems like these cannot be solved or mitigated by states acting alone, but require international cooperation and regulation. Rule of law at the international level brings the solution of regional and global problems closer.

International law has also been increasingly concerned with human rights all over the world. True, these rights almost always have a counterpart in national constitutional law. But even if this is the case, national human rights law is affirmed and stabilized by international human rights law.

Also, international law, international human rights courts, and other monitoring mechanisms can act as an extra check on the executive branch at the national level, thereby complementing checks and balances at the national level. Further elaboration of these points appears in the next section. Suffice it to say now that obedience to international law is of crucial importance for enhancing the protection of human rights at the national level.

The points just mentioned have one thing in common: rule of law at the international level ultimately serves the interests of individual human beings.

## **4 THE INTERDEPENDENCE OF THE RULE OF LAW AT THE NATIONAL AND INTERNATIONAL LEVELS**

### ***4.1 The connection between the two levels***

We have seen that the rule of law at the national and international levels have much in common. The rule of law means the same thing at both levels: the law should be obeyed. It should also have the same characteristics at both levels: that there is an independent and impartial judiciary, that laws are adequately made known, clear and accessible, and are applied equally to all.

But is the rule of law at the international level actually connected with the rule of law at the national level? Can the rule of law at the international level benefit from the rule of law at the national level? Can the rule of law at the national level be strengthened by the rule of law at the international level?

In the past, this connection between the national and international levels was not a given. Nowadays, however, national and international law can no longer be viewed as separate, at least not across all fields of law. They are increasingly interconnected.



The clearest example is constitutional law, which, as far as citizens' rights are concerned, overlaps considerably with international human rights law. For example, these days it is hard to imagine that a new constitution of a country is developed without clear references to and quotes from international human rights instruments. In some instances, constitutions state that international law is part of the national law.

Other examples of increased interconnection can be found in environmental law and investment law.

As a matter of fact – and this is very important to note by politicians who belong to a national legislature – with the growing amount of treaties in various fields, the national legislator's freedom of action is increasingly limited. One of the most important elements in legislating at the national level today is that the legislator ascertains that the law to be enacted is in conformity with treaties to which the state is a party. Examples and explanations of this can be found in the IPU publication *Parliament and Democracy in the Twenty-First Century*, referred to at the end of this Guide.

This element is particularly important in the field of human rights. Therefore, in the obligatory process of ascertaining that proposed legislation is in conformity with the constitution of the country, in parallel a corresponding examination must be performed with respect to international human rights treaties.

It is also important that national parliaments contribute to the monitoring and oversight of the implementation of international human rights norms. The IPU publication just mentioned contains interesting references to how this is done in several states, including in Africa and South America. Of particular interest is the way in which the Brazilian parliament implemented recommendations of a regional human rights treaty body. There are also a number of recommendations for parliamentarians that were elaborated in an international workshop on human rights institutions and legislatures that took place in Abuja in 2004, as well as a reference to the so-called Paris Principles relating to the Status of NHRIs, adopted by General Assembly resolution 48/134 of 20 December 1993.

This is not to say, of course, that all elements of international law are also covered by national law, or vice versa. If a state intervenes in another state in self-defence, for example, the most important legal rules are clearly to be found in the UN Charter and international customary law. It is not an issue of national law.

Also, the court which would in principle be competent to resolve the case would be the International Court of Justice, not a local court in some country. Whether the International Court of Justice would actually have jurisdiction in the particular case is, as it appears from the foregoing, an entirely different matter.

Similarly, if a dispute arises between the owner of a piece of land and the municipal government over whether the former is entitled to a building

permit, national law will be applicable and national courts, not an international court, will review the case.

It is a different matter that in such a case the applicable legislation must be in conformity with international law. If, for example, as demonstrated in practice, it is alleged that a ruling by the highest national court or competent authority would violate the standards laid down in, for example, the European Convention on Human Rights, the matter could be brought before the European Court of Human Rights. If that Court finds that the Convention has been violated, this would in many cases mean that the state in question would have to amend its national legislation in order to avoid that the same violation is repeated.

By way of example in one case the European Court of Human Rights found that Article 6 of the European Convention on Human Rights was violated because there was no access to a court that could review decisions by a government agency that affected a person's civil rights and obligations. In another case the Court found that holding DNA samples of individuals who have been arrested but are later acquitted or have the charges against them dropped is a violation of the right to privacy under the Convention. In both cases legislative action had to be taken at the national level.

It is thus fair to conclude that the increasing interconnection between the rule of law at the national and international level mutually reinforce and strengthen each other to a significant degree.

#### ***4.2 Why the rule of law at the national level depends on international law***

International law is often directly relevant for the rule of law at the national level. As it appears from the foregoing, this is most obviously the case with international human rights law. This law limits the power of states vis-à-vis their own citizens and also residents by guaranteeing freedoms such as the rights to free speech, assembly and worship (see for example Articles 6-12 of the International Covenant on Civil and Political Rights). International human rights law also provides for an independent and impartial judiciary at the national level (see for example Article 14 of the same).

##### Human rights

Almost all states have signed and ratified most universal human rights treaties. So, for example, there are presently (August 2012) 160 parties to the International Covenant on Economic, Social and Cultural Rights and 167 parties to the International Covenant on Civil and Political Rights. There are also regional human rights treaties to which many states are parties. An important task for any politician is to find out to which human rights treaties his or her state is a party.

In addition, many human rights have achieved the status of customary international law. It is widely recognized that the Universal Declaration of

Human Rights today has acquired the status of customary international law. This means that states are bound to respect fundamental human rights, even if they have not signed and ratified relevant universal or regional treaties. International human rights law thus has, or should have, a determining effect on the law at the national level.

#### Superiority of international law

International law is superior to national law. States are under an obligation to act in conformity with international law and bear responsibility for breaches of it, whether committed by the legislative, executive or judicial branches. This means that states cannot invoke national law, basically not even a national constitution, as a defence of violations of obligations under international law. In other words, international law cannot be evaded, let alone overruled, by national law.

International law, in particular human rights law, thus strengthens and deepens the rule of law at the national level. If there are gaps in a national legal system with regard to the rule of law, international law may be invoked to remedy the situation.

#### Certain limitations

In reality, in many situations the picture is considerably darker. The full force of international human rights law can be limited at the national level in various ways.

The first problem consists of reservations to treaties. When states are in the process of becoming party to a treaty, they can make statements in which they indicate that they want to exclude or modify the legal effect of certain provisions with regard to themselves.

There is considerable controversy over the extent to which human rights treaties can be subject to reservations, especially with respect to human rights treaties which also have the status of international customary law. Many argue that reservations are contrary to the object and purpose of human rights treaties. It seems clear, in principle at least, that it is *not* in the interest of the rule of law at the national level to make reservations to international human rights law.

#### Application at the national level

The second problem concerns the relation between international law and national law within states. There is, as noted before, no doubt that international law is superior to national law and that states are under an obligation to uphold and respect international law. But the question is whether this entails for example that international human rights law can be used by citizens in a national court of law in a dispute with other citizens or with the state. There are, roughly, three ways of responding to this question.

## The monistic and the dualistic system

In discussing this matter, it is important first to distinguish between two different systems for dealing with treaty law at the national level: the monistic and the dualistic system. It is important that politicians in the legislature find out to which of these systems his or her state belongs.

In the monistic system, in practice, the most important effect is that treaties ratified by the state become binding as national law in accordance with their wording. If, for example, a state violates a citizen's right to free speech as laid down in the International Covenant on Civil and Political Rights, then the citizen can hold the state accountable for the violation of this right before a national court of law. Here, international human rights law is self-executing. It has direct effect in the national legal order. It is automatically absorbed into the national legal system. International law can be applied by courts without any specific implementing legislation.

In a dualistic system the obligations under international treaties must be transformed or incorporated into national law to achieve the same result. Basically, this means that such a state cannot ratify an international treaty without reviewing its national legislation in order to bring it in conformity with the obligations undertaken in the treaty.

In both situations, however, the treaty obligations apply in relation to the other contracting states. This means that states party to the treaty are accountable *vis-à-vis* each other for violations of the obligations undertaken. So if a state violates, say, the right to free speech of a citizen which is guaranteed in the International Covenant on Civil and Political Rights, the state is accountable for that violation to other states parties to this treaty.

If, in a dualistic system a state party to a treaty has not properly transformed or incorporated the obligations under the treaty, a citizen whose rights have been violated may have difficulties in holding the state accountable for the violation of international law in a national court of law. However, depending on the subject matter, there might be remedies such as recourse to international monitoring bodies, in particular international human rights courts.

There is also a third, intermediate position. Under this theory, international law is regarded as part of a distinct system, but is capable, under certain conditions, of being applied internally without any implementing legislation. Most states have in practice accepted this latter position.

International law does not dictate that any of these methods must be used. All of them are, in principle, satisfactory. But it is important to realize what the main strengths and weaknesses are.

The major weakness of the dualistic system is that the force of international law in the national legal system depends on what action the

state takes in addition to the ratification of the treaty. Not only does the state decide if and when it transforms or incorporates international law into national law. It also decides to what extent this is done.

In other words, it is possible that transformation or incorporation of international law into national law does not happen at all, or only to a limited extent, or very slowly. Given the fact that the state often sees its own powers limited by international law, especially by human rights law, it is not surprising that human rights advocates often argue that the monistic system or the intermediate position is preferable to dualism.

The major problem with monism and the intermediate position, however, is that they put a heavy burden on national courts. To be able to adequately fulfil its role as mouthpiece of international law, judges must be very well informed about international law and very well trained in applying international law. An additional concern is that judges in different states interpret and apply international law in widely different ways.

General application of the reasoning in this section

As it appears, in explaining in this section why the rule of law at the national level depends on international law the main focus has been on human rights. It should however be clear that there are many other areas where this reasoning is relevant. By way of example one could mention the international regime for protection of intellectual property or the many multilateral treaties concluded under the auspices of the World Trade Organization (WTO) which cover not just trade but also many other areas. In this context could be mentioned that the WTO Dispute Settlement Mechanism is an international mechanism that can ensure at least a measure of enforcement.

### ***4.3 Why the rule of law at the international level depends on national law***

The other side of the coin is that the rule of law at the international level benefits from the rule of law at the national level. Indeed, it seems that the rule of law at the international level depends to a significant degree on how law is implemented at the national level.

Role of governments and legislators

The role of governments and national legislators in this respect cannot be overemphasized. In particular, it is fundamental that treaties concluded by the government and ratified by the parliament in accordance with national constitutional rules are properly implemented at the national level. Reference is made here to sections 4.1 and 4.2.

### A very serious question

In this context should also be mentioned a very serious question that concerns the interconnection between the rule of law at the national and international levels. In section 3.2.3 reference is made to the fact that in some cases members of the Security Council, including permanent members, have violated the UN Charter.

A sad example is the war against Iraq in 2003. In that situation, countries went to war in violation of both international law and domestic law. The leaders of those countries at that time believed that their national interest required the use of force contrary to the law. They were prepared to disregard the rule of law. Another example is the way in which certain counter-terrorist measures have violated international human rights standards.

This is a very serious question that must be discussed in depth because of its importance for international peace and security in the future. It is, however, not possible to go into detail in this brief Guide. But not mentioning the problem would simply be dishonest.

The rule of law has to apply absolutely to all people at all times. It is easy to apply the rule of law to people with whom you agree, but if people have ideas and follow practices with which you strongly disagree there is a danger that some start arguing that the rule of law does not apply to such people.

Suffice it to say that the behaviour of the major states, and in particular the permanent members of the Security Council, will be a determining factor, if not the determining factor, for the maintenance of international peace and security in the future. Of particular importance is that Western democracies take the lead here. As a matter of fact their performance in this field simply must be impeccable. Unfortunately, this is not the case in today's world.

### Role of national courts

Crucially important in implementing international law at the national level are also the national courts. National courts can play a vital role in ensuring that states, organizations and individuals comply with their obligations under international law. In a sense, the future of the rule of law at the international level depends in no small way on national courts.

Needless to say, there are limits to the contribution that national courts can make. They are *not* in a position to apply *all* norms of international law to *all* kinds of disputes between *all* subjects of international law. But there are cases where national courts can make a contribution, for example in cases where national courts assume jurisdiction for holding individuals from other countries responsible for violations of fundamental human rights.

Moreover, even in cases where national courts do have jurisdiction to apply international legal norms, international courts will often be indispensable as an instance of final appeal, not only because they can ensure unity and coherence in the interpretation and application of international law, but also because they can provide an extra check on the quality of decisions at the national level.

For example, if national courts in all member states of the Council of Europe were very active and conscientious in applying the European Convention of Human Rights in relevant cases, the European Court of Human Rights would still be indispensable as a final arbiter on the interpretation and application of this treaty.

Nevertheless, there is much truth in the idea that national courts are particularly important for the future of the rule of law at the international level. There are many cases in which national courts can in principle play a role in ensuring that states, organizations and individuals comply with their obligations under international law. Indeed, there are several reasons why they seem particularly well-placed to play this role.

What national courts can do

Firstly, national courts can fill gaps in the authority of international courts and other international dispute resolution mechanisms.

Secondly, national courts can provide a relatively quick and cheap alternative to international dispute resolution mechanisms. Since the rule of law requires court proceedings to be accessible and that justice not be delayed excessively, this is an important advantage.

Thirdly, states are often reluctant to empower international courts and tribunals by subjecting their judicial powers to them. International law imposes limits on the powers of the state, and states generally do not wish to authorize supranational courts to determine the exact scope of these limits. National courts are often regarded as more acceptable. Since greater acceptance may lead to greater compliance with judgments, this is important for the rule of law.

Fourthly, national courts are usually in a better position to adapt international law to local circumstances than more remote courts and institutions. They know more about local legal values and norms and have more experience in handling them. Since many international norms, especially in the area of human rights, allow for some degree of sensitivity to national legal norms and values, the so-called margin of appreciation, adjudication at the national level is an important advantage. Decisions by national courts are likely to be more acceptable to the state and the citizens and therefore more easily complied with.

Fifthly, national courts are necessary to protect international courts and tribunals from being overburdened. Indeed, this is one of the reasons for the requirement in regional human rights conventions that national

remedies must be exhausted before the organs established by the conventions are competent to review a case.

The principle of complementarity

This is also one of the reasons behind the principle of complementarity laid down in the Rome Statute of the International Criminal Court. This principle means that states themselves have jurisdiction over international crimes as long as conditions of judicial competency have been met.

If the rule of law at the international level were to depend entirely on international courts and tribunals these institutions would be unable to handle their case-load with the result that justice would be delayed excessively and thereby denied.

It goes without saying, however, that if national courts are to play the role just mentioned, they must be of the highest quality. They must satisfy the requirements of the rule of law at the national level discussed before, notably independence and impartiality. If national courts are considered corrupt by citizens, they will not contribute positively to the future of the rule of law at the international level.

In other words, working on the improvement of the quality of national courts is not only in the interest of the rule of law at the national level, but also of the rule of law at the international level.

## **5 REFERENCES TO FURTHER READING**

References to further reading appear under the following links on the websites of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Hague Institute for the Internationalisation of Law:

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law

<http://www.rwi.lu.se/>

The Hague Institute for the Internationalisation of Law (HiIL)

<http://www.hiil.org/>

The website of the Inter-Parliamentary Union (IPU) is available at:

<http://www.ipu.org/english/home.htm>

The website of the World Justice Project (WJP) is available at:

<http://worldjusticeproject.org/>



Special reference is made to the following publications:

The Final Communiqué from the 26th Annual Plenary Session of the InterAction Council of Former Heads of State and Government

<http://www.interactioncouncil.org/final-communicu-29>

Human Rights: Handbook for Parliamentarians. Published jointly by the IPU and the Office of the United Nations High Commissioner for Human Rights, 2005

[http://www.ipu.org/PDF/publications/hr\\_guide\\_en.pdf](http://www.ipu.org/PDF/publications/hr_guide_en.pdf)

Parliament and Democracy in the Twenty-First Century: A Guide to Good Practice. Published by the IPU, 2006

[http://www.ipu.org/PDF/publications/democracy\\_en.pdf](http://www.ipu.org/PDF/publications/democracy_en.pdf)

Parliamentary Oversight of the Security Sector. Published jointly by the IPU and the Geneva Centre for the Democratic Control of Armed Forces, 2003

<http://www.ipu.org/PDF/publications/decaf-e.pdf>

Human Rights and Parliaments: Handbook for Members and Staff. The Westminster Consortium, the international Bar Association and UKaid, 2011

[http://www.ibanet.org/Human\\_Rights\\_Institute/About\\_the\\_HRI/HRI\\_Activities/Parliamentary\\_Strengthening.aspx](http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Parliamentary_Strengthening.aspx)

Principles relating to the Status of National Institutions (The Paris Principles)

<http://www2.ohchr.org/english/law/parisprinciples.htm>

The Rule of Law Index established under the auspices of The World Justice Project

<http://www.worldjusticeproject.org/rule-of-law-index/>