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The Internationalized Rule of Law

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In Resolution 62/70 of 8 January 2008, the UN General Assembly speaks about the rule of law at the international level and the rule of law at the national level. While these two phrases have framed the practical and scholarly debate on the rule of the law over the past years, this bifurcation hampers our understanding of, as well as effective policy formulation for, the rule of law problems that unfold in the 21st century. The rule of law increasingly is implicated at the interaction and interface between international and national law. We do not only speak about the rule of law at international level and the rule of law at domestic level. We also, and increasingly, have to speak of an internationalized rule of law. This is the rule of law as it applies to the overlapping sphere of domestic and international law.

In Resolution 62/70 of 8 January 2008, the UN General Assembly speaks about the rule of law at the international level and the rule of law at the national level. These terms have framed the practical and scholarly debate on the rule of the law over the past years.

There may be several explanations for this dichotomy between the rule of law at the international level and the rule of law at the domestic level. One simple explanation is that domestic rule of law problems often have no international dimension. An example might be a case of a corrupt local official who is bribed and grants a building permit to a corporation in violation of planning law. Conversely, international rule of law problems may be far removed from domestic law. An example is the invasion by the coalition led by the United States and the United Kingdom in Iraq, in violation of the UN Charter, without any international remedy being available.

A more fundamental reason for the dichotomy between the rule of law at the national and at the international level are the obvious structural differences between the international and the national legal orders. The most notable of these is the fact that whereas at the domestic level the rule of law primarily (though not exclusively) involves protection against the public power of the state, there is in the international legal order no equivalent to such centralized public power. This

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structural difference has several consequences for the nature of the rule of law at the domestic and the international level. One such consequence is the absence of compulsory international courts of general jurisdiction. Another is that the rule of law at the international level is primarily concerned with the 'horizontal' struggle between states for power. This may explain why many states in their submissions to the General Assembly discussion on the rule of law referred to such classic international law issues as non-intervention and the use of force – issues that are quite far removed from the rule of law discourse as it plays out within a state. The consequence is that, while the exact contents of the rule of law at domestic law and at international law remains elusive, the contents and operation of the rule of law at domestic and at international level is not identical.

While both the practical and the more structural explanations to some extent account for the continued dichotomy between the rule of law at the international level and the rule of law at the domestic level, the dichotomy fails to capture much of the rule of the law problems as they unfold in the 21st century.

The increasing connections between international law and domestic law undermine the viability of maintaining a strict dichotomy between the rule of law at international level and the rule of law at domestic level. Indeed, in those areas where international law and domestic law connect or even overlap, it is no longer helpful to distinguish sharply between the two levels *vis-à-vis* the rule of law. This development has multiple dimensions. Let me consider three of them.

First, international law influences and often even determines the domestic rule of law. International law is increasingly of a regulatory nature, governing directly the legal rights and obligations of private persons who are located in domestic legal orders. International law, particularly international human rights law, imposes such fundamental limitations on the power of government that in fact it has become hard to think of rule of law problems in the relationship between a state and its citizens that do not have some connection to international law. In this respect, international (human rights) law strengthens and supports the domestic rule of law, for instance in protecting the autonomy of domestic courts *vis-à-vis* the political branches, and in protecting citizens against retrospective laws.

A second dimension is that the application of international law, surely one of the requirements of the rule of law at international level, depends on the rule of law at the domestic level. In virtually all fields of international law, compliance with international law is not possible without a meaningful connection to the domestic arena. That is obvious for all those areas in which international law substantively deals with the same issues as domestic law (fundamental rights, the environment, criminal law, etc.) and domestic laws must reflect international law. The point is true more generally, however. The basic rules of international law – that a state shall not go to war against another state and, if it does, shall not kill

innocent civilians – are mostly thought of as interstate affairs. But such rules too are powerless if there is no connection between the international norm and domestic law. The full effect of international rights and obligations requires and presupposes a domestic rule of law. One cannot really conceive of a rule of law at the international level in the absence of a domestic rule of law in a large number of states.

A third dimension is that domestic institutions can fill rule of law gaps at the international level. As international law pervades the domestic legal order more deeply, it seems a sound premise that international law should conform to rule of law requirements that we tend to pose for domestic law. Indeed, in those areas where international law and domestic law intersect, it is not always helpful to distinguish sharply between the rule of law at international level and the rule of law at domestic level. Consider the (thus far failed) attempts of victims of the Srebrenica massacre to hold the United Nations responsible in Dutch courts. These courts operate under domestic law and primarily apply domestic law. Yet, these proceedings are potentially significant for closing a rule of law gap that results from the absence of any meaningful recourse against the United Nations at international level.

Domestic institutions, notably courts, can play a role in upholding the rule of law at international level by scrutinizing whether international acts (in particular acts of international organizations) are compatible with fundamental rights. Determining whether or not international acts of law-making conform to fundamental rights ideally would be a task of international courts. But in the absence of such courts with adequate jurisdiction, national courts can provide the missing link by assessing international acts in the light of fundamental rights. Rather than domestic filters being viewed as an unwarranted barrier to the full effect of international law, domestic institutions may be complementary to the ambitions of international law itself. The *Kadi* judgment of the European Court of Justice of September 2008 is a fitting example.

In sum, the rule of law is increasingly defined by the interaction and interface between international and national law. There is thus a third domain between the two levels with which the General Assembly is concerned. We do not only speak about the rule of law at the international level and the rule of law at domestic level. We also increasingly have to speak of an internationalized rule of law. This is the rule of law as it applies to the overlapping sphere of domestic and international law. The internationalized rule of law is characterized by the fact that international law and international institutions can fill rule of law gaps at the domestic law and vice versa, gaps brought about by the very growth of that overlap.

As is the case for the rule of law at a purely domestic level and the rule of law at international level, the exact contents of this internationalized version of the

rule of law remains difficult to identify. But on some elements there will be little debate. In essence, the rule of law means literally what it says: persons and institutions should be ruled by the law – as a norm and in actual practice. The rule of law requires that they abide by positive laws in force. This definition can be applied to the domestic level as well as to the international level and is certainly the key to the rule of law as it applies to overlapping spheres of international and domestic law. A slightly more expanded definition, still neutral enough to be applicable both at the international and the national level, would say that the rule of law means absence of the arbitrary use of power and the non-retrospective application of laws. Given the customary nature of a large number of human rights, we even can accept a thicker definition of the rule of law that applies domestically, internationally, and thus also to the internationalized rule of law.

The independent judiciary is a key element of the internationalized rule of law. Indeed, this seems the phenomenon that distinguishes the rule of law at the international level from the internationalized rule of law. It has been contested whether independent courts are a necessary element of the rule of law at the international level. But when international law overlaps with domestic law, the absence of independent court that can review international law-based claims is not acceptable. Domestic courts may fulfill that role. The relatively strong position of domestic courts is not likely to be a temporary deficiency of international law. Though the number and authority of international tribunals have increased, states will continue to be reluctant to subject large parts of their public powers to international judicial review. Domestic judicial powers may be regarded by states as an acceptable alternative to supranational judicial institutions, because states may find that such institutions unduly restrict their sovereignty. Moreover, domestic courts, for all their limitations and problems, have more experience and more power to control the exercise of authority by 'their' government than remote, often somewhat teeth less international courts and tribunals.

It is true that the role of domestic institutions, and in particular courts, in the protection of an internationalized rule of law is limited across the world. There are many countries with a weak rule of law where one cannot possibly expect courts to solve rule of law gaps at the international level. In states where a relatively stable rule of law exists, courts may fulfill that function, but in such states the political question doctrine, the requirement that treaties are to be self-executing before they can be applied by courts, and a variety of other factors limit the effective power of domestic courts in upholding the key elements of the rule of law – whether at national, at international level or both. However, the rule of law was never conceived of as an accurate description of reality, but rather and perhaps primarily as an ambition.

It is doubtful whether the emergence of an internationalized rule of law has been appropriately reflected in the wide variety of international policies that seek

to strengthen the rule of law. The debate in the United Nations should refocus to include also the rule of law at the juncture of the national and international level – on the internationalized rule of law rather than (only) on the rule of law at each of the two levels. The myriad rule of law programs that have been developed in the past decades in many states across the world likewise should adjust to the internationalized rule of law, and recognize the potential of a legal order that is open to international law for strengthening the rule of law. This has been done to some extent as a part of efforts to reconstruct the rule of law in Kosovo and other former Eastern-European states, but it does not appear to be a systematic point of attention in such programs.

The rule of law remains as much a problem and an ambition as it has been in the past centuries. But the parameters and signposts have changed. Focal points of rule of law development should include the power of international law to help establish and reform domestic judiciaries where these are deficient, but also the power of domestic courts to supply judicial review missing at international level and safeguarding internationally protected rights. The rule of law at the national and international levels is only part of the problem and part of the ambition. It is the internationalized rule of law that should have our attention.